

11-1-1993

Personal Liability For Corporate Participants Without Corporate Veil-Piercing: Louisiana Law

Glenn G. Morris

Louisiana State University Law Center, glenn.morris@law.lsu.edu

Follow this and additional works at: <https://digitalcommons.law.lsu.edu/lalrev>



Part of the Law Commons

Repository Citation

Glenn G. Morris, *Personal Liability For Corporate Participants Without Corporate Veil-Piercing: Louisiana Law*, 54 La. L. Rev. (1993)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol54/iss2/1>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

Personal Liability For Corporate Participants Without Corporate Veil-Piercing: Louisiana Law

Glenn G. Morris*

TABLE OF CONTENTS

I. Introduction	207
II. Contract Liability Generally	208
III. Effects of Shareholder Guarantees	210
IV. Undisclosed Agency Liability	213
A. Timing of Disclosure	217
B. Partial Disclosure, Disclosure of Corporate Status	219
V. Defects in Corporate Authorization	225
A. Liability for Exceeding Authority—Code Provisions	230
B. Exceeding Authority—Jurisprudence	237
C. Mislabeled Exceeding Authority Cases	242
VI. Tort Liability Generally	244
A. Tortious Interference with Contract	247
1. Interpreting 9 to 5	251
2. The Effects of 9 to 5	258
VII. Conclusion	260

I. INTRODUCTION

Unless the separate legal personality of the corporation is disregarded under a veil-piercing theory, corporate shareholders, as such, are not personally liable for the debts of their corporation.¹ But the fact that these persons bear no personal liability in their capacity as shareholders does not mean that they are immune from liability under other generally applicable principles of law. When a shareholder personally commits a tort² or personally becomes a party to a

Copyright 1993, by LOUISIANA LAW REVIEW.

* Associate Professor of Law, Louisiana State University Law Center.

1. La. R.S. 12:93(B) (1969); *Riggins v. Dixie Shoring Co.*, 590 So. 2d 1164, 1167-69 (La. 1991), *reh'g denied*, 592 So. 2d 1282 (1992). See generally Glenn G. Morris, *Piercing the Corporate Veil in Louisiana*, 52 La. L. Rev. 271 (1991).

2. Corporate officers and agents have been held personally liable for:

- 1) Their personal fraud: *Lone Star Indus., Inc. v. American Chem., Inc.*, 461 So. 2d 1063 (La. App. 4th Cir. 1984), *aff'd*, 480 So. 2d 730 (1986); *Dolese Concrete Co. v. Tessitore*, 357 So. 2d 869 (La. App. 1st Cir.), *writ denied*, 359 So. 2d 620, 623 (1978);
- 2) Their personal negligence resulting in personal injury: *Canter v. Koehring Co.*, 283 So. 2d 716 (La. 1973);
- 3) Their personal negligence resulting in accidental physical damage to corporeal

contract,³ that shareholder becomes personally liable for the resulting obligation, not because the corporation has incurred an obligation for which he is liable, but because he personally did the things necessary to be treated as a tortfeasor or contracting party in his own right. If the corporation bears liability in connection with the same event or transaction, the separate personality of the corporation will still shield the shareholder from personal liability for the resulting corporate debt, but it will not protect the shareholder from his personal responsibility for his own contract or tort.

This type of personal-conduct-based liability can be particularly important in a small business setting, where most shareholders are actively and personally involved in the day-to-day operation of the firm. Indeed, the owners of small business corporations are much more likely to be held personally liable for their own personal conduct under non-corporate principles of law than they are to be subjected to for the liabilities of the corporation itself under a corporate law veil-piercing theory. This article provides an introduction to these other, largely-overlooked theories, and discusses their implications in practice.⁴

II. CONTRACT LIABILITY GENERALLY

Shareholders, as such, are protected against personal liability for corporate debts by the separate legal personality of the corporation⁵ and by the related

property: *United States Fidelity & Guar. Co. v. Ledford*, 244 So. 2d 252 (La. App. 3d Cir.), *writ denied*, 246 So. 2d 681 (1971). *Accord* H.B. "Buster" Hughes, Inc. v. Bernard, 318 So. 2d 9 (La. 1975) (indicating that such liability was possible, but finding it not to exist in the instant case).

3. The two most common means by which corporate shareholders become parties to corporate contracts are by personal guarantees, usually deliberate but sometimes inadvertent, and by their acts as corporate agents without adequate disclosure concerning their agency. *See* La. Civ. Code arts. 3012, 3013 (agents not liable for principals' contracts unless they personally guarantee them); La. Civ. Code arts. 3035-3062 (governing contracts of suretyship generally); *Homer Nat'l Bank v. Springlake Farms, Inc.*, 616 So. 2d 255 (La. App. 2d Cir. 1993) (liability on disputed personal guarantee); *C. T. Traina Plumbing & Heating Contractors, Inc. v. Palmer*, 580 So. 2d 525 (La. App. 4th Cir.), *writ denied*, 584 So. 2d 1166 (1991) (liability as undisclosed agent). However, any act or statement that might reasonably be construed as a corporate shareholder's consent to a personal contract could be enough to bind him to such a contract under ordinary principles of objective contract interpretation. La. Civ. Code arts. 1927, 2045 and comment b to Article 2045. *Cf.* *Weeden Eng'g Corp. v. Hale*, 435 So. 2d 1158 (La. App. 3d Cir.), *writ denied*, 441 So. 2d 764 (1983) (lawyer who wrote an expert witness, in his capacity as agent for client, but saying, "I wish to employ you" was held personally liable to the witness for the payment of the witness' fee); *Castille v. Folck*, 338 So. 2d 328 (La. App. 3d Cir. 1976) (horse auctioneer held personally liable on implied personal assurances to bidding audience that horses being sold had been tested for certain diseases).

4. The discussion in this article is limited to claims by third parties under general theories of private law. No effort is made to discuss the fiduciary or other duties owed within the corporation or to cover particular statutory provisions that may impose personal liability, either civil or criminal, on corporate officers or directors in connection with various types of regulation or taxation.

5. *Riggins*, 590 So. 2d at 1167-69.

statutory rule that shareholders are not liable for corporate debts.⁶ Other corporate participants, such as officers and employees, also enjoy protection from contractual liability, but the source of their protection is mainly agency, not corporation, law.⁷ In fact, corporation law has only limited relevance in this area. Corporation law does provide that a fictional person, separate from the shareholders, is the principal in so-called "corporate" transactions,⁸ but the existence of this kind of separate fictional person is neither necessary nor sufficient to protect an agent from personal liability for the transactions that he undertakes for his principal. Any agent can avoid personal liability for his principal's contracts, regardless of whether the purported principal on the contracts happens to be a corporation or a human being,⁹ and, conversely, a corporation's separate fictional personality can be fully respected without necessarily protecting the corporation's agents from personal liability.¹⁰

6. La. R.S. 12:93(B) (1969).

7. The corporation statute does not mention officers or directors in its description of the persons who are to be free from personal liability for the debts of the business. The pertinent provision refers strictly to shareholders. *See id.* Persons who do not hold any such ownership-like position but who act strictly as disclosed agents of the corporation do not need the protections of corporation law. Agency law already protects them from personal liability for the authorized contracts they enter into as agents in the name of another person. La. Civ. Code arts. 2985, 3012, 3013. Even if these agents were acting for an unincorporated business association, e.g., a proprietorship or partnership, they would still bear no personal liability for the authorized contracts they had executed as disclosed agents. Only the principal—the proprietorship or partnership—would be bound.

8. *Riggins*, 590 So. 2d at 1167.

9. Most of the modern cases dealing with agents involve agents of corporations. *See, e.g.*, *Bergman v. Nicholson Management & Consultants, Inc.*, 594 So. 2d 491 (La. App. 4th Cir.), *writ denied*, 600 So. 2d 646 (1992); *Voiter v. Antique Art Gallery*, 524 So. 2d 80 (La. App. 3d Cir.), *writ denied*, 531 So. 2d 271 (1988); *Donnelly v. Handy*, 415 So. 2d 478 (La. App. 1st Cir. 1982). Business is so frequently conducted through corporations today that it is difficult to find modern cases that apply the nonliability rule outside of the corporate setting. Nevertheless, the Louisiana Civil Code rule concerning the nonliability of disclosed agents is stated in general terms, without even mentioning corporations. *See* La. Civ. Code arts. 3012, 3013. *Cf.* 2 Marcel Planiol, *Traité Élémentaire De Droit Civil* ¶ 2240 (Louisiana State Law Institute trans., 1959) (1939) ("the mandatary does not obligate himself by the acts which he accomplishes in the name of his principal"). The silence in agency law on the subject of corporations is understandable, for the agency rules originated in Roman law, *see* Planiol, *supra*, ¶ 2231, many centuries before the birth of the modern business corporation. Corporation law did not create the concept of nonliability for business representatives; it took advantage of the principles that already existed in agency law. Before corporations became dominant in business, the same agency principles were applied routinely in dealing with agents of individuals and partnerships. *See, e.g.*, *Rosenthal v. Myers*, 25 La. Ann. 463 (1873); *Gilman v. Bonner & Smith*, 7 La. Ann. 674 (1852); *Lincoln v. Smith*, 11 La. 11 (1837). Today, the typical setting for an agency dispute has indeed changed, but the same principles of nonliability still apply, whether or not the principal happens to be incorporated.

10. *See, e.g.*, *C. T. Traina Plumbing & Heating Contractors, Inc. v. Palmer*, 580 So. 2d 525 (La. App. 4th Cir.), *writ denied*, 584 So. 2d 1166 (1991) (liable as undisclosed agent of corporation); *Lone Star Indus., Inc. v. American Chem., Inc.*, 461 So. 2d 1063 (La. App. 4th Cir. 1984), *aff'd*, 480 So. 2d 730 (1986) (liable for personal fraud in connection with corporate business); *Cooley v. Al Hirt Enters., Inc.*, 180 So. 2d 841 (La. App. 4th Cir. 1965) (agent of corporation could be held personally

The importance of agency law principles cannot be overstated in the small business setting, for the small business owner will rarely face personal liability in his capacity as shareholder. Rather, as a result of participating in the actual operations of the corporation, the owner of the business will face exposure to contractual liability almost entirely in connection with his activities as agent. As an agent, the business owner or participant can become personally liable for the contracts of his principal in three different ways: by guaranteeing the contracts personally, by exceeding his authority, and by failing to satisfy his disclosure duties.

III. EFFECTS OF SHAREHOLDER GUARANTEES

The general law of guarantees and suretyship are beyond the scope of this article.¹¹ However, it is clear that a personal guarantee will make the guarantor personally liable for the guaranteed obligation, even if the guarantor would otherwise be free of liability as an agent or shareholder.¹²

Shareholder guarantees of corporate indebtedness are undoubtedly the most common source of personal liability on corporate indebtedness. These guarantees are almost always required in major transactions between sophisticated creditors and closely-held corporations. In effect, major shareholders routinely waive the limited liability that corporation law theoretically provides to them in the very transactions in which the limitation might otherwise be considered most important. As a practical matter, shareholders will typically enjoy limited liability for corporate obligations only in connection with debts that are not normally associated with personal guarantees, such as tort claims, employee salary obligations, and smaller, routine trade accounts. These limited protections can still be important, of course, for a company's tort exposure can potentially be very great and its numerous small accounts can add up to a large total figure. Nevertheless, a closely-held corporation is normally not a device that allows shareholders to engage in a business free from any personal responsibilities for the obligations that the business generates. Through guarantees, shareholders will usually end up bearing personal liability for much, if not most, of the corporation's total indebtedness.

The personal exposure created by shareholder guarantees has important effects on the management of the debtor corporation. Indeed, shareholder guarantees are not demanded by creditors merely as backups to the creditworthiness of the debtor corporations. Guarantees are routinely demanded even when the shareholder's additional assets are so meager that they are going to make

liable to third party for exceeding his authority).

11. See generally La. Civ. Code arts. 3035-3070 (provisions on suretyship); La. R.S. 10:3-419 (1993) (effective Jan. 1, 1994) (treatment of accommodation parties on negotiable instruments as sureties; applicability of the Civil Code suretyship articles).

12. La. Civ. Code arts. 3012 (agent liable if he personally guarantees); 3035 (definition of surety); 3045 (liability of surety).

little difference in the lender's collection efforts if the debtor corporation defaults on the loan.¹³ In this type of case, which is common in small business lending, the real point of the shareholder guarantee is not to reach some financially insignificant personal assets of the shareholder after default, but to encourage the shareholders to do their very best to avoid default in the first place.

Shareholder guarantees reduce or eliminate the incentives that the shareholders might otherwise have to pay themselves handsome salaries in preference to repaying the lender, or to take attractive new business opportunities for themselves personally, leaving behind a financially-troubled corporate borrower.¹⁴ Creditors who hold shareholder guarantees do not have to stand by and watch the assets of their corporate borrower disappear until, too late to do much good, they finally gain the right as a result of their debtor's insolvency to try to engage in the expensive and typically fruitless effort to rescind their debtor's various asset transfers.¹⁵ Instead, these creditors can be confident that the shareholder-guarantors will treat the guaranteed corporate debts as if they were the debts of the shareholders themselves, and so will do their best to see that those debts are paid.

In general, the incentives created by loan guarantees work to the benefit of all creditors, and not merely the creditors who hold the guarantees. The shareholder-guarantors will understand that the loan on which they are personally obligated will be repaid by the principal debtor, the corporation, only if the corporation stays in business long enough to generate the necessary funds. They will also understand that the corporation will stay in business only if it pays its day-to-day bills and expenses.¹⁶ Under normal circumstances, therefore, the shareholders' best course of action is to manage the company well enough to pay all of its bills, guaranteed and unguaranteed alike.

