An Agricultural Law Research Article

Principal and Agent –An Agency Relationship Exists Between a Large Corporate Grain Dealer and a Local Grain Elevator When the Dealer Exercises De Facto Control over the Operations of the Elevator

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Originally published in NORTH DAKOTA LAW REVIEW
58 N.D. L. REV. 835 (1982)

PRINCIPAL AND AGENT—AN AGENCY RELATIONSHIP EXISTS BETWEEN A LARGE CORPORATE GRAIN DEALER AND A LOCAL GRAIN ELEVATOR WHEN THE DEALER EXERCISES DE FACTO CONTROL OVER THE OPERATIONS OF THE ELEVATOR.

Plaintiffs[1] brought an action against Warren Grain and Seed Company (Warren) and Cargill, Incorporated (Cargill) for losses suffered when Warren defaulted on contracts made with the plaintiffs for the sale of grain.[2] In 1964 Warren applied for and received financing for working capital from Cargill.[3] Under this agreement Warren received money by issuing drafts on Cargill.[4] Proceeds from Warren's sales were to be deposited with Cargill and credited to its account.[5] In return for this, Cargill was appointed Warren's grain agent and received the right of first refusal to purchase market grain sold by Warren.[6]

In 1967 Warren and Cargill signed a new contract that, in addition to incorporating the 1964 agreement, added several provisions.[7] Under this contract Warren agreed to provide Cargill with an annual financial statement and to allow Cargill to keep its

1. A. Gay Jenson Farms Co. v. Cargill, Inc., 309 N.W.2d 285 (Minn. 1981). Plaintiffs in this action were 86 individual, partnership, or corporate farmers. *Id.* at 287. At trial plaintiffs attempted to prove actual agency, so that was the only issue on appeal. *Id.* at 290.

2. *Id.* at 288. Warren purchased cash grain from local farmers that was resold through the Minneapolis Grain Exchange or to terminal grain companies. Warren also stored grain for farmers and bought and sold seed grain. *Id.*

3. *Id.* This money was loaned on "open account" financing with a stated limit of $175,000 in 1964. *Id.*

4. *Id.* These drafts were drawn through Minneapolis banks and imprinted with both Cargill's and Warren's names. *Id.*

5. *Id.*

6. *Id.* This market grain was grain sold by Warren to the terminal market. *Id.*

7. *Id.* The 1967 contract extended the credit limit to $300,000 and gave Cargill several rights over Warren's business operations. *Id.*

books.[8] Cargill's consent was required before Warren could make improvements in excess of $5,000, become liable on another's indebtedness, declare dividends, or sell or purchase stock.[9]

Warren's credit limit was extended twice after the 1967 contract.[10] The relationship between Warren and Cargill continued until 1977 when Warren ceased operations because of financial difficulties.[11] By 1977 Cargill had assumed a great deal of financial and managerial control over Warren.[12] The Minnesota Supreme Court,[13] affirming the district court's verdict in favor of the plaintiffs, *held* that Cargill, by its control and influence over Warren, became a principal liable for transactions entered into by its agent, Warren.[14] *A. Gay Jenson Farms Co. v. Cargill, Inc.*, 309 N.W.2d 285 (Minn. 1981).

Principles of agency[15] have grown out of the master-servant

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8. *Id.* Warren could submit to being audited by an independent firm in lieu of allowing Cargill to keep its books. Warren also allowed Cargill access to its books. *Id.*

9. *Id.* The provisions of the 1964 contract were incorporated into the 1967 agreement. *Id.*

10. *Id.* at 289. In 1972 Warren's credit line was extended to $750,000 and extended again in 1976 to $1,250,000. *Id.*

11. *Id.* An April 1977 audit revealed that Warren was four million dollars in debt. After Warren ceased operations it was determined that Warren was indebted to Cargill in the amount of 3.6 million dollars. *Id.*

12. *Id.* at 291. The following are factors listed by the court to indicate Cargill's control over Warren:

> (1) Cargill's constant recommendations to Warren by telephone;
> (2) Cargill's right of first refusal on grain;
> (3) Warren's inability to enter into mortgages, to purchase stock or to pay dividends without Cargill's approval;
> (4) Cargill's right of entry onto Warren's premises to carry on periodic checks and audits;
> (5) Cargill's correspondence and criticism regarding Warren's finances, officers salaries and inventory;
> (6) Cargill's determination that Warren needed "strong paternal guidance";
> (7) Provision of drafts and forms to Warren upon which Cargill's name was imprinted;
> (8) Financing of all Warren's purchases of grain and operating expenses; and
> (9) Cargill's power to discontinue the financing of Warren's operations.

Id.

13. *Id.* at 287, 295. The opinion was written by Justice Peterson. Justice Simonett took no part. *Id.*

14. 309 N.W.2d at 290. The court stated:

> We hold that all three elements of agency could be found in the particular circumstances of this case. By directing Warren to implement its recommendations, Cargill manifested its consent that Warren would be its agent. Warren acted on Cargill's behalf in procuring grain for Cargill as the part of its normal operations which were totally financed by Cargill. Further, an agency relationship was established by Cargill's interference with the internal affairs of Warren, which constituted de facto control of the elevator.

Id. at 291.

The finding of control was based on § 14 O of the Restatement (Second) of Agency. Section 14 O reads as follows: "A creditor who assumes control of his debtor's business for the mutual benefit of himself and his debtor, may become a principal, with liability for the acts and transactions of the debtor in connection with the business." RESTATEMENT (SECOND) OF AGENCY § 14 O (1958).