13. The shareholder issuing the guarantee often has personal assets that are insignificant in relation to the size of the indebtedness. See Scott C. Barney, Comment, *Bankruptcy Preferences and Insider Guarantees*, 51 La. L. Rev. 1047, 1061-63 (1991) (citing Isaac Nutovic, *The Bankruptcy Preference Laws: Interpreting Code Sections 547(c)(2), 550(c)(1), and 546(a)(1)*, 41 Bus. Law. 175, 196 (1985)).

14. Barney, *supra* note 13, at 1063-64.

15. Only shareholders have standing to bring derivative actions to enforce the fiduciary duties that are owed by officers and directors to the corporation. La. Code Civ. P. arts. 591, 596; *McCall v. McCall Enters., Inc.*, 578 So. 2d 260 (La. App. 3d Cir.), *writ denied*, 581 So. 2d 708 (1991). For a creditor to challenge corporate management, he has to show that grounds exist, based on some form of insolvency or financial embarrassment, to replace corporate management with a bankruptcy trustee or with a receiver or liquidator, or to file revocatory or oblique actions under the terms of the Civil Code. See 11 U.S.C.A. § 303 (1993) (grounds for relief in involuntary bankruptcy); La. R.S. 12:143 (1969) (involuntary liquidation); La. R.S. 12:151 (1969) (appointment of receiver); La. Civ. Code arts. 2036, 2044 (revocatory and oblique actions). Otherwise, the creditor must negotiate complicated loan covenants, and then monitor the debtor's compliance with the covenants, in the hopes that the lender's power to declare an event of default on the corporate loan will adequately deter adverse behavior by those in control of the borrowing corporation. Personal guarantees are much simpler. They work automatically and are far more difficult to circumvent.

16. See Barney, *supra* note 13, at 1065.

However, once it becomes obvious to the shareholder-guarantors that the corporation is approaching insolvency, the incentives change. The shareholders will now wish to cause the corporation to reduce or cut off its payments to nonessential, non-guaranteed creditors and to generate and spend as much cash as possible in repaying the guaranteed creditors. This type of behavior will reduce the shareholders' own exposure on the guaranteed debts at the expense of those creditors who hold no such guarantees, and will allow the shareholders to shift some of the costs of the business failure from themselves to the corporation's non-guaranteed creditors.¹⁷

These insolvency-related incentives have produced a debate among courts and commentators concerning the proper treatment of guaranteed debts under bankruptcy law.¹⁸ Beginning with a 1989 decision by the Seventh Circuit,¹⁹ several courts have treated certain payments on shareholder-guaranteed corporate debts as rescindable insider preferences under bankruptcy law.²⁰ This approach has been strongly criticized on policy grounds by several courts and commentators.²¹ However, as a matter of Louisiana law, the question appears to be moot, as the comments to the 1984 revision of the obligations articles of the Civil Code indicate that issues of preferential payments are to be governed by federal bankruptcy law, and not by Louisiana law.²²

17. See Nutovic, *supra* note 13, at 195-96 (insider guarantees sought by lenders to enable them to exert pressure for preferred treatment). *But see* David I Katzen, *Deprizio and Bankruptcy Section 550: Extended Preference Exposure Via Insider Guarantees, and Other Perils of Initial Transfer Liability*, 45 Bus. Law. 511, 520 (1990) (preferential treatment of payments on insider-guaranteed debts will only matter if the guarantor is unable to pay; typically if this type of debt is not repaid by the principal debtor, the guarantor will also be unable to pay, so indifferent to whether guaranteed or non-guaranteed creditor is paid); Barney, *supra* note 13, at 1065-66 (preference treatment of payments on insider-guaranteed debts will encourage use of alternative security arrangements for powerful creditors, and these arrangements will not produce the incidental benefits for other creditors that guarantees provide).

18. Compare *In re Robinson Bros. Drilling, Inc.*, 97 B.R. 77 (Bankr. W. D. Okla. 1988), *aff'd*, 892 F.2d 850 (10th Cir. 1989) and *In re C-L Cartage Co.*, 899 F.2d 1490 (6th Cir. 1990) and *Levitt v. Ingersoll Rand Fin. Corp.*, 874 F.2d 1186 (7th Cir. 1989) (treating certain payments on shareholder-guaranteed debts as insider preferences, subject to rescission; known generally as the *Deprizio* rule) with *In re Arundell Hous. Components, Inc.*, 126 B.R. 216 (Bankr. D. Md. 1991) and *In the Matter of the Midwestern Cos.*, 102 B.R. 169 (Bankr. W. D. Mo. 1989) (rejecting the *Deprizio* rule). For citations to disagreements among commentators, see Barney, *supra* note 13, at 1050 n.21. See also Heuk J. Brands, *The Interplay Between Sections 547(b) and 550 of the Bankruptcy Code*, 89 Colum. L. Rev. 530, 542-46 (1989); Jay L. Westbrook, *Two Thoughts About Insider Preferences*, 76 Minn. L. Rev. 73, 80-86 (1991).

19. *Levitt*, 874 F.2d 1186.

20. *In re Robinson Bros. Drilling*, 97 B.R. 77; *In re C-L Cartage Co.*, 899 F.2d 1490. See *Erin Food Servs., Inc. v. Cambridge Meridian Group, Inc.*, 980 F.2d 792 (1st Cir. 1992) (assuming, without deciding, that the *Deprizio* rule was correct).

21. *In re Arundell Hous. Components, Inc.*, 126 B.R. 216 (Bankr. D. Md. 1991); Westbrook, *supra* note 18, at 80-86; Brands, *supra* note 18, at 542-46; Katzen, *supra* note 17, at 520; Barney, *supra* note 13.

22. La. Civ. Code art. 2036, cmt. (g). *But see* *Amp Serv. Corp. v. Richard*, 419 So. 2d 911

The personal liability created by a guarantee seldom surprises the guarantor. However, it should be noted that the law recognizes the possibility of an implied, even inadvertent personal contract or, in the language of the jurisprudence, a "pledging of personal responsibility."²³ Depending on the nature of the obligation incurred, the debt might be in the nature of suretyship (if it was conditioned on the principal debtor's failure to pay²⁴), or it might simply be construed as a direct personal obligation on the part of the agent. The point is that corporate shareholders should be careful in their dealings with third parties not to speak or write as if they were personally undertaking the responsibility to pay a corporate debt or to perform some other corporate obligation. This type of language sometimes can be interpreted as an undertaking of personal contractual liability by the agent.²⁵

IV. UNDISCLOSED AGENCY

Next to a personal guarantee, the most common agency law basis for imposing contractual liability on a corporate participant is the failure of the participant, while acting as an agent for the corporation, to provide adequate disclosure of his agency. Louisiana law, like the common law,²⁶ holds an undisclosed agent personally liable for the contracts that he negotiates on his principal's behalf.²⁷ Undisclosed agency liability is particularly troublesome in a small business setting because it is fairly common for shareholders to act in representative capacities, for example, as officers, agents, or employees, on

(La. 1982) (prior to revision of obligations articles in 1984; preferential transfer of security interest to shareholders/creditors to the prejudice of arms' length unsecured creditors was subject to attack as an unlawful preference).

23. See *Weeden Eng'g Corp. v. Hale*, 435 So. 2d 1158 (La. App. 3d Cir.), *writ denied*, 441 So. 2d 764 (1983); *Castille v. Folck*, 338 So. 2d 328 (La. App. 3d Cir. 1976).

24. See La. Civ. Code arts. 3035, 3037 and comment a to Article 3037.

25. See *Weeden Eng'g Corp. v. Hale*, 435 So. 2d 1158 (La. App. 3d Cir.), *writ denied*, 441 So. 2d 764 (1983) (lawyer who wrote an expert witness, in his capacity as agent for client, but saying, "I wish to employ you," was held personally liable to the witness for the payment of the witness' fee); *Castille v. Folck*, 338 So. 2d 328 (La. App. 3d Cir. 1976) (horse auctioneer held personally liable on implied personal assurances to bidding audience that horses being sold had been tested for certain diseases).

26. Restatement (Second) of Agency § 322 (1958); Harold G. Reuschlein & William A. Gregory, *The Law of Agency and Partnership* (2d ed. 1990).

27. E.g., *Chappuis & Chappuis v. Kaplan*, 170 La. 763, 129 So. 156 (1930); *Dash Bldg. Materials Ctr., Inc. v. Henning*, 560 So. 2d 653 (La. App. 4th Cir. 1990); *G.T.M. Carpet Co. v. Richards*, 534 So. 2d 539 (La. App. 5th Cir. 1988); *Travis v. Hudnall*, 517 So. 2d 1085 (La. App. 3d Cir. 1987); *Frank's Door & Bldg. Supply, Inc. v. Double H Constr. Co.*, 459 So. 2d 1273 (La. App. 1st Cir. 1984). Until recently, some question existed as to whether Louisiana law recognized one important feature of the common law of undisclosed agency, namely, the power of an undisclosed agent to create a contract enforceable by his undisclosed principal against the third party. That question has now been answered; Louisiana does recognize this power. *Woodlawn Park Ltd. Partnership v. Doster Constr. Co.*, 623 So. 2d 645 (La. 1993).

behalf of their closely-held corporations without formally disclosing to the third party the capacity in which they are acting.

Undisclosed agency theory, properly understood,²⁸ poses risks of liability only for those shareholders who involve themselves personally in negotiating contracts on behalf of their corporation, and only with respect to those particular transactions in which disclosure or notice about the agency has been inadequate. Purely passive shareholders, those who limit their involvement in corporate operations to voting at shareholder meetings, do not face risks of undisclosed agency liability, and those active shareholders or employees who do bear undisclosed agency liability bear that liability only for the particular transactions affected.

Undisclosed agency theory is simple and appealing: an agent who negotiates a contract in his own name does not appear to the other party to the contract to be an agent at all. He seems to be negotiating for himself as a principal. The law merely treats the agent as what he objectively seems to be, a contracting party in his own right.²⁹ The agent is liable as a party to the contract for the simple reason that he appeared to be a party at the time of contracting.³⁰ The third party is allowed to enforce his contract against the person with whom he

28. Some Louisiana cases have confused undisclosed agency with undisclosed corporate capacity. Some undisclosed corporate capacity cases have imposed liability on shareholders for transactions that the shareholders did not themselves negotiate. See *infra* text accompanying notes 54-63.

29. See, e.g., *Chappuis & Chappuis v. Kaplan*, 170 La. 763, 129 So. 156 (1930); *C. T. Traina Plumbing & Heating Contractors, Inc. v. Palmer*, 580 So. 2d 525 (La. App. 4th Cir.), *writ denied*, 584 So. 2d 1166 (1991); *Black Equip. & Supply, Inc. v. Koehl & Assocs., Inc.*, 571 So. 2d 902 (La. App. 5th Cir. 1990), *writ denied*, 577 So. 2d 12 (1991); *Marmedic, Inc. v. International Ship Management & Agency Servs., Inc.*, 425 So. 2d 878 (La. App. 4th Cir. 1983); *Chartes Corp. v. Twilbeck*, 305 So. 2d 730 (La. App. 4th Cir. 1974); *Pat's Furniture Showrooms, Inc. v. Furniture Warehouse of Houma, Inc.*, 392 So. 2d 145 (La. App. 1st Cir. 1980), *writ not considered*, 397 So. 2d 803 (1981); *Melancon v. Keller*, 136 So. 2d 67 (La. App. 4th Cir. 1962).

30. Note that we are *not* talking about apparent authority here. The question in an apparent authority case is not whether the third party understood that he was dealing with an agent, but whether the purported agent appeared to have the necessary *authorization* from the principal. See *Hight Enters., Inc. v. Smith & Johnson (Shipping), Inc.*, 421 So. 2d 267 (La. App. 4th Cir. 1982), *writ denied*, 427 So. 2d 1206 (1983) (distinguishing apparent authority from undisclosed agency). In an apparent authority case, where the legal rules also happen to be based on objective contract theory, the *principal* (as distinguished from the agent) may be bound to the third party if, by his conduct or statements, he has caused the third party reasonably to believe that the agent had the authority that he purported to have. See, e.g., *Tedesco v. Gentry Dev., Inc.*, 540 So. 2d 960 (La. 1989); *Boulos v. Morrison*, 503 So. 2d 1 (La. 1987); *Interstate Elec. Co. v. Frank Adam Elec. Co.*, 173 La. 103, 136 So. 283 (1931); *Hawthorne v. Kinder Corp.*, 513 So. 2d 509 (La. App. 2d Cir. 1987); *AAA Tire & Export, Inc. v. Big Chief Truck Lines, Inc.*, 385 So. 2d 426 (La. App. 1st Cir. 1980). Whether an undisclosed agent acted within his authority is important in deciding whether the principal is bound by the actions of the agent, but authority is irrelevant to the liability of the agent himself. If the agent acts with authority on behalf of his principal, then his actions bind both him and the principal, but if the actions are unauthorized, they should bind him alone.

reasonably thought he was contracting, even if that person was secretly acting as an agent for someone else.³¹

"Undisclosed" agency is actually something of a misnomer, for while express disclosure is certainly sufficient to preclude this sort of liability, actual disclosure either by the agent or by the principal is not strictly necessary. If, under the circumstances, a third party already knows or should know what disclosure would reveal,³² then actual, express disclosure is not required.³³ Still, for the agent, express disclosure is normally the best policy.³⁴ The agent bears the burden of proof on the disclosure issue and the reported cases suggest that circumstantial notice is difficult to prove.³⁵ When agent defendants are forced to fall back on the argument, "I didn't tell him but he must have known,"

31. The contract may also be enforced by the third party against the undisclosed principal. *Frank's Door & Bldg. Supply, Inc. v. Double H Constr. Co.*, 459 So. 2d 1273 (La. App. 1st Cir. 1984). However, there seems to be some disagreement concerning the nature of the liability owed by the principal and the agent to the third party. Older cases, following the much-criticized traditional common law theory, say that the third party, once he knows about the principal, must make an election concerning which of the two parties he wishes to hold liable; he may not obtain a judgment against both. Later cases, better reasoned on this point, hold that the liability owed is solidary in nature. Compare Restatement (Second) of Agency § 186, cmt. a and § 210, cmts. a, b (1958) (common law rule and criticisms) and *LaBella Insulation, Inc. v. Connolly*, 182 So. 2d 117 (La. App. 4th Cir. 1966); *Dumaine & Co. v. Gay, Sullivan & Co.*, 192 So. 117 (La. App. Orleans 1939), *order set aside on other grounds*, 194 La. 777, 194 So. 779 (1940) (election required); *Darr v. Kinchen*, 176 So. 2d 638 (La. App. 1st Cir.), *writ denied*, 248 La. 386, 178 So. 2d 664 (1965) (judgment may be obtained against "either" the principal or agent; citing a Florida case as if it were a Louisiana case) with *Travis v. Hudnall*, 517 So. 2d 1085 (La. App. 3d Cir. 1987); *Frank's Door*, 459 So. 2d 1273 (solidary liability).

32. Say, for example, that a uniformed repair person for a well-known retail store, driving a truck painted with the store's color scheme and trademarks, arrives at a local parts supply house, and then orders repair parts from the supplier without saying explicitly that he is placing the order as agent for his employer. It seems unlikely that the repair person would be held personally liable on the order, even though nothing has been said explicitly about his role as agent. Both his agency status and the identity of his principal seem rather obvious under the circumstances.

33. *E.g.*, *G.T.M. Carpet Co. v. Richards*, 534 So. 2d 539 (La. App. 5th Cir. 1988); *Pesson v. Kleckley*, 526 So. 2d 1220 (La. App. 3d Cir. 1988); *American Plumbing Co. v. Hadwin*, 483 So. 2d 169 (La. App. 2d Cir.), *writ denied*, 486 So. 2d 756 (1986); *Mike's Serv. Station Supply, Inc. v. Thiele*, 391 So. 2d 560 (La. App. 4th Cir. 1980), *writ denied*, 396 So. 2d 931 (1981); *J.T. Doiron, Inc. v. Lundin*, 385 So. 2d 450 (La. App. 1st Cir. 1980); *Eastin v. Ramey*, 257 So. 2d 717 (La. App. 3d Cir. 1972).

34. *J.T. Doiron*, 385 So. 2d at 452-53 ("Certainly, actual written or verbal communication by the agent to the party with whom he is dealing is the best method to disclose the agent's status. The agent who reveals his status and his principal's identity in such a way has performed the affirmative duty placed on him by the law and has removed the presumption that he acted in his individual capacity.").

35. *E.g.*, *C. T. Traina Plumbing & Heating Contractors, Inc. v. Palmer*, 580 So. 2d 525 (La. App. 4th Cir.), *writ denied*, 584 So. 2d 1166 (1991); *Black Equip. & Supply, Inc. v. Koehl & Assocs., Inc.*, 571 So. 2d 902 (La. App. 5th Cir. 1990), *writ denied*, 577 So. 2d 12 (1991); *G.T.M. Carpet Co.*, 534 So. 2d 539; *Pat's Furniture Showrooms, Inc. v. Furniture Warehouse of Houma, Inc.*, 392 So. 2d 145 (La. App. 1st Cir. 1980), *writ not considered*, 397 So. 2d 803 (1981); *J.T. Doiron*, 385 So. 2d 450.

their positions appear weak. Sometimes they win,³⁶ but more frequently they lose.³⁷

Despite the greater attention normally devoted to corporate veil-piercing,³⁸ undisclosed agency theory usually poses the greater danger to the limited liability of a small business owner. Veil-piercing is considered extraordinary, and, in theory at least, is based on informality so severe that the corporation can be said to have become "indistinguishable" from the shareholders.³⁹ In contrast, undisclosed agency liability may arise from simple informality in a single transaction.

Undisclosed agency theory is so simple, so appealing, and so susceptible to reversal-resistant factual findings and burden-of-proof determinations by trial courts that it offers these courts a much more dependable means of imposing personal liability than does veil-piercing theory. The creditor in an undisclosed agency case need not prove that the debtor corporation has been so badly managed that its very existence ought to be disregarded; the existence of the corporation may be freely conceded. All the creditor needs to do to recover personally from the defendant is to convince the court that the defendant failed to carry his burden of proving adequate disclosure or notice of either the agency

36. *J.T. Doiron*, 385 So. 2d 450. Cf. *American Plumbing*, 483 So. 2d 169 (where conflicting evidence existed concerning pre-contract disclosure, but where plaintiff admitted defendant's express disclosure of agency and identity of principal no later than two or three hours after minor work on contract had commenced, and where bills were sent to and paid by corporation, it was manifestly erroneous to impose personal liability on defendant under undisclosed agency theory); *Bush v. Saucier*, 197 So. 2d 907 (La. App. 1st Cir. 1967) (circumstances corroborated agent's claim that he provided express, though verbal, disclosure of his agency status). *Accord* *Port Ship Serv., Inc. v. Norton, Lilly & Co.*, 883 F.2d 23 (5th Cir. 1989), *cert. denied*, 495 U.S. 962, 110 S. Ct. 2575 (1990). *Port Ship* did not purport to construe Louisiana law, but instead followed an earlier decision, *Port Ship Serv., Inc. v. International Ship Management & Agencies Serv., Inc.*, 800 F.2d 1418 (5th Cir. 1986), which had applied general common law principles of agency in a dispute arising out of service contracts entered into by a maritime agent in the name of specified vessels (whose owners were not identified) anchored near New Orleans. *Port Ship* (1986) held that disclosure of agency status and identifying the vessel was sufficient notice to apprise the third party that his contract was with the owner of the vessel rather than with the agent personally. *Port Ship* (1986) was really a case of partial disclosure rather than complete nondisclosure. However, a Louisiana court that considered a similar relationship between a third party and a marine service company that was purporting to act as agent for an identified vessel's owner, affirmed a trial court determination that the purported agent was an independent contractor, not an agent, and held that, even if he was an agent, disclosure had been inadequate. *Marmedic, Inc. v. International Ship Management & Agency Servs., Inc.*, 425 So. 2d 878 (La. App. 4th Cir. 1983).

37. See, e.g., *G.T.M. Carpet Co.*, 534 So. 2d 539; *Pesson*, 526 So. 2d 1220; *Andrus v. Bourque*, 442 So. 2d 1383 (La. App. 3d Cir. 1983); *Duckworth-Woods Tire Serv., Inc. v. Smith & Johnson (Shipping), Inc.*, 430 So. 2d 207 (La. App. 4th Cir. 1983); *Thiele*, 391 So. 2d 560; *Regency Elec., Inc. v. Verges*, 360 So. 2d 252 (La. App. 4th Cir. 1978); *Chartes Corp. v. Twilbeck*, 305 So. 2d 730 (La. App. 4th Cir. 1974); *Eastin*, 257 So. 2d 717; *Williams v. O'Bryan*, 257 So. 2d 174 (La. App. 3d Cir. 1972).

38. See generally *Morris*, *supra* note 1.

39. See *id.*

itself or the identity of the principal. Creditors seem to enjoy far greater success with this theory than with the veil-piercing theory.

To avoid undisclosed agency, active shareholders should be careful to respect corporate fictions at least to the extent that they sign all contracts in the corporation's name, and that they make sure that all business signs, cards, stationery and forms include an appropriate designation of corporate status. Ideally, the shareholders of a small business corporation should avoid thinking or speaking of themselves as the direct, personal owners of their business. They should be conscious that it is their agency status, and not merely the incorporation of their business that protects them from personal liability.

A. *Timing of Disclosure*

An undisclosed agent is held liable as a party to the contracts that he negotiates for the simple reason that he appears to be a party when the contract is made. It follows that if this status as an apparent party is to be avoided through disclosure, the disclosure must occur (or the third party must have adequate notice in some other way) no later than contemporaneously with the creation of the contract.⁴⁰

Several cases go so far as to say that disclosure must occur "before" the contract is entered into,⁴¹ but these statements appear to be nothing more than inartful expressions of the true rule that disclosure must occur no later than the time of contracting. The real point of the timing rule is not that disclosure should occur twice, once before signing and once again as part of the signature itself, but simply that the required disclosures (or other indications of agency) cannot relieve the agent of liability if they come sometime *after* the contract is entered into. Once the agent has become a party, he cannot undo his status simply by explaining, after-the-fact, that he really was acting only as an agent.⁴²

Disclosure occurs in most written contracts simply by means of a signature block in proper form, such as this:

40. *Melancon v. Keller*, 136 So. 2d 67, 69 (La. App. 4th Cir. 1962) (requiring disclosure "at the time of making the contract"); *Tri-State Oil Tool Co. of S. La. v. Pioneer Oil & Gas Co.*, 135 So. 2d 297 (La. App. 4th Cir. 1961) ("... unless notice of the fact of agency and the name of the principal is given at the time of the contract it will not be sufficient disclosure to avoid liability").

41. *Travis v. Hudnall*, 517 So. 2d 1085 (La. App. 3d Cir. 1987); *Centanni v. A.K. Roy, Inc.*, 258 So. 2d 219 (La. App. 4th Cir. 1972); *McKay v. Vesley*, 163 So. 2d 121 (La. App. 3d Cir. 1964).

42. See *Centanni*, 258 So. 2d 219 (disclosure of identity of client one day after contract signed was insufficient to relieve real estate agent of personal liability as undisclosed agent); *Williams v. O'Bryan*, 257 So. 2d 174 (La. App. 3d Cir. 1972) (imposing undisclosed agency liability where disclosure occurred after indebtedness was incurred); *Tri-State Oil Tool Co.*, 135 So. 2d 297 (notice to contractor in the middle of performance of contracted work that dispute existed between previously undisclosed agent and agent's purported principal about which of the two was supposed to pay for the work was ineffective to relieve the previously undisclosed agent of personal liability for the full contract price, even though the contractor had finished the job after learning about the dispute).

ABC, INC.

By: /s/ Joan Smith,

Agent [or "President" or other similar designation]

This form of disclosure is sufficient to preclude undisclosed agency liability on the part of the agent.⁴³ As long as the contract itself clearly denotes that one or both of the signing parties signed as agents for their identified principals, then adequate and timely disclosure has occurred for the properly-signing agent(s).

One last distinction needs to be drawn concerning the timing of disclosure: while post-contract *disclosure* is ineffective, post-contract indications of agency status might still be relevant as evidence in resolving a factual dispute whether disclosure really did occur by the time the contract was made. If the post-contract factors suggest only after-the-fact efforts by the agent to withdraw from liability, then they are legally ineffective. However, if the plaintiff has corresponded with the corporate principal after the contract was executed, or has sent bills to and has been paid strictly by the principal, then these post-contract actions should be viewed as some evidence (though certainly not conclusive) that the plaintiff really did understand *at the time of contracting* that he was dealing with the principal rather than the agent.⁴⁴ If, on balance, this evidence outweighs contrary evidence of a lack of disclosure or knowledge, then the agent should not be held liable under an undisclosed agency theory.⁴⁵

43. See, e.g., *Meisel v. Natal Homes, Inc.* 447 So. 2d 511 (La. App. 4th Cir. 1984) (signature on contract as corporate vice president was express disclosure of agency; signature alone was sufficient disclosure, although there were other, corroborating indications of agency status); *Donnelly v. Handy*, 415 So. 2d 478 (La. App. 1st Cir. 1982) (signature on contract "as president," distinguished from signature in personal capacity, held to be sufficient to preclude personal liability for breach of contract terms not agreed to by means of the personal signature).

44. See *Meisel*, 447 So. 2d 511. Cf. *American Plumbing Co. v. Hadwin*, 483 So. 2d 169 (La. App. 2d Cir.), *writ denied*, 486 So. 2d 756 (1986) (where conflicting evidence existed concerning pre-contract disclosure, but where plaintiff admitted defendant's express disclosure no later than two or three hours after minor work on contract had begun, and where bills were sent to and paid by corporate principal, it was manifestly erroneous to impose personal liability on defendant under undisclosed agency theory).

45. However, one of the more common forms of post-contract evidence, i.e., payments by corporate checks, has seemed in most cases not to be very persuasive on the pre-contract disclosure issue; defendants have frequently lost with that sort of evidence. See, e.g., *C.T. Traina Plumbing & Heating Contractors, Inc. v. Palmer*, 580 So. 2d 525 (La. App. 4th Cir.), *writ denied*, 584 So. 2d 1166 (1991); *Dash Bldg. Materials Ctr., Inc. v. Henning*, 560 So. 2d 653 (La. App. 4th Cir. 1990); *G.T.M. Carpet Co. v. Richards*, 534 So. 2d 539 (La. App. 5th Cir. 1988); *Pesson v. Kleckley*, 526 So. 2d 1220 (La. App. 3d Cir. 1988); *Frank's Door & Bldg. Supply, Inc. v. Double H Constr. Co.*, 459 So. 2d 1273 (La. App. 1st Cir. 1984); *Darr v. Kinchen*, 176 So. 2d 638 (La. App. 1st Cir.), *writ denied*, 248 La. 386, 178 So. 2d 664 (1965); *Wilson v. McNabb*, 157 So. 2d 897 (La. App. 1st Cir. 1963); *Three Rivers Hardwood Lumber Co. v. Gibson*, 181 So. 607 (La. App. 2d Cir. 1938).