15. The basis of agency is explained as follows: "The fundamental idea of agency has its

relationship.[16] At common law an agent[17] was one who by the authority and on the account of another undertook to do something and to render account for it.[18] In early cases the two essential elements necessary to create an agency relationship were a representative character and an authority that was derivative in nature.[19]

Today, many jurisdictions follow the Restatement (Second) of Agency's (Restatement) definition[20] in determining whether an agency relationship has been created.[21] The Restatement requires a finding of a fiduciary relationship, "which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."[22]

There are three essential elements in every agency relationship.[23] The first element is consent; all agency relationships are consensual in nature.[24] One cannot become the agent of

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conception in something lawful that a person may do and a delegation by such person to another of the power lawfully to do that thing." 2 AM. JR. 2D *Agency* § 3 (1962).

16. W. SEAVEY, HANDBOOK OF THE LAW OF AGENCY 2 (1964). Seavey explains the purpose of the law of agency as enabling one to use the services of another to accomplish things that he could not accomplish alone. The rules of agency have evolved for the advancement of both business and the community. *Id. See generally* Wyse, *A Framework of Analysis for the Law of Agency*, 40 MONT. L. REV. 31 (1979) (basic agency principles concisely presented).

17. "The word agent or agency, from *ago, agere, agens, agentis,* denotes an actor, a doer, a force or power that accomplishes things." F. MECHEM, OUTLINES OF THE LAW OF AGENCY § 1 (4th ed. 1952).

18. Simon v. Vaughan & Blackwell, 165 Ky. 167, ____, 176 S.W. 995, 999 (1915). The court in *Simon* discusses the common law requirements of agency in the context of insurance companies and their employees. *Id.* at ____, 176 S.W. at 998.

19. *E.g.*, S. B. McMaster, Inc. v. Chevrolet Motor Co., 3 F.2d 469, 474 (E.D.S.C. 1925); Thompson v. Atcheley, 201 Ala. 398, ____, 78 So. 196, 198 (1917); International Harvester Co. v. Commonwealth, 147 Ky. 655, ____, 145 S.E. 393, 397 (1912), *aff'd*, 234 U.S. 557 (1913); Sternaman v. Metropolitan Life Ins. Co., 170 N.Y. 13, ____, 62 N.E. 763, 765 (1902); Stroman v. Brown, 116 Okla. 36, ____, 243 P. 133, 134 (1925).

20. RESTATEMENT (SECOND) OF AGENCY § 1(1) (1958). Section 1(1) defines agency in the following manner: "Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *Id.*

21. *E.g.* United Packinghouse Workers v. Maurer-Neuer, Inc., 272 F.2d 647 (10th Cir. 1959); Valley Nat'l Bank v. Milmoe, 74 Ariz. 290, 248 P.2d 740 (1953); Crouch v. Twin City Transit, 434 S.W.2d 816 (Ark. 1968); Norby v. Bankers Life, 304 Minn. 464, 231 N.W.2d 665 (1975).

22. RESTATEMENT (SECOND) OF AGENCY, *supra* note 20.

23. *See* RESTATEMENT (SECOND) OF AGENCY, *supra* note 20. Comment b to § 1(1) of the Restatement describes the factual elements of an agency relationship:

> Agency is a legal concept which depends upon the existence of required factual elements: the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control of the undertaking. The relation which the law calls agency does not depend upon the intent of the parties to create it, nor their belief that they have done so. To constitute the relation, there must be an agreement, but not necessarily a contract, between the parties; if the agreement results in the factual relation between them to which are attached the legal consequences of agency, an agency exists although the parties did not call it agency and did not intend the legal consequences of the relation to follow.

Id. comment b.

24. Buck v. Nash-Finch Co., 78 S.D. 334, 343, 102 N.W.2d 84, 89 (1960). In *Buck* the court refused to find an agency relationship because the debtor did not consent to the creditor's control of

another without the latter's consent, either express or implied.[25] Express agreement arises when the parties agree orally or in writing.[26] In the absence of an express agreement, the courts will look to the circumstances in each case to determine whether the conduct of the parties manifests mutual consent that one shall act on the behalf of the other, subject to his control.[27]

The creation of an agency relationship does not necessarily depend on the intent of the parties, nor on their belief that they have created an agency.[28] An agency may be proven not only by direct evidence of an agreement between the parties, but also by circumstantial evidence, such as words and conduct from which an intention to create an agency may be fairly implied.[29]

The second essential element for the creation of an agency relationship is that the agent act on behalf of the principal.[30] An act by the agent on the principal's behalf will create an agency relationship if the principal has indicated that it is unnecessary for the agent to expressly accept to act on his behalf.[31]

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all aspects of his business. *Id.* at 348, 102 N.W.2d at 91. *See also* Valley View Cattle Co. v. Iowa Beef Processors, 548 F.2d 1219 (5th Cir. 1975) (creation of the relationship of agent and principal is created by express or implied contract or by operation of law). *Contra* Weisenberger v. Corcoran, 275 Ky. 322, 121 S.W.2d 712 (1938); Cassiday Fork Boom & Lumber Co. v. Terry, 69 W. Va. 572, 73 S.E. 278 (1912) (*Corcoran* and *Cassiday* represent the older view of the agency relationship as a contractual rather than a consensual relationship).

25. *E.g.*, Nerland v. Schiavone, 250 Minn. 160, 84 N.W.2d 61 (1957). In *Nerland* the court concluded that "[t]he principal must in some way manifest his consent before the agent has authority to act. . . . If the agent's authority is to be implied, such implication must be drawn from facts for which the principal is responsible." *Id.* at 165, 84 N.W.2d at 65.