B. Partial Disclosure, Disclosure of Corporate Status

Many of the cases that are decided on undisclosed agency grounds in Louisiana are mislabeled. They do not involve a complete nondisclosure of agency in which the third party is led reasonably to believe that the "agent" is acting for himself individually as a principal. Rather, in these cases, the agent discloses his agency status, and usually some information concerning the identity of his principal, but not enough information to allow the third party to identify the principal with adequate precision.⁴⁶ In the common law, this incomplete form of disclosure is known as "partial disclosure," and it is distinguished from the total nondisclosure that exists in the true "undisclosed agency" cases.

Partial disclosure and nondisclosure theories are similar in the common law in the sense that each ultimately relies on an objective interpretation of the parties' contract as the correct means of resolving questions concerning the identities of the parties to be bound. In many cases, regardless of which theory is chosen, the outcome is the same: the agent is held personally liable. But there remains an important difference between the two theories. In complete nondisclosure cases, where the third party does not know even that the agent is an agent, the only plausible interpretation of the contract is that the agent was perceived by the third party as binding himself personally to the agreement. In the case of partial disclosure, where the agent purports to be an agent for *someone*, however poorly identified, the same may not be true. The agent is normally considered liable, but the parties may agree to the contrary. Whether an agreement to the contrary has been reached is simply a question of contract interpretation.

Thus, when an agent tells the third party only that he is an agent, without providing even the slightest information concerning the identity of his principal, the agent is almost always considered personally liable on the contract.⁴⁷ This liability is not imposed as some form of punishment for the agent's failure to disclose; it merely represents the most plausible interpretation of the parties' dealings with one another. A third party is not likely to promise something of value in a contract unless he sees real value in the promise he receives in return, and the value of that return promise will depend heavily on the identity and creditworthiness of the promisor. If the agent's identity is known, and the

46. Compare *Black Equip. & Supply, Inc. v. Koehl & Assocs., Inc.*, 571 So. 2d 902 (La. App. 5th Cir. 1990), *writ denied*, 577 So. 2d 12 (1991) and *Travis v. Hudnall*, 517 So. 2d 1085 (La. App. 3d Cir. 1987) (complete nondisclosure; third party reasonably believed that it was contracting with agent) with *Wilkinson v. Sweeney*, 532 So. 2d 243 (La. App. 3d Cir.), *writ denied*, 534 So. 2d 447 (1988) and *Duckworth-Woods Tire Serv., Inc. v. Smith & Johnson (Shipping), Inc.*, 430 So. 2d 207 (La. App. 4th Cir. 1983) (partial disclosure; third party knew it was dealing with agent of someone else, but the someone else was identified with a name that was considered inadequate to fulfill agent's disclosure obligation).

47. The agent would not be liable if other facts and circumstances provided adequate notice to the third party of the identity of the principal and if the fact-finder determined that it was this principal, and not the agent, who was intended to be the party bound by the agreement in question.

principal's is not, then it is only natural to suppose that the third party was trading his promise in the contract for the promise of the only other person whose identity he knew, i.e., the agent.⁴⁸ Accordingly, where a third party has no reasonable means of ascertaining the identity of the principal being represented by a partially-disclosed agent, the inference is said to become "almost irresistible" that the agent was reasonably understood by the third party to be binding himself personally as a party to the agreement.⁴⁹ Mere disclosure of agency status, without any indication of the identity of the principal, will almost always result in personal liability on the part of the agent.

More difficult to decide are those cases in which the agent has indicated his agency status and has provided some information concerning the identification of the principal, but where the identifying information has proven to be incomplete or defective in some way. Dangers of misunderstandings between the third party and the agent do arise in these cases, but the appropriate resolution of these misunderstandings is far from obvious. None of the inferences are irresistible anymore. The parties may or may not have expected the agent to bear personal liability. A closer examination of the facts in each case is required.

Louisiana courts, failing to see any distinction between partial disclosure and complete nondisclosure, have glossed over some important factual distinctions. They have lumped together all cases of inadequate disclosure, calling them all undisclosed agency cases, and have generally imposed personal liability on a corporate shareholder/agent when any defect or incompleteness has existed in the agent's identification of the corporate principal.

The liability imposed by Louisiana's blanket rule has indeed seemed appropriate in some cases. In one case, a creditor sued a business owner who had incorporated his business, without telling the creditor, and who had continued to deal with the creditor under the old proprietorship trade name.⁵⁰

48. The third party may indeed be consenting to a contract with the agent *and* the undisclosed principal, but it is not likely that he is agreeing to contract *solely* with the principal whose identity remains completely undisclosed.

49. Restatement (Second) of Agency § 321 cmt. a (1958). The closest example of this type of case in Louisiana is *Centanni v. A.K. Roy, Inc.*, 258 So. 2d 219 (La. App. 4th Cir. 1972), in which a real estate agent was held personally liable on a real estate sales contract that he had signed as "Agent for Client (Owner)." Even this case is not a perfect example of the completely-hidden principal, for the third party could have discovered the identity of the owner of the property, and it was clear that the agent was purporting to represent someone who at least owned the property being sold. See *Port Ship Serv., Inc. v. Norton, Lilly & Co.*, 883 F.2d 23 (5th Cir. 1989), *cert. denied*, 495 U.S. 962, 110 S. Ct. 2575 (1990); *Port Ship Serv., Inc. v. International Ship Management & Agencies Serv., Inc.*, 800 F.2d 1418 (5th Cir. 1986) (under general common law principles applicable in maritime disputes, disclosure of agency status and identification of vessel to be served was sufficient notice to apprise the third party supplier that his contract was with the owner of the vessel rather than with the agent personally). A better example of complete nondisclosure of the principal's identity would be a case in which the real estate agent had signed simply as "Agent for Client (Purchaser)." In that case, the Purchaser might have been anybody.

50. *Mike's Serv. Station Supply, Inc. v. Thiele*, 391 So. 2d 560 (La. App. 4th Cir. 1980), *writ*

The imposition of personal liability was proper in this case not because of a complete lack of disclosure—the creditor knew that it was dealing with a trade-named business—but because the disclosure that did occur seemed reasonably to identify the individual proprietor-turned-shareholder as the principal to be bound.⁵¹

In other cases, affiliated corporate debtors have tried to attribute some particular corporate debt to one company rather than another, and to impose on the third party creditor the responsibility of knowing which of the several corporations was being identified by the corporate agents' use of similar-sounding corporate names. Although courts have recited undisclosed agency theory in these cases, all they really have done is allow a third party to assume that the name being used to identify a corporate debtor was the name of the corporation with which the creditor had originally agreed to deal, and not some other like-named corporation that was later substituted for the first corporation without his knowledge.⁵²

Finally, two cases have been decided in which the trade name of an incorporated business has included the individual name of one of the company's major shareholders (i.e., "Danny's Automotive Repair" and "Cookie's Auto Sales"), as if the trade name were being used to identify a proprietorship rather than a corporation.⁵³ In this sort of case, it might well be reasonable for a creditor to assume that he was dealing directly with the business owner as proprietor and not as a shareholder and agent of a separate corporation, and, in that event, it would be appropriate under partially-disclosed agency analysis to impose personal liability.

But not all of Louisiana's "undisclosed" agency cases may be defended in this way; a few seem wrong both in theory and in result. In one case, a shareholder was held liable after employees of a corporation-owned restaurant ordered seafood for the restaurant as disclosed agents for "The Captain's Raft."⁵⁴ In another case, a corporate shareholder and agent of "Suntans Unlimited, Inc." was held personally liable on a lease that he had signed strictly as a disclosed agent for "Suntans Unlimited," having dropped the "Inc." from the name.⁵⁵ In this type of case, the agent is disclosing both his agency status and

denied, 396 So. 2d 931 (1981).

51. *Id.* at 561.

52. *Dash Bldg. Materials Ctr., Inc. v. Henning*, 560 So. 2d 653 (La. App. 4th Cir. 1990); *Duckworth-Woods Tire Serv., Inc. v. Smith & Johnson (Shipping), Inc.*, 430 So. 2d 207 (La. App. 4th Cir. 1983). These sorts of cases really do not pose undisclosed agency problems, for they involve situations in which some disclosure has indeed occurred and in which the creditor is not seeking to impose liability on the agent at all, but rather on one principal as opposed to another.

53. *Thiele*, 391 So. 2d 560 ("Danny's Automotive Repair"); *Prevost v. Gomez*, 251 So. 2d 470 (La. App. 1st Cir. 1971) ("Cookie's Auto Sales").

54. *You'll See Seafoods, Inc. v. Gravois*, 520 So. 2d 461 (La. App. 5th Cir.), *writ denied*, 523 So. 2d 218 (1988).

55. *Wilkinson v. Sweeney*, 532 So. 2d 243 (La. App. 3d Cir.), *writ denied*, 534 So. 2d 447 (1988).

the identity of his principal. The only defect in the agent's disclosure, if there really is a defect, is the absence of an indication of corporate status in the principal's trade name. Nevertheless, Louisiana courts almost always impose personal liability in these cases, provided that the partially-disclosed agent is also a shareholder of the corporate principal, and, despite the clear (if arguably defective) disclosure of agency, the courts claim to be doing so under an undisclosed agency theory.⁵⁶

These are not true undisclosed agency cases. They do not involve a complete failure by the agent to disclose his agency status or the identity of his principal; only the corporate status of the trade-named principal remains undisclosed. Indeed, some of these so-called "undisclosed agency" cases do not involve efforts to impose liability on agents at all. Despite the "agency" label, courts have imposed liability on the shareholders of the corporate principal even when the shareholders were not involved in negotiating the subject transactions as agents. Conversely, the courts have refused to impose this form of liability on agents who have used the same kind of trade name in the same kind of transaction, but were *merely* agents and not major shareholders in the trade-named company involved.⁵⁷

56. *Wilkinson*, 532 So. 2d 243; *You'll See Seafoods*, 520 So. 2d 461; *Andrus v. Bourque*, 442 So. 2d 1383 (La. App. 3d Cir. 1983); *R.H.S. (Racing Head Service) v. Fallon*, 395 So. 2d 940 (La. App. 2d Cir.), *writ denied*, 399 So. 2d 609 (1981); *Pat's Furniture Showrooms, Inc. v. Furniture Warehouse of Houma, Inc.*, 392 So. 2d 145 (La. App. 1st Cir. 1980), *writ denied*, 397 So. 2d 803 (1981); *Regency Elec., Inc. v. Verges*, 360 So. 2d 252 (La. App. 4th Cir. 1978); *Prevost*, 251 So. 2d 470; *Perhach v. Bender*, 147 So. 2d 18 (La. App. 2d Cir. 1962). *Cf.* *Martin Home Ctr., Inc. v. Stafford*, 434 So. 2d 673 (La. App. 3d Cir. 1983) (unclear whether undisclosed agency or undisclosed corporate status). *But see American Plumbing Co. v. Hadwin*, 483 So. 2d 169 (La. App. 2d Cir.), *writ denied*, 486 So. 2d 756 (1986) (factual dispute about corporate status disclosure was resolved in favor of defendant agent); *Roran Corp. v. Carron*, 345 So. 2d 1239 (La. App. 1st Cir. 1977) (affirming trial court finding that agent had adequately disclosed the corporate status of his business).

In *Perhach*, 147 So. 2d 18, the shareholder of a Delaware corporation was held liable on a contract that he signed in the official name of the corporation, Redneb Pipe Company. At the time, "Company" was not one of the designations of corporate status recognized in Louisiana's corporation statute. *See* former La. R.S. 12:4 (1928). Citing some old, non-Louisiana authority contained in "Words and Phrases," the court held that "company" was not necessarily a corporate designation, and so held that the disclosure of corporate status had been inadequate. Under current law, adopted in 1968, the word "Company" or the abbreviation "Co." is said to be acceptable as a corporate designation, provided that neither is preceded by the word "and" or the symbol "&." La. R.S. 12:23(A) (1969). Thus, *Perhach* would no longer appear to be good authority on this point.

57. *Compare You'll See Seafoods*, 520 So. 2d 461 (shareholder of a corporation named "Computer Tax Service of La., Inc.," which owned a restaurant operating under the trade name "The Captain's Raft," was held personally liable under undisclosed agency theory for contracts that he had not himself negotiated, but which had been entered into in the restaurant trade name by other, disclosed agents of the corporation) *with Metro Communications, Inc. v. Callen*, 596 So. 2d 249 (La. App. 3d Cir. 1992) (nonshareholder employee who signed contract as agent for "Marcello's," a trade name for restaurant owned by Performance Institute of Southwest Louisiana, Inc., was held not liable; disclosure was considered adequate).

What really seems to be troubling the courts in this line of cases is not an agent's failure to identify his principal, but rather a controlling shareholder's failure to cause his corporation to do business under a name that apprises the third party of the principal business' incorporated status. The courts seem concerned in these cases that the use of a "defective" type of trade name (one that does not indicate corporate status) could subject a third party to the limited liability rules of corporation law without his having received any notice of that limitation of liability at the time of contracting. These courts appear to believe that shareholders should enjoy corporate law protections against personal liability only with respect to those transactions in which the other party was told (or knew or should have known) that he was dealing with a corporation. Thus, these are not undisclosed, or even partially-disclosed, agency cases. They are undisclosed corporate status cases.

The reasoning in the undisclosed corporate status cases does have some intuitive appeal, for it seems wrong to bind a party to an implied limited liability provision without his knowledge. On closer examination, though, the disclosure rule that these courts are imposing seems difficult to defend either technically or practically.

On the technical side, there is no support in the law (except for these aberrant cases) for the proposition that corporate limited liability is conditioned on the disclosure of corporate status in each given corporate transaction. Shareholders are supposed to be shielded from personal liability for the debts of the corporation by the corporation's separate personality, not by the creditor's agreement to limited liability in a particular transaction.⁵⁸ Corporate names are indeed supposed to include some designation of corporate status, but trade names are allowed,⁵⁹ and a defective name is not supposed to affect the corporation's existence as a separate juridical person.⁶⁰ Corporations are deemed to exist for all pertinent purposes⁶¹ upon the issuance of a certificate of incorporation,⁶² without regard to the names that they use in their operations. It is common for corporations to utilize trade names that do not include a designation of corporate status; a stroll through any shopping mall should confirm this.

Admittedly, these technical arguments are inconclusive. Courts do sometimes disregard a corporation's separate personality despite the issuance of

58. See *Riggins v. Dixie Shoring Co.*, 590 So. 2d 1164, 1167 (La. 1991), *reh'g denied*, 592 So. 2d 1282 (1992).

59. *MAS Nursing, Inc. v. Burke*, 523 So. 2d 909 (La. App. 3d Cir.), *writ denied*, 530 So. 2d 570 (1988).

60. La. R.S. 12:23(F) (1969).

61. The state itself may challenge the existence of a defectively-incorporated company, even if a certificate of incorporation has been issued. As against all other persons, however, including corporate creditors, a certificate of incorporation is conclusive proof that the corporation is duly incorporated as a separate juridical person. La. R.S. 12:25(B) (1969).

62. The certificate is conclusive proof of due incorporation against all persons except the state itself, but once issued, the effective date of incorporation usually relates back to some earlier point, such as the execution or filing of the articles of incorporation. See La. R.S. 12:25(B), (C) (1969).

a certificate of incorporation. In contract cases, they tend to do this when it is inappropriate to hold the corporate creditor to an implied "nonrecourse" clause in his particular transaction with the corporation.⁶³ Thus, in practice, despite inconsistent technical rules, courts do tend to treat corporate limited liability as an implied contract term in particular transactions. The recognition or rejection of the separate legal personality in contract cases appears to reflect a court's judgment about the presence and propriety of a nonrecourse clause in a particular case.

But even under this nontechnical, interpretation-of-the-contract approach, the failure to disclose corporate status should result in personal liability on the part of the shareholder only where an objective interpretation of the contract would suggest that he was a party to the agreement. To accept this sort of suggestion the factfinder would have to conclude that the creditor actually did believe, and reasonably could believe, that the fictitious name used in the contract was intended not to identify the fictitious entity that actually owned the business, but rather the individuals who happened to be the shareholders of the fictitious entity. In effect, the factfinder would have to believe that proprietorships, rather than corporations, were the norm in business, so that a person dealing with a business named "Wal-Mart" or "Suntans Unlimited" actually could believe, reasonably, that he was dealing with the shareholders of "Wal-Mart" or of "Suntans Unlimited" in their individual capacities as proprietors, and not with the business organizations themselves. That would seem to be a rather strange belief.

It seems far more likely that a person who was dealing with a business operating under an obviously fictitious name such as "Wal-mart" or "Suntans Unlimited," would assume that he was dealing with whomever it was that actually owned the business. If, as usual, the owner turned out to be a corporation or other form of limited liability entity, the creditor would have no reason to be surprised. Most modern businesses are conducted through corporations or other forms of limited liability entities, and modern consumers are quite familiar with the "corporate" or "company" form of business.

Certainly some circumstances might exist under which the separate existence of a corporation should be disregarded, or in which a customer had become justifiably confused about the identity of a purported corporate principal. In those cases, theories of veil piercing and partial disclosure should be used to impose liability in a way that is consistent with a reasonable interpretation of the parties' contractual dealings. However, the mere failure to tack an "Inc." onto the end of a corporate trade name ought not result in the imposition of liability on the corporation's shareholders under any theory. Whether the matter is approached technically or practically, the "disclosure of corporate status" cases seem wrongly decided.

Of course, from a business planning standpoint, it does not matter much that the corporate status cases may be wrongly decided. The planner must treat these

63. See *Morris*, *supra* note 1, at 292-96.

cases as the controlling law until they are overruled. The owner of a small business corporation should make sure that all names used to identify his business are names that do indeed disclose corporate status. Business signs, cards, stationery, forms, receipts, and checks all should include some sort of corporate designation. In transactions carried out on forms supplied by others, a "corporate status" name should always be used. Where no other form of writing is to be generated, the owner or agent should consider providing the other party with a business card that indicates the identity and corporate status of the business that he is representing.

V. DEFECTS IN CORPORATE AUTHORIZATION

The third and final way for a corporate participant to lose his usual agency law protection against contractual liability is to exceed his authority as agent. This form of liability appears to be relatively unusual in practice. Indeed, these corporate authority issues merit attention not so much for the exposure they create, but for the distinctive nature of corporation law rules that are supposed to be controlling.

Corporations, as legal fictions, can conduct their business only through the acts of their agents. In theory, these agents are supposed to obtain their authority, either directly or indirectly, from a decision of the corporate board of directors⁶⁴ that is made in one of two ways: at a duly convened meeting of the board⁶⁵ or through the written consent of all the directors.⁶⁶ While corporations may have agents whose powers and appointments were never considered by the board itself (an authorized corporate officer may hire corporate employees, for example⁶⁷), these indirectly-authorized agents are still supposed to have only those powers that some other person (such as the corporate president) had been authorized by the board to confer. In one way or another, all corporate agents theoretically should be able to trace their authority back to some procedurally-correct decision by the corporation's board of directors.⁶⁸ Absent

64. Subject to provisions in a corporation's articles or bylaws and to certain limited shareholder-voting requirements in the corporation statute itself (e.g., for mergers and amendments of the corporate articles), all corporate powers are vested in the corporation's board of directors. La. R.S. 12:81(A) (1969). In the normal course of corporate operations, shareholders—as such—participate in corporate management only indirectly through the exercise of electing the board of directors, the body that holds all direct management powers. See La. R.S. 12:81(B) (1969) (shareholders elect directors).

65. A duly convened meeting requires such notice as the bylaws provide, subject to certain waiver-of-notice rules, and requires that a quorum of directors (i.e., a majority of the directors) be present. If a quorum is present at a duly-noticed meeting, then the directors take action by a vote of the majority of the directors present. La. R.S. 12:81(C)(6), (7) (1969).

66. La. R.S. 12:81(C)(9) (1969).

67. *Dunham v. Anderson-Dunham, Inc.*, 466 So. 2d 1317 (La. App. 1st Cir.), writ denied, 472 So. 2d 29 (1985).

68. La. R.S. 12:82(D) (1969). Because all corporate powers are vested in the board of

this procedurally-correct form of actual authority, the corporation theoretically should not be bound by the acts of its purported agents.⁶⁹

Of course, it is possible under general principles of agency law for certain acts of an agent to bind the principal even if the act was not carried out in accordance with the agent's actual authority. Apparent authority⁷⁰ and ratification,⁷¹ particularly tacit ratification,⁷² are often used to bind a principal

directors, corporate powers may be exercised by other persons only to the extent that the exercise of such powers has been authorized by the board, either in the bylaws or through board resolutions. La. R.S. 12:81(A) (1969). Indeed, although the corporation statute requires that every corporation elect at least three officers, namely, a president, treasurer, and secretary, the statute says absolutely nothing about the powers that these officers are to hold. That is left entirely to the board of directors. Officers and agents have only such powers as the board decides to confer on them. La. R.S. 12:82(A), (D) (1969).

69. See *Jeanerette Rice & Milling Co. v. Durocher*, 123 La. 160, 48 So. 780 (1909) (recognizing some possibility of informal power arising from business practice, but emphasizing that the source of an officer's authority is proper action by a board of directors); *Dunham*, 466 So. 2d 1317 (actual express authority stems from statute, articles, bylaws or board resolutions); *Fluidair Prods., Inc. v. Robeline-Marthaville Water Sys.*, 465 So. 2d 969 (La. App. 3d Cir. 1985) ("An officer of a corporation cannot act without authority of its board of directors or bylaws. La. R.S. 12:81. The office of president in itself confers no power to bind the corporation or control its property."); *Margolis v. Allen Mortgage & Loan Corp.*, 268 So. 2d 714 (La. App. 4th Cir. 1972) ("It is axiomatic that the authority to act on behalf of a corporation can only be conferred by the charter or a resolution of the Board of Directors."); *Rivercity v. American Can Co.*, 600 F. Supp. 908 (E.D. La. 1984), *aff'd*, 753 F.2d 1300 (5th Cir. 1985) (in rejecting a self-dealing transaction by board chairman, court cited the *Margolis* rule, *supra*). But see *George A. Broas Co. v. Hibernia Homestead & Sav. Ass'n*, 134 So. 2d 356 (La. App. 4th Cir. 1961) ("[T]he president of a corporation is clothed with apparent authority to transact business on his firm's behalf . . .").

70. The Civil Code does not recognize apparent authority; indeed, it seems plainly to reject it. Apparent authority, by definition, binds the principal to acts of an apparent agent that the principal really did not authorize. See, e.g., *Boulos v. Morrison*, 503 So. 2d 1, 3 (La. 1987). The Civil Code provides that whatever an agent does which exceeds the power granted to him by the principal "is null and void with regard to the principal, unless ratified," La. Civ. Code art. 3010, and that a principal is bound to execute only those engagements contracted by the agent "conformably to the power confided to him." La. Civ. Code art. 3021. "For anything further he is not bound except insofar as he has expressly ratified it." *Id.*

Despite these Code provisions, the jurisprudence has uniformly accepted the availability of the apparent authority theory. E.g., *Tedesco v. Gentry Dev. Co.*, 540 So. 2d 960 (La. 1989) (approving of the theory generally, but disapproving of its application in a transaction involving immovable property where the alleged authority of the agent was not in writing); *Boulos*, 503 So. 2d at 3-4 (approving of the theory, but finding no apparent authority in the case presented); *Interstate Elec. Co. v. Frank Adam Elec. Co.*, 173 La. 103, 136 So. 283 (1931) (finding apparent authority); *Pesson v. Kleckley*, 526 So. 2d 1220 (La. App. 3d Cir. 1988) (finding apparent authority); *Hawthorne v. Kinder Corp.*, 513 So. 2d 509 (La. App. 2d Cir. 1987) (finding apparent authority). Courts acknowledge that apparent authority is not recognized by the Civil Code, as if it were silent on the point, but they gloss over the fact that the Code seems actually to reject the concept. See, e.g., *Tedesco*, 540 So. 2d at 963.

71. See La. Civ. Code arts. 1843, 3021.

72. La. Civ. Code art. 1843. The ratification language in the mandate articles, which is the original 1825 language, appears to require that the ratification be express, not tacit. The pertinent mandate article is thus inconsistent with Article 1843. Arguably, because the mandate articles are

to an act that he claims was not actually authorized at the time. Yet even these substitutes for actual authority always depend upon acts by the principal.⁷³ An agent cannot bootstrap himself into a position of authority simply by his own acts or representations.⁷⁴

In a corporate setting, the "acts of the principal" element should mean, theoretically, that the corporation would not be bound unless the corporation itself had taken the necessary actions in the statutorily-prescribed fashion. Without those kinds of official corporate actions, the only evidence of authority for the transaction in question would be some similarly unauthorized actions by corporate agents or shareholders. In that case, no apparent authority or ratification could exist in the technically-correct sense of those terms.

However, except for major corporations and major transactions in smaller corporations (where lawyers tend to be more heavily involved), the strict statutory theories of authority appear to have little to do either with the way that real corporations are actually managed or with the way that real disputes about corporate authority are judicially resolved. Closely-held corporations, which overwhelmingly dominate the reported corporation law cases in Louisiana, tend to be operated directly and informally by their shareholders—much as a proprietorship or partnership might be—without all the procedural complexities and formalities that are contemplated by the corporate statute.⁷⁵ Major shareholders typically participate in the operation of the corporation without any formal board authorization, so that the only way that "acts of the principal" can ever be found to establish any form of authority, whether actual, apparent, or after-the-fact, is by looking to the behavior of these participating shareholders. Technically, these shareholders are supposed to have little or no direct power, but in fact they usually run things.⁷⁶

If courts were to insist on strict adherence to statutory formalities in the face of this nearly universal informality in actual corporate operations, it would become nearly impossible for third parties to enforce their contracts with corporations. The corporations could ratify those contracts that they themselves wished to enforce and could repudiate other contracts as unauthorized. This

part of a more narrowly-constructed, nominate contract portion of the Code, those articles should control over the more general provision set forth in Article 1843 of the obligations title. However, the obligations article is much more recent (having been adopted in 1984), and is much more consistent with the jurisprudence. There is little doubt, practically speaking, that tacit ratification is permitted.

73. *E.g.*, *Tedesco*, 540 So. 2d at 963 (apparent authority); La. Civ. Code art. 1843; *Rebman v. Reed*, 286 So. 2d 341, 342 (La. 1973) (ratification).

74. *Boulos*, 503 So. 2d at 3; *Everett v. Foxwood Properties*, 584 So. 2d 1233, 1237-38 (La. App. 2d Cir. 1991); *Paillet v. Guillory*, 315 So. 2d 893, 897 (La. App. 3d Cir. 1975).

75. *See Riggins v. Dixie Shoring Co.*, 590 So. 2d 1164, 1169 (La. 1991), *reh'g denied*, 592 So. 2d 1282 (1992) (informal management of small, closely-held corporation met "spirit" of separate corporate governance requirements in veil-piercing law); F. Hodge O'Neal & Robert B. Thompson, *O'Neal's Close Corporations* § 8.02 (3d ed. 1988).

76. O'Neal & Thompson, *supra* note 75, §§ 8.03, 8.04.

tactical advantage would not matter in most cases because the corporation would perform most of its contracts just as most other parties would, without resort to litigation. But in the very cases where it would matter most, where the corporation was willing to litigate rather than to perform, the corporation would enjoy an advantage that most other parties would not, namely, the ability to repudiate selected contracts on the grounds that the statutory procedures for corporate authorization had not been followed.