26. *E.g.*, State v. Hostetter, 344 Mo. 665, 127 S.W.2d 697 (1939). The court in *Hostetter* adopted Webster's definition of express: that which is "directly and distinctly stated; expressed, not merely implied or left to inference." *Id.* at ____, 127 S.W.2d at 699.

27. *E.g.*, Walnut Hills Farms, Inc. v. Farmers Co-op, 244 N.W.2d 778 (Iowa 1976). The court defined an implied agency as "an actual agency which may be established by the surrounding circumstances and inferences arising therefrom." *Id.* at 781.

28. *E.g.*, Tax Comm'n v. Parsons-Jurden Corp., 9 Ariz. App. 92, 499 P.2d 626 (Ct. App. 1969) (agency is ultimately a question of intention of the parties as evidenced by their acts and is not dependent upon what the particular person is called); Crown v. Hertz Corp., 382 F.2d 681 (5th Cir. 1967). The court in *Crown* concluded that the law treats the relationship as one of principal and agent if the parties actually place themselves in a position that requires the relationship to be inferred. *Id.* at 688.

29. *E.g.*, Pay-n-Taket, Inc. v. Crooks, 259 Iowa 719, 145 N.W.2d 621 (1966) (the inquiry of whether there is an agency relationship is a question of fact and the burden of proving this relationship is on the party asserting its existence); Andrew v. Rolsrud, 218 Iowa 15, 253 N.W. 913 (1934). Since existence of the agency is a question of fact, the court in *Andrew* upheld the following jury instruction:

> An agency may be created by implication. It must be based on facts for which the Principal is responsible. It is a question of fact, to be determined by the facts and the inferences drawn therefrom. The authority need not be expressly conferred, and in many cases it is informally conferred, or is inferred from the acts and conduct of the principal. The important thing is to find the assent of the principal, either express or implied.

Id. at 18, 253 N.W. at 914.

30. *E.g.*, Nicholas v. Moore, 570 P.2d 174 (Alaska 1978). The court in *Nicholas* concluded that one may become an agent by voluntarily performing a gratuitous service for another, but consent does not arise until an individual begins performing a service or acting on his behalf. *Id.* at 176.

31. *Id.* The court noted that the inference of an agency relationship "is strengthened if, being

The third essential element of an agency relationship is the right of the principal to control the agent.[32] The right to control need not be exercised.[33] The Restatement describes the element of "continuous subjection to the will of the principal as the distinguishing factor between agents and other fiduciaries and agency agreements and other agreements."[34]

Generally, a debtor-creditor relationship is not an agency relationship.[35] For example, a creditor bank is not a principal liable for the acts and transactions of its borrower. A debtor-creditor relationship, however, may become an agency relationship.[36] This evolution is described in section 14 O of the Restatement: "A creditor who assumes control of his debtor's business for the mutual benefit of himself and his debtor, may become a principal, with liability for the acts and transactions of the debtor in connection with the business."[37]

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requested to act in the matter, the other does something which he could properly do only as an authorized agent." *Id.* (citations and emphasis omitted).

32. *E.g.*, Universal Life Church, Inc. v. Commissioner of Lottery, 96 Mich. App. 385, 292 N.W.2d 169 (Ct. App. 1978) (individual church was not the agent of a religious organization because the religious organization had no control over the actions of the church); Vieths v. Ripley, 295 N.W.2d 659 (Minn. 1980). In *Vieths* the court reasoned that since there were no facts showing that an employer was acting as an agent for a powerlines' owner, it was error to impute negligence of employer to owner. Thus, the decision was based on the absence of the owner's right to control the employer. *Id.* at 664.

In Teeman v. Jurek, 312 Minn. 292, 251 N.W.2d 698 (1977), an agency relationship was not found between a buyer and a seller because the record indicated absolutely no element of control. *Id.* at 299, 251 N.W.2d at 702.

33. Dumas v. Lloyd, 6 Ill. App. 3d 1026, ____, 286 N.E.2d 566, 569 (App. Ct. 1972). In *Dumas*, although the company did not exercise any control over the manager, the court concluded that the control requirement necessary for the creation of an agency relationship is satisfied when only the right to control exists. *Id.* at ____, 286 N.E.2d at 569.

In Jurek v. Thompson, 308 Minn. 191, 241 N.W.2d 788 (1976), the court described the right to control as the critical element, saying that it is this element that distinguishes agency from other relationships. *Id.* at 198-99, 241 N.W.2d at 791.

34. RESTATEMENT (SECOND) OF AGENCY, *supra* note 20, comment b, at 8. The comment provides that the "characteristics which tend to indicate an agency or a non-agency relation are stated in sections 12 to 14 O." *Id.*

35. A. Gay Jenson Farms Co. v. Cargill, Inc., 309 N.W.2d 285 (1981). The writers of the amicus briefs were very concerned about the effect an affirmance would have on debtor-creditor relationships. *Id.* at 292. The court in *Jenson* attempted to console them by saying, "We deal here with a business enterprise markedly different from an ordinary bank financing, since Cargill was an active participant in Warren's operations rather than simply a financier." *Id.*

36. RESTATEMENT (SECOND) OF AGENCY, *supra* note 14. The section comment expands this concept, stating:

> A security holder who merely exercises a veto power over the business acts of his debtor by preventing purchases or sales above specified amounts does not thereby become a principal. However, if he takes over the management of the debtor's business either in person or through an agent, and directs what contracts may or may not be made, he becomes a principal, liable as any principal for the obligations incurred thereafter in the normal course of business by the debtor who has now become his general agent. The point at which the creditor becomes a principal is that at which he assumes de facto control over the conduct of his debtor, whatever the terms of the formal contract with his debtor may be.

Id. comment a.

37. RESTATEMENT (SECOND) OF AGENCY, *supra* note 14. For the text of § 14 O, see *supra* note 14. The application of this section of the Restatement by the courts has been very sparse, with only one case directly applying § 14 O. Buck v. Nash-Finch Co., 78 S.D. 334, 102 N.W.2d 84 (1960).

Some early examples of the extent to which a creditor may exercise control without liability as a principal are found in *Waldie v. Steers Sand & Gravel Corp.*[38] and *Wasilowski v. Park Bridge Corp.*[39] In *Waldie* the libellant's barge was damaged.[40] He sued the charterer, the tug, the consignee, and the surety of the consignee.[41] The consignee was in danger of defaulting on its contract, so its surety, after advancing the consignee money, hired an engineer to supervise and have complete control over the contract.[42]

The court in *Waldie* did not hold the surety liable because the purpose of the surety was not to take over the contract, but to protect loans that it had made to the consignee.[43] The court seemed to hint at the idea that was later developed in section 14 O of the Restatement[44] when it noted that if nothing more had appeared than the agreement giving the engineer complete control and stating that his decisions were to be binding, the surety might have been held liable.[45] The engineer, however, never gave directions, made any contracts, or ordered any materials. The surety, therefore, could not be considered to have taken over the contract.[46]

In *Wasilowski*[47] the court held that a creditor who financed a party who defaulted on its subcontracts was not liable as a principal because the debtor retained some interest in the completion of the contract.[48] The *Wasilowski* court held that a relationship that was initially a debtor-creditor relationship could not become a principal-agent relationship as long as the party whom the creditor was financing retained any interest in completion of the contract.[49]

38. 151 F.2d 129 (2d Cir. 1945) (decided before § 14 O of the Restatement (Second) of Agency was drafted).

39. 156 F.2d 612 (2d Cir. 1946) (decided before § 14 O of the Restatement (Second) of Agency was drafted).

40. Waldie v. Steers Sand & Gravel Corp., 151 F.2d 129, 129 (2d Cir. 1945). Although *Waldie* was decided before § 14 O of the Restatement was written, it provides a good example of how much control could be exercised by a surety, in protecting a loan, before it would be held liable. *See id.* at 131.

41. *Id.* The consignee of the barge's cargo directed delivery at the wharf under a government contract. *Id.* at 130.

42. *Id.* The surety was only willing to lend the consignee money if it could be properly secured. The parties therefore agreed that the money be put in the surety's control. *Id.*

43. *Id.* The test applied by the court in *Waldie* was whether the surety had completely taken over the contract. *Id.*

44. RESTATEMENT (SECOND) OF AGENCY, *supra* note 14. Sections 14A and 14 O of the Restatement were written to aid in the often difficult inquiry of whether the relationship is one of principal and agent. *See id.* topic 4, scope note.

45. 151 F.2d at 131.

46. *Id.* If the engineer had exercised these powers and taken over the contract, a finding of liability based on agency principles would be consistent with § 14 O of the Restatement (Second) of Agency.

47. Wasilowski v. Park Bridge Corp., 156 F.2d 612 (2d Cir. 1946) (a debtor having no interest would seem to suggest that a creditor has complete control).

48. *Id.* at 614. The debtors were very insistent about protecting their interest in the contract. *Id.* at 615.

49. *Id.* The court in *Wasilowski* framed the central inquiry as whether the debtor had any

The creditor demanded and received complete authority to supervise, power to approve all the debtor's actions, and complete control of all the money. Because the debtor retained an interest, however, the creditor could not be held liable as a principal on agency theories.[50]

Whether a creditor should be held liable as a principal was also discussed in *Buck v. Nash-Finch Co.*[51] Nash-Finch, a wholesale grocery, financed Boedeker, a Piggly-Wiggly franchise owner, through Merchant Finance, one of Nash-Finch's wholly owned subsidiaries.[52] The court recognized Nash-Finch's dual interest, but noted that Nash-Finch had no control over the retailer's buying operations; its interest in an outlet for its goods was only a possibility, with Nash-Finch's main interest being the protection of its loan.[53] Nash-Finch, through Merchant Finance, required Boedeker to hire a manager who was given a great deal of control over the operation of the store.[54] The court in *Buck* refused to find Nash-Finch liable as a principal under section 14 O for contracts that its debtor, Boedeker, had defaulted on because there was no mutual consent giving Nash-Finch complete control over every aspect of the business.[55] Section 14 O requires that a creditor assume de facto control of his debtor's business before liability based on agency can result.[56]

The above cases show a tendency of the courts to allow creditors a great deal of control in protecting their loans before finding them liable as principals for their debtor's obligations.[57]

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interest, rather than whether the creditor had complete control. *Id.* The court's emphasis on the continued interest, however, indicates that the debtor had not abandoned the contract. Logically, if the contract had not been abandoned, the creditor could not assume complete control and vice versa. *Id.*

50. *Id.*

51. 78 S.D. 334, 102 N.W.2d 84 (1960).

52. Buck v. Nash-Finch Co., 78 S.D. 334, 336, 102 N.W.2d 84, 85 (1960). Boedeker's obligations were adequately secured by chattel mortgages on the fixtures, equipment, and stock of merchandise; real estate mortgages; and an assignment of the life insurance contracts on the life of Boedeker. *Id.*

53. *Id.* at 347, 102 N.W.2d at 90. The court seemed to feel that Nash-Finch was an ordinary creditor. Boedeker bought much of his merchandise from other wholesalers and was under no obligation to buy from Nash-Finch. *Id.* at 337, 102 N.W.2d at 85.