Fortunately, courts normally do not insist on strict adherence to corporate formalities in the context of closely-held corporations. Except where other types of formalities, e.g., writings, are required by some other, non-corporate rule of law (as in immovable property transactions⁷⁷), courts in close-corporation authority cases tend to look through form to substance. They do not let the shareholders use a lack of board resolutions as an excuse to get their corporations out of contracts that they, the dominant shareholders, have authorized (actually or apparently) or ratified.⁷⁸ Procedural defects tend to be used to upset a corporate transaction only when it is possible to see a causal connection between the procedural violation and some discernable harm to a nonconsenting⁷⁹ person whom the procedure was designed to protect.⁸⁰ The mere presence of a procedural defect will not nullify the transaction.⁸¹

Unfortunately, the courts typically do not justify their conclusions by explicit reference to the characteristics of close-corporation governance. Instead, they tend just to gloss over the problem. Without acknowledging what they are doing, the courts simply pretend that the acts of a major corporate shareholder may be treated as the acts of his corporation for purposes of establishing

77. *Tedesco*, 540 So. 2d 960 (testimonial proof cannot be used to prove agent's authority to bind his principal to contract to sell immovable property, regardless of whether the alleged authority is actual or apparent). Although the court did not address the issue directly, the *Tedesco* reasoning would suggest that ratification would require the same written evidence as would actual or apparent authority.

78. *See, e.g., Hotard v. Fleitas, Inc.*, 67 So. 2d 345 (La. App. Orl. 1953) (corporation's letter agreement, signed by the three individuals who owned all of the corporation's stock, and who served as its three directors, was enforceable against corporation notwithstanding lack of board resolution).

79. Consent to a transaction need not occur in a formal, statutory fashion. Informal acquiescence is sufficient, and may even be deemed to occur through informal agency relationships with other participants in the corporation. *See Ogden v. Culpepper*, 474 So. 2d 1346 (La. App. 2d Cir. 1985) (acquiescence of father to issuance of stock was imputed to his children where children had allowed their father to look after their interests in the corporation).

80. *Fluidair Prods., Inc. v. Robeline-Marthaville Water Sys.*, 465 So. 2d 969 (La. App. 3d Cir. 1985) (premature, unauthorized acceptance of contract work by recently-appointed president of water company); *Rivercity v. American Can Co.*, 600 F. Supp. 908 (E.D. La. 1984), *aff'd*, 753 F.2d 1300 (5th Cir. Unit A Aug. 1985) (unauthorized self-dealing); *Marsh Inv. Corp. v. Langford*, 490 F. Supp. 1320 (E.D. La. 1980), *aff'd*, 652 F.2d 583 (5th Cir. Unit A Aug. 1981) (*per curiam*), *cert. denied*, 454 U.S. 1163, 102 S. Ct. 1037 (1982) (forged resolutions and shareholder consents ineffective to bind corporation to mortgage of its property).

81. *See Ogden*, 474 So. 2d 1346 (issuance of stock by unlawful one-member board was merely voidable, not void, and was legally-effective in this case due to implicit ratification by representative of other shareholders).

authority or ratification. They say that a corporation is bound by contracts that the "corporation" appeared to have authorized or ratified, when what they are really examining is the statutorily unauthorized behavior of the corporation's dominant shareholder(s).⁸²

It seems unlikely that the courts really believe that one statutorily unauthorized act can be redeemed (i.e., authorized or ratified) by a series of other similarly unauthorized, unratified acts. Instead, these informal authority cases seem to reflect the sound, if implicit, conviction on the part of the courts that major, actively-participating shareholders of small corporations should be treated as having bound their corporations to all transactions that they (the shareholders) have in fact authorized, without regard to whether the authorizations occurred in the statutorily-prescribed fashion.⁸³ That sort of informal, direct approach to corporate governance is far more consistent with prevailing practice, and with the reasonable expectations of contracting parties, than is the overly formalized, indirect, centralized model of corporate governance contemplated by the corporate statute.

Louisiana courts are not alone in their apparent fudging on the technical rules in close-corporation authority disputes. The practice appears to be common in most states in which no special arrangements have been made for closely-held corporations.⁸⁴ Without some special statutory or jurisprudential rules for closely-held corporations, courts are effectively forced to choose between technical accuracy in their reasoning and pragmatic fairness in their results. Fairness, thank goodness, has tended to prevail.

The law might be improved from a technical standpoint either by new legislation or by new jurisprudential theories. Examples can be seen in the legislation and cases of other jurisdictions. Legislation that is written explicitly to serve the needs of closely-held corporations typically deletes the requirement of a board of directors and allows the corporation to be managed in essentially the same way as a partnership. The better cases tend to attribute certain built-in

82. See, e.g., *Holloway v. Acadian News Agency, Inc.*, 488 So. 2d 328 (La. App. 3d Cir. 1986).

83. O'Neal & Thompson, *supra* note 75, § 8.05. In practice, close corporations tend to operate in much the same way as partnerships: ownership and management functions are unified in the shareholders, and not artificially separated as the corporate statute requires. Compare La. Civ. Code art. 2807 (most partnership decisions allowed by informal majority approval) and La. Civ. Code art. 2814 (except for certain immovable property transactions, each partner is a mandatary of the partnership in the ordinary course of its business, and contrary agreements do not affect the rights of good-faith third parties) with La. R.S. 12:81(A), 82(D) (1969) (subject to certain limited exceptions, all corporate powers are vested in the board of directors; officers and agents have only such powers as conferred by the bylaws or by resolutions of the board). The Mississippi Supreme Court has explicitly acknowledged the analogy between close corporations and partnerships and has ruled explicitly that "an executive officer of a close corporation . . . in carrying on the usual business of a corporation has the same apparent authority as a partner in a partnership as against third parties who in good faith rely upon his representation." *Baxter-Porter & Sons Well Servicing, Inc. v. Venture Oil Corp.*, 488 So. 2d 793, 796 (Miss. 1986).

84. O'Neal & Thompson, *supra* note 75, § 8.05.

powers to certain corporate positions, rejecting the statutory requirement that all power be based on some statutorily prescribed action by the board of directors. This power is sometimes called "apparent authority," but might better be described as a form of power inherently associated with the corporate position involved.⁸⁵ Mississippi has taken a sound approach. It has acknowledged explicitly the similarities between partnerships and close corporations, and so has applied partnership-like rules to resolve agency disputes in that setting.⁸⁶

Statutes and cases that acknowledge explicitly the special character of close corporations are superior to the current law in Louisiana because they reflect more candidly and accurately the reasons why courts reach the results they do in the close corporation setting. The current approach reaches the right result most of the time, but it poses the danger of creating precedent in one setting, the closely-held corporation setting, that may be inappropriate in other settings. The court's glossing over formality problems may not be warranted in all cases in which an agent is alleged to have exceeded his authority. By linking the more liberal governance rules to the setting in which the rules are considered to be justified, the courts could avoid the creation of potentially overbroad rules in other settings.

A. Liability for Exceeding Authority—Code Provisions

The liability of a corporate agent for exceeding his authority is determined by agency law, not corporation law. The corporation statute says how the agent or officer is supposed to get his agency authority, i.e., through statutorily-correct actions by the board of directors, but nothing about what ought to happen when

85. The "powers-of-the-position" approach would shift the emphasis from the acts of the principal to the normal commercial expectations associated with the position involved. The beginning assumption would not be that the agent had only such powers as the principal had actually or apparently conferred; the burden would not be placed on the third party to show what things the principal did to make him or the agent believe that the agent was authorized to act as he did. Rather, the third party would be permitted to assume that the agent involved had the powers normally associated with his position, unless the principal could show either that he, the principal, had not acquiesced in the agent's assuming the position in question or that the third party had reason to know that the agent really did not possess the type of authority typical for that position. This latter theory is the one used in partnership law. In partnership law, a partner's authority is based purely on his position as a partner. The partnership can avoid liability for the acts of a partner only if those acts involved a transaction in immovable property, or if they were outside the ordinary course of business of the partnership. La. Civ. Code art. 2814. To win an authority dispute with a partnership, the third party need only prove that the purported agent of the partnership was a partner, that the act of the agent was in the ordinary course of the partnership's business, and that the third party had no knowledge or notice of any pertinent limitations on the agent's authority. He would not be required to prove, as he would under an apparent authority doctrine, that some actually-authorized agent of the partnership had done something affirmative to indicate to him, the third party, that the partner in question did in fact have the authority to enter into the disputed transaction.

86. *Venture Oil*, 488 So. 2d 793.

that authority is exceeded.⁸⁷ These issues are left to agency law, where in most contexts the corporation is treated as the principal, the corporate officers, employees, and other representatives are treated as agents, and the corporation's customers, suppliers, and the like are treated as third parties.

In the common law, an agent normally is deemed to be subject to a duty to his principal not to exceed his agency authority⁸⁸ and to warrant that authority to the third parties with whom he deals.⁸⁹ If the agent exceeds his authority in violation of these implied duties or warranties, then he may be held liable either to the third party⁹⁰ or to the principal,⁹¹ whichever suffers the pertinent damages.⁹²

The Louisiana Civil Code does not cover the first of these issues, the duty of the agent to the principal not to exceed his agency authority, probably because the Code does not recognize any mechanism (such as apparent authority) by which an agent's unauthorized and unratified juridical acts could bind the principal in the first place. Unauthorized acts are declared "null and void with regard to the principal" except to the extent ratified,⁹³ so the principal has no need of recovery against the agent for the agent's unauthorized juridical acts.⁹⁴

87. Corporate officers and directors are said to stand in a fiduciary relation to the corporation and its shareholders, but except for the general conferral of all corporate powers on the board of directors, no effort is made in the statute to deal with questions of officer or agent authority. See La. R.S. 12:81(A), 91 (1969).

88. Restatement (Second) of Agency § 383 (1958).

89. Restatement (Second) of Agency § 329 (1958). The implied warranty may be disclaimed by the agent and does not arise if the third party knows that the agent is not authorized. *Id.*

90. Restatement (Second) of Agency §§ 329, 330 (1958).

91. Restatement (Second) of Agency §§ 383, 399, 400, 401 (1958).

92. The alternative nature of the agent's liability (either to the principal or to the third party, but not to both) is seldom discussed in Louisiana, though at least one case has said that this would be the rule. *Item Co. v. LaPlace Chamber of Commerce*, 16 So. 2d 567, 572 (La. App. Orl. 1944). The common law justification for the rule is persuasive. Under the common law, if a principal did not actually authorize the agent's act, he is still bound if the agent acted within his apparent authority or inherent agency power, or if the principal ratifies the unauthorized act. In these cases, the third party is not damaged by the agent's exceeding his authority, and will not have any claims against the agent. Restatement (Second) of Agency § 329, cmt. (f) (1958) ("[I]f he [the agent] acts in violation of orders but within his power to bind his principal (see §§ 159-178) [e.g., apparent authority], the agent is not liable to the other party to the transaction since, if the principal becomes a party, the rights of the other party are not affected by the fact that the agent committed a wrong to his principal."). The agent, however, will have breached his duty to the principal to act only as authorized, and will be liable to the principal for any damages caused by this breach of duty. Restatement (Second) of Agency § 383 (1958). If, on the other hand, the principal is not bound under any theory, then the third party has not received what the agent warranted or represented, an authorized transaction binding on the principal. Thus, the third party is entitled to recover damages. Restatement (Second) of Agency §§ 329, 330 (1958).

93. La. Civ. Code art. 3010. The principal is bound to execute only those engagements contracted by the agent "conformably to the power confided to him." La. Civ. Code art. 3021. For anything further, the principal "is not bound, except in so far as he has expressly ratified it." *Id.*

94. Agency and servant relationships may overlap, of course, and a master may be held vicariously liable for the tortious conduct of his servants in the course and scope of their

In practice, of course, things are not so simple. Despite the language of the Code, Louisiana courts have indeed accepted the common law doctrine of apparent authority.⁹⁵ Hence, they have created, at least theoretically, the need to deal with the principal's rights against an agent who exceeds his authority. Nevertheless, the reported decisions on this topic are sparse, presumably because the apparent authority theory tends to be raised in those cases in which the agent is incapable of paying the claim anyway.⁹⁶ The few cases that do exist support the same rule as the common law, that an agent may be held liable to his principal for the damages caused by the agent's exceeding his authority.⁹⁷ Most of the decisions in this field either fail to cite authority,⁹⁸ or simply follow

employment, even if their tortious acts were unauthorized. La. Civ. Code art. 2320. The discussion in the text is concerned strictly with the liability of a principal that arises out of his agent's purporting to engage in juridical acts on the principal's behalf.

95. *E.g.*, *Tedesco v. Gentry Dev., Inc.*, 540 So. 2d 960 (La. 1989) (approving of the theory generally, but disapproving of its application in a transaction involving immovable property where the alleged authority of the agent was not in writing); *Boulos v. Morrison*, 503 So. 2d 1, 3-4 (La. 1987) (approving of the theory, but finding no apparent authority in the case presented); *Interstate Elec. Co. v. Frank Adam Elec. Co.*, 173 La. 103, 136 So. 283 (1931) (finding apparent authority); *Pesson v. Kleckley*, 526 So. 2d 1220 (La. App. 3d Cir. 1988) (finding apparent authority); *Hawthorne v. Kinder Corp.*, 513 So. 2d 509 (La. App. 2d Cir. 1987) (finding apparent authority).

96. Where an agent has indeed exceeded his actual authority and is capable of paying the claim involved, it would normally be easier to obtain a judgment directly against the agent for the claim, rather than imposing liability on the principal and making him recover from the agent. Apparent authority functions mainly as a device for allocating the risk of the agent's disappearance or insolvency. (If apparent authority exists, the third party collects his claim from the principal and lets the principal worry about recovering from the agent, while if apparent authority does not exist, the third party is forced to assert his claim against the agent himself.) Given these functions, apparent authority tends to be discussed in those cases in which there would be no practical point in the principal's pursuing a judgment against the agent for exceeding his authority; the agent would tend to be absent or incapable of paying the claim anyway.