54. *Id.* at 338-41, 102 N.W.2d at 86-87. In a memorandum from his creditor, the franchise owner was instructed on the manager's duties:

> Estel is to handle all the money, both that coming in and going out. It will be up to him to check the cash registers, make the deposits, handle all payouts, make up the payroll and pay off employees. In connection with the records, he is to keep all books and records which are needed so the accountant at Sioux Falls can make up his records and reports.

Id. at 339, 102 N.W.2d at 86-87.

55. *Id.* at 348-49, 102 N.W.2d at 91. No mutual assent was found because despite the creditor's control in many areas, the debtor, Boedeker, controlled all purchases of merchandise for the store. *Id.*

56. RESTATEMENT (SECOND) OF AGENCY, *supra* note 14. For the text of § 14 O, see *supra* note 14.

57. 78 S.D. at 348-49, 102 N.W.2d at 91-92.

Both the *Wasilowski* and *Buck* cases may be distinguished from the *Jenson* case on the basis of the characteristics of the creditors involved. In *Wasilowski* and *Buck* the creditors were ordinary financiers.[58] Both courts refused to find the creditors liable on agency principles because the creditors had not assumed control of every aspect of the debtor's businesses or contracts, nor had the debtors given up all interest.[59] The creditors in all three cases exercised a great deal of control, but in *Jenson,* Cargill was doing more than protecting its loan to Warren.[60]

Often a buyer-supplier relationship will resemble a principal-agent relationship.[61] The comments to section 14K of the Restatement[62] explain the distinguishing factors.[63] Factors indicating that one is a seller and not an agent are:

> (1) That he is to receive a fixed price for the property, irrespective of the price paid by him. This is the most important. (2) That he acts in his own name and receives the title to the property which he thereafter is to transfer. (3) That he has an independent business in buying and selling similar property.[64]

No single factor is determinative.[65] Instead, the courts will look at the substance of the transaction to determine whether one is a supplier or an agent.[66]

The major issue in *A. Gay Jenson Farms Co. v. Cargill, Inc.*[67] was whether Cargill could be held liable as a principal for contracts

58. Wasilowski v. Park Bridge Corp., 156 F.2d at 613 (the debtors secured a loan from the Park Bridge Corp.); Buck v. Nash-Finch, 78 S.D. at 336, 102 N.W.2d at 85 (Nash-Finch financed Boedeker through Merchant Finance, one of its wholly owned subsidiaries).

59. Wasilowski v. Park Bridge Corp., 156 F.2d at 614 (debtors were very insistent about protecting their interest); Buck v. Nash-Finch Co., 78 S.D. at 348-49, 102 N.W.2d at 91 (no consent that Nash-Finch would control Boedeker's buying operations).

60. *See Jenson,* 309 N.W.2d at 292. Cargill's purpose was not to make money as a lender, but to find a source of market grain. *Id.* at 293.

61. RESTATEMENT (SECOND) OF AGENCY § 14K (1958). The Restatement compares an agent with a supplier in the following manner: "One who contracts to acquire property from a third person and convey it to another is the agent of the other only if it is agreed that he is to act primarily for the benefit of the other and not for himself." *Id.* For cases applying § 14K and the factors which distinguish an agent from a supplier, see Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc., 630 F.2d 250 (5th Cir. 1980); Valley View Cattle Co. v. Iowa Beef Processors, Inc., 548 F.2d 1219 (5th Cir. 1977); Rufenacht v. Iowa Beef Processors, Inc., 492 F. Supp. 877 (N.D. Tex. 1980); Farmers Elevator Co. v. Pheister, 153 Mont. 152, 455 P.2d 325 (1969).

62. RESTATEMENT (SECOND) OF AGENCY, *supra* note 61.

63. RESTATEMENT (SECOND) OF AGENCY, *supra* note 61, comment a, at 75.

64. RESTATEMENT (SECOND) OF AGENCY, *supra* note 61, comment a, at 75.

65. The *Jenson* court discussed only the third factor in § 14K, the independent business requirement. 309 N.W.2d at 292. The court reasoned that because all segments of Warren's business were financed by Cargill, there was no independent business. *Id.* The court concluded, therefore, that the relationship was more than that of a buyer-supplier. *Id.*

66. *See generally* W. SEELL, AGENCY §§ 32-33 (1975).

67. 309 N.W.2d 285 (Minn. 1981).

entered into by Warren.[68] The court concluded that Cargill was a principal liable for the contracts on which Warren defaulted.[69]

Cargill's liability was based on its control and influence over Warren.[70] The court determined that the three elements necessary for the creation of an agency were present.[71] The three elements essential to any agency relationship are mutual consent, action by one on another's behalf, and a right of control over the one acting:[72]

In discussing the elements of consent and action, the court reasoned that Cargill had manifested its consent that Warren be its agent by directing Warren to implement Cargill's recommendations. The court also noted that Warren had acted on Cargill's behalf in procuring grain for Cargill. These findings were enough to satisfy the consent and action elements of agency.[73]

The major emphasis in *Jenson* was placed on the third element — the element of control.[74] Normally the element of control is articulated as the right to control,[75] but in *Jenson* the court based the control element on section 14 O of the Restatement,[76] which states that a creditor who assumes control of his debtor's business may be held liable as a principal.[77] Logically, an assumption of de facto control encompasses the right to control, but only one case has taken the approach of basing the right to control on section 14 O of the Restatement.[78] Traditionally creditors have been allowed to assume a great deal of control over their debtors' businesses and actions to protect their loans.[79] In *Jenson,* however, the court found

68. *Id.* at 290.

69. *Id.*

70. *Id.* at 291. The court in *Jenson* concluded that control by Cargill was necessary for finding liability based on agency principles. *Id.* Control is necessary for an agency relationship under both § 1 and § 14 O of the Restatement RESTATEMENT (SECOND) OF AGENCY, *supra* note 20; RESTATEMENT (SECOND) OF AGENCY, *supra* note 14.

71. 309 N.W.2d at 291.

72. RESTATEMENT (SECOND) OF AGENCY, *supra* note 20.

73. 309 N.W.2d at 291.

74. RESTATEMENT (SECOND) OF AGENCY, *supra* note 20. While all three elements are necessary for the creation of an agency relationship, it is often the element of control which distinguishes an agency relationship from other relationships. *Id.* comment b.

75. RESTATEMENT (SECOND) OF AGENCY § 14 (1958). The Restatement provides that "[a] principal has the right to control the conduct of the agent with respect to matters entrusted to him." *Id.*

76. RESTATEMENT (SECOND) OF AGENCY, *supra* note 14.

77. RESTATEMENT (SECOND) OF AGENCY, *supra* note 14.

78. Buck v. Nash-Finch Co., 78 S.D. 334, 102 N.W.2d 84 (1960). In *Buck* a grocery wholesaler was financing a local retailer through Merchant Finance, one of its wholly owned subsidiaries. Even though the creditor had a dual interest, the loan and a possible market for its wholesale goods, the creditor was not held liable as a principal because he had not assumed de facto control of his debtor's business. *Id.* at 348, 102 N.W.2d at 91. This case may be distinguished from *Jenson* on the basis of the interest. Although the creditor had an interest in a possible market, he exercised no control in this area, whereas Cargill was motivated by its need for grain and controlled this aspect of Warren's business.

79. *Id.* at 348-49, 102 N.W.2d at 91-92. The *Buck* court concluded that "the courts have not hesitated in holding evidence of broad measures of control by a creditor insufficient to sustain a

that Cargill had assumed control of Warren and was therefore liable as a principal.[80]

The court in *Jenson* relied heavily on *Butler v. Bunge Corp.*,[81] in which Bunge, a large commodities corporation similar to Cargill, was held liable as a principal because of the control it exercised over the operations of a grain elevator.[82] The court in *Bunge* did not rely on section 14 O of the Restatement,[83] but the result in both cases was that a grain company that asserts sufficient control over an elevator will be held responsible for the acts and transactions of the elevator on agency principles.[84]

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finding that the debtor was authorized to contract on behalf of the creditor as an undisclosed principal." *Id.*

80. 309 N.W.2d at 291.

Another court may have based liability on the law of partnership or joint venture. *See, e.g.*, Johnson v. Plastex Co., 500 P.2d 596, 598 (Okla. 1971). Section 6 (1) of the Uniform Partnership Act provides that "[a] partnership is an association of two or more persons to carry on as co-owners a business for profit." UNIFORM PARTNERSHIP ACT § 6 (1) (1914).

Section 15 of the Uniform Partnership Act provides that "[a]ll partners are liable jointly and severally for everything chargeable to the partnership." *Id.* § 15. However, § 7 (4) (d) of the Uniform Partnership Act provides as follows:

> In determining whether a partnership exists, these rules shall apply:
>
> . . .
>
> (4) the receipt by a person of a share of the profits is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:
>
> . . .
>
> (d) As interest on a loan, though the amounts of payment vary with the profits of the business.

Id. § 7 (4) (d).

81. 329 F. Supp. 47 (N.D. Miss. 1971).

82. Butler v. Bunge Corp., 329 F. Supp. 47, 61 (N.D. Miss. 1971). The *Bunge* court found the following elements of control:

> (1) Bunge furnished all or practically all of the means and appliances for the work; (2) Bunge furnished substantially all funds received by Bayles; (3) Bunge controlled the destination of all grain handled by Bayles; (4) Bunge controlled the price, weights and grades of all grain handled by Bayles; (5) Bunge, on certain occasions, permitted Bayles to sell a limited quantity of grain to other buyers; (6) Bunge not only had the right to direct details important to grain buying but gave actual direction to Bayles through constant contact, quoting its price to him and consulting with him regarding prices for the farmers; (7) Bunge had a significant degree of control over the operation of the grain elevator at Roundaway in such areas as training Bayles' personnel, inspecting the premises and requiring maintenance of insurance against hazards of operation; (8) Bayles' grain transaction with farmers was the identical type of business activity that was regularly carried on by Bunge, and Bayles' transactions formed a substantial part of Bunge's business that was developed from the area in which Coahoma Grain Elevator operated; and finally (9) although the agreement formally specified a fixed term, the relationship between the parties had no viability apart from grain dealings that were wholly subject to Bunge's will.

Id. The court concluded that these elements of control "make clear that Bunge did not consider Bayles an independent operator who was free to become Bunge's competitor in buying grain from the farmers in the region, but rather that he was effectually given authority to buy grain from Bunge." *Id.*

83. RESTATEMENT (SECOND) OF AGENCY, *supra* note 14.

84. Bunge was held liable because the operator of its grain elevator was an agent not an independent contractor. This distinction was made by an analysis of the control exercised by Bunge over the operator. 329 F. Supp. at 61. The court refused to allow Bunge to claim that Bayles was an independent contractor when Bunge had maintained complete control of the business. *Id.* at 58.