97. *Wagenvoord Broadcasting Co. v. Lonigan*, 221 So. 2d 323 (La. App. 4th Cir. 1969) (collection agency held liable to creditor for exceeding authority in settling debtor's account with the creditor where agent had not been misled concerning its authority through any negligence or fault of the principal); *Thompson v. Levy*, 12 Orl. App. 261 (La. App. 1915) (shipping agent liable to owner of furniture for freight costs incurred by principal in shipping furniture from unauthorized destination, Arcola, Mississippi, to correct destination, Arcola, Louisiana); *Lowe & Pattison v. Bell & McLay*, 6 La. Ann. 28 (Orleans 1851) (corn ordered by agent at price higher than that authorized by principal was to be treated as ordered for agent's own account; agent could not recover from principal for losses suffered on resale of corn at lower price); *Manufacturers Casualty Ins. Co. v. Martin-Lebreton Ins. Agency*, 242 F.2d 951 (5th Cir.), *cert. denied*, 355 U.S. 870, 78 S. Ct. 121 (1957) (insurance agency liable to insurer under Louisiana law for exceeding authority in writing building performance bond; citing only common law authorities and court's own earlier decisions); *Canada Steamships Lines v. Inland Waterways Corp.*, 166 F.2d 57 (5th Cir. 1948) (agent liable to principal under Louisiana law for unauthorized method of "clearing" cargo, resulting in tax on cargo of castor oil); *McCurnin v. Kohlmeyer & Co.*, 347 F. Supp. 573 (E.D. La. 1972) (brokerage firm liable to customer under Louisiana agency law for losses arising out of unauthorized commodities transaction).

98. *Wagenvoord*, 221 So. 2d at 323.

jurisprudential rules that were drawn originally from common law sources; they do not cite the Civil Code.⁹⁹

If one had to find Civil Code authority for the results in these cases, then Article 3002 or 3003 might be pressed into service. Article 3002 provides that an agent "is bound to discharge the functions of his procuration" and that he is "responsible to his principal for the damages that may result from the non-performance of his duty."¹⁰⁰ If acting outside authority were considered a breach of the duty to "discharge the functions" of the procuration, then the agent could indeed be held liable to the principal under this provision. No reported case has endorsed this theory.

Article 3003 imposes liability on an agent for his fault or neglect. Although, strictly speaking, a violation of instructions might or might not involve fault or negligence in the normal tort-law sense of the terms, actual authority under agency law does depend in part on the reasonableness of the agent's interpretations of his instructions. In that sense, perhaps, exceeding authority constitutes "fault." One federal case, interpreting Louisiana law, has used this theory.¹⁰¹

On the second of the issues, the duty owed by the agent to the third party not to exceed his authority, the Civil Code does have something to say, and what it says is rather close in effect to what the common law says: an agent normally¹⁰² is liable to the third party if he exceeds his authority, but absent a personal guarantee, an agent acting within his authority is not liable for the performance of the obligations that he contracts in the name and on behalf of his principal. The two key articles are Article 3010 and Article 3013. Article 3010 provides:

The attorney can not go beyond the limits of his procuration; whatever he does exceeding his power is null and void with regard to the principal, unless ratified by the latter, and the attorney is alone bound by it in his individual capacity.

Article 3013 provides:

The mandatary is responsible to those with whom he contracts, only when he has bound himself personally, or when he has exceeded his authority without having exhibited his powers.

99. *Lowe & Pattison*, 6 La. Ann. at 28; *Manufacturers Casualty Ins. Co.*, 242 F.2d at 951; *Canada Steamships Lines*, 166 F.2d at 57 (citing Louisiana cases not on point and relying on common law rules).

100. La. Civ. Code art. 3002.

101. *McCurnin*, 347 F. Supp. at 573.

102. The agent would not be liable for exceeding his authority, either under the common law or under the Louisiana Civil Code, if he had made it clear to the third party that he was not making any representations or giving any warranties concerning his authority. As discussed later in the text, some of the Louisiana jurisprudence is more liberal than the common law in allowing the agent to shift to the third party the risk of misunderstanding the extent of the agent's authority. See *infra* text accompanying notes 115-25.

The "exhibiting of powers" mentioned in Article 3013 merits special attention. The phrase suggests that an agent might exceed his authority *without* bearing personal liability. A similar point is made by Article 3012:

The mandatary, who has communicated his authority to a person with whom he contracts in that capacity, is not answerable to the latter for anything done beyond it, unless he has entered into a personal guarantee.

The point of the "exhibition of powers" and "communication of authority" phrases seems to be to shift to the third party the risk of misinterpreting the scope of authority granted to the agent by the principal. Normally, under Article 3010, an agent who had exceeded his authority would be bound personally by the contracts that he had negotiated, much as a common law agent would be personally liable to the third party for violating his implied warranty of authority. But if the agent had "exhibited his powers," then the result would be different. The agent would be apprising the third party of the pertinent facts and letting the third party make his own decision about the extent of the agent's authority. If the third party then decided to deal with the agent, the third party would be making his own decision based on the terms of the exhibited powers, and would not be relying on any implied representation or warranty of authority by the agent. If it turned out that the third party was wrong in his interpretation of the exhibited powers, then he himself would be deemed simply to have misjudged the situation. He alone would bear the loss, without any recourse against the agent.¹⁰³

In the usual case, of course, nothing is going to be said one way or the other about the authority of the agent. The agent is going to assume that his act is authorized, and so is the third party. What happens in that case if the act turns out not to have been authorized? Who bears the risk? The common law would say "the agent." Much as a seller is deemed to warrant his ownership of the thing sold, the common law deems an agent to represent or warrant implicitly to the third party that he, the agent, possesses authority from his principal to take the actions that he takes.¹⁰⁴

The agent may avoid his implied warranty of authority under the common law by manifesting to the third party his intention not to provide it, and he may also avoid liability for breaching the warranty if he shows that the third party actually knew the pertinent facts anyway. Subject to these two exceptions, though, an agent who exceeds his authority is liable to the third party for any

103. See *Gulf South Enters., Inc. v. Delta Materials Operating Co.*, 137 So. 2d 427 (La. App. 4th Cir. 1962) (agent not personally liable to third party for exceeding authority in purporting to bind bail bond company as surety on commercial promissory note; written power of attorney exhibited to third party made it clear that agent's authority was limited to bail bonds).

104. Restatement (Second) of Agency §§ 329, 330 (1958); Harold G. Reuschlein & William A. Gregory, *The Law of Agency & Partnership* §§ 119-20 (2d ed. 1990). For a Louisiana decision using warranty language see *Harvey v. Hoyle*, 14 Or. App. 152, 157 (La. App. 1917).

damages resulting from his unauthorized acts, including any amounts by which the third party would have benefitted had the acts been authorized as warranted.

The language of the pertinent Civil Code articles would seem to support essentially¹⁰⁵ the same results: the mandatary is said to be liable under Article 3010 for exceeding his authority, seemingly automatically, unless he has "communicated his authority" or "exhibited his powers" as contemplated in Articles 3012 and 3013. The point of these communications under Articles 3012 and 3013 would appear to be to inform the third party that the agent was not making any representations or warranties concerning his authority, and that he was letting the third party make his own decisions on the authority question. In common-law terminology, the agent would be said either to be disclaiming his warranty of authority, or to be telling the third party the facts necessary to preclude liability for any breach of the warranty.

The Code articles do not address the effects of the third party's knowledge about the agent's authority when that knowledge has been acquired from some source other than the communications of the agent himself. Logically, the failure of an agent to make adequate disclosure concerning his authority should not create liability if the information to be disclosed is known by the third party anyway, from another source. The agent should not bear personal liability for exceeding his authority if he can prove that the third party was aware, or should have been aware under the circumstances, that sufficient uncertainty existed concerning the agent's authority to make an inference of an implied warranty by the agent implausible. In other words, the fact finder should determine whether the agent was implicitly warranting his authority, i.e., acting as if he had authority, no question about it, or instead was "quitclaiming" his actions to the third party, i.e., taking the actions necessary to bind the principal if authority existed, but letting the third party exercise his own judgment on whether that authority really did exist.

Actual disclosure of the pertinent facts by the agent should be sufficient as a matter of law to shift the authority risk to the third party, but the reverse should not be true. A nondisclosing agent should not be liable to the third party for exceeding his authority if, under the circumstances, a reasonable person would have understood that he was dealing with the agent at his own risk. The issue is not one of comparative negligence, however, but of objective contract

105. The basic rules appear to be the same; however, the Louisiana Civil Code clearly rejects some of the implications of the common law theory. The common law's warranty theory, combined with its approach to authority questions in connection with the death or incapacity of the principal, has led to some questionable rules. An agent may be held liable to a third party for breaching his warranty of authority if it turns out that his previously-authorized actions had become unauthorized due to the intervening death or incapacity of the principal, regardless of whether the agent knew or had reason to know about the death or incapacity. Restatement (Second) of Agency § 329, cmt. b (1958). In contrast, under the Civil Code, the mere incapacity of the principal does not automatically terminate the agent's authority, and actions taken by an agent in ignorance of his principal's death, if otherwise authorized, are considered valid. La. Civ. Code arts. 3027(B), 3032-3033.

interpretation: whether the third party knew enough about problems with the agent's authority to support the inference that the third party was accepting the agent's actions for whatever they were worth, without the agent's normal warranty of authority.

The reported cases do not discuss this precise issue, but they do follow similar rules when the issue is the disclosure of an agent's representative status, rather than the extent of his authority. These cases say that disclosure is the better practice, but that even without disclosure an agent is permitted to avoid liability by proving that the third party already knew or had adequate notice of the information that was supposed to be disclosed. Although the information to be disclosed is different in the authority cases than in the disclosure-of-agency cases, the underlying theory would not seem to change. The agent should be liable unless he proves either adequate disclosure or adequate knowledge or notice of the pertinent facts, but he should not be required to prove that he himself was the source of the pertinent information.

Planiol supports the foregoing interpretations. He justifies the agent's liability to the third party on grounds of warranty.¹⁰⁶ In Planiol's view, if an agent's acts turn out to have been outside his authority, so that the principal is not bound, then the liability of the agent should depend on the agent's disclosure, or the third party's independent knowledge of the pertinent information:

Third persons, therefore, who deal with the mandatary may in the end find that they have entered into a useless contract where the act was not authorized by the procuration and where the principal has refused to ratify. Can they in such a case proceed against the mandatary and hold him responsible for the damages they have suffered? That depends: if the mandatary has made his powers sufficiently known, they are considered as having dealt with him at their risk; if on the contrary, the powers of the mandatary were not sufficiently known to them, the latter was in fault and is personally liable for everything he may have done beyond his mandate.¹⁰⁷

Notice that the only liability that Planiol actually recognizes is that arising when both of two conditions are present: the mandatary has not made his powers sufficiently known *and* those powers are not sufficiently known by the third party. Nondisclosure by the agent does not produce liability if the pertinent facts are "sufficiently known" anyway, but without this independent knowledge, the mandatary does become personally liable to the third party if he exceeds his authority without exhibiting his powers.

106. According to Planiol, the mandatary who acts beyond his authority is bound by the unauthorized act unless he obtains the principal's ratification. This, he says, "is the simple application of the clause of warranty," referring to another provision concerning the *promesse de porte-fort*. 2 Planiol, *supra* note 9, ¶¶ 1020, 2256.

107. 2 Planiol, *supra* note 9, ¶ 2256, at 298.

Planiol's interpretation is thus very close to the common law theory that an agent is automatically liable for a breach of an implied warranty of authority, unless the agent disclosed the pertinent facts concerning the terms of his authority, or unless the third party already had sufficient knowledge of those facts. In the typical case, where nothing about authority is said by the agent, nor known independently by the third party, the common law and Louisiana Civil Code appear to be in agreement: the agent becomes personally liable to the third party for acts that he takes without proper authority.

B. *Exceeding Authority—Jurisprudence*

The Louisiana jurisprudence essentially contains two competing lines of cases concerning an agent's liability to a third party for exceeding his authority. One line concentrates on the normally automatic liability called for by Article 3010, with little attention to the meaning and effects of the exculpatory language in Articles 3012 and 3013 about an agent's "exhibiting" or "communicating" his powers,¹⁰⁸ while the other line of cases emphasizes this exculpatory language to the virtual exclusion of any form of automatic liability under Article 3010.¹⁰⁹ Under the first line of cases, the warranty rule is followed without much attention to the possibilities of disclaimers, while under the second, the warranty theory is essentially rejected in favor of a misrepresentation theory of recovery.

A good example of the first line of cases is *Vordenbaumen v. Gray*.¹¹⁰ In that case, one brother purported to act not only for himself but also for his brother as his agent in promising to pay a debt owed by the brothers' deceased mother. The Louisiana Second Circuit Court of Appeal ruled that the promise in question was legally enforceable,¹¹¹ but noted that the record did not contain any evidence that the first brother had been authorized by the second to make any such promise on his behalf. Neither did it contain any evidence that the second brother had ratified the promise or made any independent promise on his own. Under those circumstances, the court ruled that the first brother was personally liable not only for his own personal share of the joint promise, but

108. *Vales v. Doley*, 297 So. 2d 532 (La. App. 4th Cir. 1974); *Sears, Roebuck & Co. v. Gunn*, 286 So. 2d 404 (La. App. 4th Cir. 1973); *Nationwide Fin. Co. v. Pitre*, 243 So. 2d 326 (La. App. 4th Cir. 1971); *Cooley v. Al Hirt Enters., Inc.*, 180 So. 2d 841 (La. App. 4th Cir. 1965); *Fontenot v. Fontenot*, 175 So. 2d 910 (La. App. 3d Cir. 1965); *Vordenbaumen v. Gray*, 189 So. 342 (La. App. 2d Cir. 1939); *Opelousas-St. Landry Bank & Trust Co. v. Bruner*, 13 La. App. 337, 125 So. 507 (1st Cir. 1929).