The *Jenson* court's heavy reliance on *Bunge* was justified even though *Bunge* dealt with whether a grain elevator operator was an independent contractor or an agent, because the ultimate inquiry was the same.[85] The ultimate inquiry in both cases was whether the essential element of control was present.[86]

The *Jenson* court retreated from previous decisions of other courts allowing an extensive degree of control to creditors. The court's analysis of control consisted of listing nine factors,[87] which in the *Jenson* court's opinion indicated de facto control under section 14 O.[88]

Four of the nine factors involved communications between Warren and Cargill, including statements by Cargill, regarding recommendations, finances, salaries, inventory, and sample business forms.[89] Two of the factors arguably involved veto power.[90] The two factors involving the veto power were Cargill's right of first refusal on grain and Warren's inability to enter into mortgages, to purchase stock, or to pay dividends without Cargill's approval.[91] The court did acknowledge that some of these elements are found in an ordinary debtor-creditor relationship, but concluded that the factors must be "viewed in light of all the circumstances surrounding Cargill's aggressive financing of Warren."[92]

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85. *Id.* at 54. In *Bunge* the court analyzed an operator's agreement and found that this agreement gave Bunge absolute control over all grain received by Bayles. *Id.* at 57.

86. The *Bunge* and *Jenson* courts relied on similar indicia of an agency relationship. 391 F. Supp. at 61; 309 N.W.2d at 291. For a listing of the factors considered by the courts, see *supra* notes 12 & 82.

87. 309 N.W.2d at 291. For a listing of the nine factors relied on by the *Jenson* court, see *supra* note 12.

88. The relationship between the debtors and creditors in the earlier cases was more in the nature of an ordinary financier relationship, whereas Cargill was an active participant in the *Jenson* case.

89. 309 N.W.2d at 291. For the text of § 14 O of the Restatement, see *supra* note 14.

90. *See* RESTATEMENT (SECOND) OF AGENCY, *supra* note 14, comment a. Comment a to § 14 O provides as follows:

> A security holder who merely exercises a veto power over the business acts of his debtor by preventing purchases or sales above specified amounts does not thereby become a principal. However, if he takes over the management of the debtor's business either in person or through an agent, and directs what contracts may or may not be made, he becomes a principal, liable as any principal for the obligations incurred thereafter in the normal course of business by the debtor who has now become his general agent. The point at which the creditor becomes a principal is that at which he assumes de facto control over the conduct of his debtor, whatever the terms of the formal contract with his debtor may be.
>
> Where there is an assignment for the benefit of creditors, the latter may become the principals of the assignee if they exercise control over transactions entered into by him on their behalf.

Id.

91. 309 N.W.2d at 288.

92. *Id.* at 291. Cargill had stated at some time during its association with Warren that Warren

The remaining three factors were Cargill's right of entry onto Warren's premises to carry on periodic checks and audits, Cargill's financing of all of Warren's purchases of grain and operating expenses, and Cargill's power to discontinue the financing of Warren's operations. These factors are either elements of an ordinary debtor-creditor relationship or, like the veto powers discussed above, are methods used by unsecured creditors to protect their loans.[93] The factors of control noted by the court included communications, veto powers, elements of ordinary debtor-creditor relationships, and controls often used by unsecured creditors.[94] Despite a finding of liability based on the factors of control set out above, the court assured creditors that they would still be able to protect their loans. The court noted that in this case Cargill was, by its active participation, more than a financier.[95]

Cargill attempted to avoid liability under agency principles by arguing that the relationship between Cargill and Warren was merely one of buyer-supplier rather than principal-agent.[96] The court rejected this argument because Warren did not have an independent business in buying and selling similar property, which is required by section 14K of the Restatement (Second) of Agency.[97]

Cargill also contended that even if it were established that it was Warren's principal, it was an undisclosed principal because the plaintiffs had failed to establish that they had notice of a principal. Cargill argued that as an undisclosed principal it could not be held

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needed "very strong paternal guidance." *Id.* at 289. This determination led to Cargill's aggressive financing, as Cargill had already been involved in two similar situations and suffered heavy losses. *Id.*

93. *Id.* at 288. Cargill's loan was, for all practical purposes, unsecured. Only the first $175,000 that Cargill lent Warren was secured. *Id.* In 1977 Warren was indebted to Cargill in the amount of $3.6 million. *Id.* at 289.

94. *Id.* at 291.

95. *Id.* at 292. The court clearly was not convinced that Cargill's role was that solely of a financier. The court said:

> Further, we are not persuaded by the fact that Warren was not one of the "line" elevators that Cargill operated in its own name. The Warren operation, like the line elevator, was financially dependent on Cargill's continual infusion of capital. The arrangement with Warren presented a convenient alternative to the establishment of a line elevator. Cargill became, in essence, the owner of the operation without the accompanying legal indicia.

Id. The court found a unique fabric in the relationship between Warren and Cargill, which was very different from a normal debtor-creditor relationship. *Id.* at 293.

96. *Id.* at 291.

97. *Id.* The court did not mention the first two factors in § 14K of the Restatement for distinguishing an agency and a buyer-supplier relationship. These two factors involve a determination of whether the buyer is to receive a fixed price for the goods sold regardless of the price paid, and whether the buyer acts in its own name and receives title to the property. *See* RESTATEMENT (SECOND) OF AGENCY, *supra* note 61.

liable because all its accounts with Warren had been settled.[98] The court dismissed this contention by adopting section 208 of the Restatement,[99] a minority position. Section 208 states:

> An undisclosed principal is not discharged from liability to the other party to a transaction conducted by an agent by payment to, or settlement of accounts with, the agent, unless he does so in reasonable reliance upon conduct of the other party which is not induced by the agent's misrepresentations and which indicates that the agent has settled the account.[100]

The implications of the *Jenson* decision vary in significance depending on whether the case is read broadly or narrowly. The court in *Jenson* seemed to suggest that this decision should be read narrowly when it reassured the amici curiae that firms and banks would not decline to make further loans to country elevators if the verdict were upheld.[101] The court said, "The decision in this case should give no cause for such concern. We deal here with a business enterprise markedly different from ordinary bank financing, since Cargill was an active participant in Warren's operations rather than simply a financier."[102] Cargill's purpose in making the loan was not to make money as a lender but to obtain the grain it needed for its business.[103]

If this decision is confined to situations in which a corporation is financing a smaller enterprise, not to make money from interest on loans but to obtain necessary goods, the impact of the decision will be limited. The impact will be especially limited in the grain industry because large corporations, like Cargill, will continue their

98. 309 N.W.2d at 293. The court found it unnecessary to decide whether Cargill was a disclosed or undisclosed principal by adopting § 208 of the Restatement. *Id.*

99. RESTATEMENT (SECOND) OF AGENCY § 208 (1958). For cases, annotations, and law review articles discussing the rationale and development of the minority and majority positions of an undisclosed principal's liability after settlement, see Poretta v. Superior Dowel Co., 153 Me. 308, 137 A.2d 361 (1957); Annot., 71 A.L.R.2D 911 (1960); Gray, *The Liability of Undisclosed Principals After Settlement with an Agent,* 18 MISS. L.J. 436 (1946-1947); Seavey, *Undisclosed Principal; Unsettled Problems,* 1 HOW. L.J. 79 (1955).

100. RESTATEMENT (SECOND) OF AGENCY, *supra* note 99. Under § 208 Cargill would be liable whether it was a disclosed principal or an undisclosed principal. *Id.*

101. 309 N.W.2d at 292. The court felt that Cargill's relationship with Warren was more akin to the relationship that Cargill had with its line elevators than to an ordinary debtor-creditor relationship. The relationship of Cargill with its line elevators was a relationship of owner-operator. *Id.*

102. *Id.* Respondent's brief referred to the testimony of the president of the Minnesota Farmers Elevator Association. The president stated that Cargill's relationship with Warren was far from the customary commission house-country elevator relationship. Respondent's Brief at 22-23.

103. 309 N.W.2d at 293. A Cargill manager stated that they were staying in because they wanted the grain. Notwithstanding the risk, Cargill considered the operation profitable. *Id.*

aggressive financing of small elevators. This course of action is the only practical way for them to get the grain they need to stay in business.[104] Under this interpretation, the decision will only serve to warn similar businesses that they cannot go as far as Cargill did and expect to avoid liability based on agency principles.[105]

The *Buck* case provides a good example of a situation between the extremes of Cargill and Warren and an ordinary debtor-creditor relationship.[106] In *Buck,* Nash-Finch, a grocery wholesaler, financed a local retailer through Merchant Finance Company, one of Nash-Finch's wholly owned subsidiaries.[107] The court recognized Nash-Finch's dual interests, one in protecting the loan and another in the possibility of developing a market for its wholesale goods, but refused to find an agency relationship based on section 14 O. Creditor liability based on agency principles under section 14 O results only when a creditor assumes de facto control of its debtor's business.[108] Nash-Finch, while controlling many aspects of its debtor's business, did not control the retailer's buying operations.[109] An application of the Cargill decision in situations such as this might deter creditors like Nash-Finch from making loans to smaller businesses, despite the possibility of developing a market for their goods.

If the rationale of this decision is applied to traditional debtor-creditor relationships, the implications are significant. The failure of the court to specify which elements of control caused the agency relationship to arise coupled with the nature of the elements of control, specifically communications, veto powers, and traditional devices used by unsecured creditors, might lead ordinary financiers to refuse to make loans to small elevators. This would be detrimental to all parties involved, including farmers. It is also possible that ordinary creditors will take action in the opposite direction and exercise a great deal of control to make sure that the loans they make are used beneficially. This would result in a tremendous inconvenience to elevator operators and affect

104. Respondent's Brief at 61. This statement was made by plaintiff's counsel in refuting the contention that a ruling in favor of the plaintiff would cause all country elevators to go broke. *Id.*

105. *Id.*

106. Buck v. Nash-Finch Co., 78 S.D. 334, 102 N.W.2d 84 (1960). Although Nash-Finch had dual interests, its interest in developing a market for its wholesale products was merely a potentiality. The retailer bought many of his goods from other wholesalers and was not obliged to buy from Nash-Finch. Nash-Finch never controlled any aspect of the retailer's buying. *Id.* at 337, 102 N.W.2d at 85.

107. *Id.*

108. RESTATEMENT (SECOND) OF AGENCY, *supra* note 14.

109. 78 S.D. at 337, 102 N.W.2d at 85.

everyone adversely, because most traditional creditors do not have the expertise to be actively involved in this area.[110]

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110. There may be another possible interpretation of the court's decision based on an analogous situation in which the courts require actual control before an agency relationship may be created. This situation arises in the area of corporations and their subsidiaries. For a corporation to be held liable for the obligations of its sudsidiary on an agency theory, actual control must be proved. The courts define this as an old rule of law applied to a new situation. The exception to the general rule that corporations will not be held liable for the obligations of their subsidiaries arises when a corporation exercises actual control. *E.g.*, Japan Petroleum Co. v. Ashland Oil, 465 F. Supp. 831 (D. Del. 1978). It is conceivable that the court in *Jenson* was trying to establish the same rule by the use of § 14 O. If this is true, creditors would be afforded a higher degree of protection because the third requirement for the creation of an agency relationship, the right to control, would be transformed to actual control.