109. *Tedesco v. Gentry Dev., Inc.*, 521 So. 2d 717 (La. App. 2d Cir. 1988), *aff'd*, 540 So. 2d 960 (1989); *Neiman-Marcus Co. v. Viser*, 140 So. 2d 762 (La. App. 2d Cir. 1962); *Gulf South Enters., Inc. v. Delta Materials Operating Co., Inc.*, 137 So. 2d 427 (La. App. 4th Cir. 1962); *Wilson Sporting Goods Co. v. Alwes*, 21 So. 2d 102 (La. App. 1st Cir. 1945).

110. 189 So. 342.

111. *Id.* at 347-48. The court's conclusion that consideration existed for the promise was not well-reasoned, but, for the purposes of this agency discussion, the important point is that the court was dealing with a promise that it considered to be binding.

also for his brother's share because he had acted without authority in purporting to bind his brother to help pay his mother's indebtedness. Citing Civil Code articles 3010, 3012 and 3013, along with a couple of earlier decisions, the court said: "It is a well settled principle of law in this state, that one who acts without authority, or exceeds his authority when purporting to act for or in behalf of another, is personally bound to fulfill the terms of the contract made."¹¹²

Several other Louisiana decisions have followed essentially the same theory as *Vordenbaumen*.¹¹³ These cases typically cite Civil Code article 3010 and appear to assume that such liability arises automatically, much as the common-law warranty liability arises, without any showing that the agent affirmatively misled the third party in some way.

The seminal authority for the other line of cases, those emphasizing the nonliability of an agent, is a 1928 Louisiana Supreme Court decision, *A. Lorenze Co. v. Wilbert*.¹¹⁴ Language in that opinion, taken out of context, has been recited in several later cases¹¹⁵ in a way that suggests that a warranty-style

112. *Id.* at 348.

113. *Vales v. Doley*, 297 So. 2d 532 (La. App. 4th Cir. 1974) (citing Article 3010 and holding real estate broker personally liable on real estate purchase agreement resulting from broker's unauthorized offer in purchaser's name); *Sears, Roebuck & Co. v. Gunn*, 286 So. 2d 404 (La. App. 4th Cir. 1973) (citing Article 3010 and holding wife personally liable for purchases made without authority on estranged husband's charge account); *Nationwide Fin. Co. v. Pitre*, 243 So. 2d 326 (La. App. 4th Cir. 1971) (husband not liable on note on which his wife had forged his signature; any recovery had to be obtained from wife); *Cooley v. Al Hirt Enters., Inc.*, 180 So. 2d 841 (La. App. 4th Cir. 1965) (plaintiff should be allowed to amend petition against purported principals, who denied providing authority for the purchase of two paintings, to include a claim against the purported agent of the principals for exceeding his authority); *Fontenot v. Fontenot*, 175 So. 2d 910, 912 (La. App. 3d Cir. 1965) (that disclosed agents become personally bound by contracts that they execute without adequate authority is "a legal proposition so clear as to require no citation of authority beyond the codal articles"); *Opelousas-St. Landry Bank & Trust Co. v. Bruner*, 13 La. App. 337, 125 So. 507 (La. App. 1st Cir. 1929) (brother who purported to buy property for himself and as agent for brother, but without adequate authority, bound only himself, and so became the sole owner of the property).

114. *A. Lorenze Co. v. Wilbert*, 165 La. 247, 115 So. 475 (1928). A few earlier cases had made similar pronouncements, but *Lorenze* became the authority recited in most of the more recent cases. As in *Lorenze*, the exculpatory language in these older cases can be read either narrowly, imposing liability for exceeding authority except where the agent exhibited his powers or the third party knew the pertinent facts, or broadly, suggesting that an agent is not liable without affirmative misrepresentations. See *Succession of Aiken*, 144 La. 64, 70, 80 So. 200, 202 (1918) (contract by executor of succession that purported to bind estate to pay lawyer a legal fee in connection with the administration of the succession was beyond the authority of an executor and not binding on the succession, but executor was not personally liable for exceeding his authority because lawyer "knew as well as [the executor] that the [executor] had no authority; all the facts and surrounding circumstances attending the transaction being equally well known by each of the parties."); *Barry v. Pike*, 21 La. Ann. 221 (1869) (agent is held liable for exceeding authority on misrepresentation theory; agent is not liable if the limitations of the agent's authority were known to the third party); *Trastour v. Fallon*, 12 La. Ann. 25, 28 (1857) (agents not liable to third party unless they contracted in their personal capacities or unless "they misled him [the third party] by assuming to act for others without sufficient authority.").

115. *Tedesco v. Gentry Dev., Inc.*, 521 So. 2d 717, 725 (La. App. 2d Cir. 1988), *aff'd*, 540 So.

theory of liability is incorrect. According to the source passage, "It is well settled that one who contracts as the agent for another is not bound personally if it develops that he exceeded his authority or acted without legal authority, unless the other party to the contract was misled or deceived."¹¹⁶

If this "deception" passage were taken as an accurate statement of the law, it would mean that an agent would not be liable under Louisiana law for exceeding his authority in the typical transaction, where nothing was said about authority one way or the other. Unless the agent had affirmatively deceived the third party in some way, he would not be liable to the third party merely for exceeding his authority. In common-law terminology, the agent would not be deemed to have warranted his authority; he would be liable only for misrepresentations of authority. In effect, a third party would bear the same risk as an agent in misinterpreting the agent's authority, even though the agent would normally be in the better position to know the pertinent facts concerning the limits of his authority.

It is doubtful that *Lorenze* really meant what this one passage seems to suggest, any more than *Vordenbaumen* meant to suggest that agents could never avoid personal liability if they acted beyond their authority. The trouble with the cases in this area is that they tend to exaggerate the legal rules that they recite. The results in the cases, as distinguished from the recited rules, are not so surprising and generally can be reconciled.

Properly interpreted, *Lorenze* simply held that when the law and facts are equally available (or equally known) by both the agent and third party, agency law does not shift the risks of formal legal defects in the authorization under which the agent purports to act from the third party to the agent.¹¹⁷ The

2d 960 (1989); *Neiman-Marcus Co. v. Viser*, 140 So. 2d 762, 766 (La. App. 2d Cir. 1962); *Gulf South Enters., Inc. v. Delta Materials Operating Co., Inc.*, 137 So. 2d 427 (La. App. 4th Cir. 1962); *Wilson Sporting Goods Co. v. Alwes*, 21 So. 2d 102, 103 (La. App. 1st Cir. 1945).

116. *A. Lorenze Co.*, 165 La. at 255, 115 So. at 478.

117. The third party in *Lorenze* was a corporate affiliate of the maker of the note; both corporations had the same president, a Mr. A. Lorenze. Because of this overlap in office-holdings, Mr. Lorenze had asked the vice president of the debtor corporation to sign the note so that a note payable to the A. Lorenze Co. would not be signed by Mr. A. Lorenze himself, as president of the debtor corporation. The signing of the note had been authorized explicitly by a resolution of the board of directors of the maker corporation. The only defect in the vice president's authority was a technical one. The board resolution had been adopted at a meeting held outside of Louisiana, and under the law in effect at the time, the location of the meeting rendered the resolution invalid.

It seems obvious that the agent in *Lorenze* knew nothing that the president of the third party corporation did not know, and may even have been acting in accordance with this common president's instructions. The common president knew every fact that he needed to know to assess for himself the authority with which the vice president purported to act. If the agent did not actually "exhibit his powers" (i.e., show the president the board resolution), then surely the president had, in *Planiol's* words, "sufficient knowledge" concerning the resolutions to access for himself the authority with which the corporate agent purported to act. The agent was in no better position than the third party to know the requirements of the law concerning the adoption of resolutions by Louisiana-chartered, Louisiana-domiciled corporations.

following passage from *Lorenze* captures the spirit of the case much better than the "deception" excerpt quoted earlier:

If [the third party] was fully informed of the facts, by virtue of which the party acting as agent for another claimed authority to represent the other party, the party acting as agent is not bound personally if he exceeds his authority or if it develops that the supposed authority was invalid.¹¹⁸

Most of the later cases in the *Lorenze* line of cases may be explained in similar terms. Two of them dealt with transactions in which the third party was fully informed concerning the relevant facts, and might even have known more than the agent.¹¹⁹ Another¹²⁰ dealt with the consequences of a formal legal defect in the agent's authority,¹²¹ and not with any special knowledge held by the agent concerning the limits of his authority or the existence or competence of his principal.¹²²

For other similar holdings, see *Succession of Aiken*, 144 La. 64, 80 So. 200 (1918); *Tedesco*, 521 So. 2d at 717; *Brashears v. Milner*, 64 So. 2d 519 (La. App. 1st Cir. 1953).

118. *Lorenze*, 115 So. at 478.

119. *Buckley v. Woodlawn Dev. Corp.*, 233 La. 662, 98 So. 2d 92 (1957); *Brashears*, 64 So. 2d at 519.

120. *Tedesco*, 521 So. 2d at 717. Compare *Tedesco* with *Tulane Educ. Fund's Adm'rs v. Baccich & DeMontluzin*, 129 La. 469, 56 So. 371 (1911) (agents held personally liable to third party for purporting to sell options on land to him without written authority to do so, requiring the third party optionee to negotiate with owner for a purchase at a higher price; court did not believe agents' allegations that they had "exhibited their powers" by explaining that they did not currently have the necessary authority, but hoped later to acquire it). Three other cases might also be placed in the *Tedesco* "legal defect" category: *Buckley*, 233 La. at 662, 98 So. 2d at 92, *Succession of Aiken*, 144 La. at 64, 80 So. at 200, and *Brashears*, 64 So. 2d at 519. However, the defects in *Buckley* were not purely formal, and regardless of the nature of the defect, the third parties in all three of the other cases were fully aware of the facts that suggested a lack of lawful authority. Thus, it is not clear whether the defendants won in these cases because agents are not deemed to warrant the law, or because the third parties happened to know all the pertinent facts.

121. *Tedesco*, 521 So. 2d at 717 (lack of written authority to sign contract to sell immovable property). See *Brashears*, 64 So. 2d at 519 (need for court approval for sale of property of succession).

122. In contrast to some other cases in which the third party was fully aware that certain legal requirements had not been fulfilled (*Succession of Aiken*, 144 La. at 64, 80 So. at 200, and *Brashears*, 64 So. 2d at 519), it was not clear in *Tedesco*, 521 So. 2d at 717, whether either the agent or the third party knew about the applicable legal requirement, i.e., that authority to sign contracts to sell immovable property had to be in writing. Arguably, the agent was in a better position than the third party in this case to know, or to find out, whether the legal requirement of a writing had been satisfied. Nevertheless, without regard to the relative knowledge of the parties on this point, the *Tedesco* court concluded that it was unreasonable as a matter of law for a third party simply to assume that the necessary authority existed without actually seeing it in writing. In effect, the agent was allowed to assert the same defense as the principal—the contract was unenforceable due to the lack of written authority.

The point of *Tedesco* on this issue seemed similar to that in *Lorenze*: all parties may be presumed to know the law. If the law makes certain actions unenforceable in the absence of specified

Another case of the *Lorenze* line of cases quotes the "deception" passage in dealing with an entirely moot point, the liability of the agent to the third party for transactions that the court had found to be binding on the principal.¹²³ Still another case, *Wilson Sporting Goods Co. v. Alwes*,¹²⁴ uses *Lorenze* merely to change the grounds for a judgment in favor of a defendant agent so that the agent's case against the third party for an abuse of rights would appear to be stronger.¹²⁵

If one examines the actual holdings rather than stated rationales of these cases, one sees that the pattern of results is very close to what one would expect under the Restatement (Second) of Agency: an agent is normally understood to warrant his authority, but may avoid liability for violating this warranty of authority if the facts and circumstances suggest either that the agent manifested

formalities, then third parties, the parties seeking to enforce these transactions, must themselves be held responsible for a failure to see to the fulfillment of the requirements. Otherwise, the requirements themselves will be weakened through the allowance of recoveries against agents for transactions that could not be enforced against the principals themselves.

One may criticize the very idea that a principal should be entitled to assert purely formal defenses to transactions that are fully, though informally, authorized. But if purely formal defenses are to be honored, it is important not to let the third party hold the agent hostage to a waiver of the defense. Principals should not be held to assert their legal defenses only on pain of rendering their innocent agents personally liable as a result. If a principal's assertion of a formality-based defense is really going to be effective, the same defense will have to be extended to the agent. Third parties who ignore legally-required formalities will have to be treated, as they were in *Tedesco*, as proceeding at their own risk.

123. *Neiman-Marcus Co. v. Viser*, 140 So. 2d 762, 766 (La. App. 2d Cir. 1962).

124. *Wilson Sporting Goods Co. v. Alwes*, 21 So. 2d 102 (La. App. 1st Cir. 1945).

125. The agent in *Alwes*, who was a principal of a high school, had been sued personally to collect amounts owed to the plaintiff third party in connection with the agent's ordering athletic equipment for his school. The defendant agent had reconvened against the plaintiff, alleging damage to his reputation and good name caused by the filing of the suit against him.

The *Alwes* trial court dismissed the reconventional demand. However, after a trial in which the plaintiff had apparently tried to prove that the agent had acted without disclosing his agency capacity and/or had acted beyond his authority, the jury found in favor of the defendant, and the trial court entered judgment for the defendant based on the jury verdict. The defendant agent wished to have the basis for the judgment in his favor changed to a dismissal on grounds of no cause or right of action, apparently so that he could strengthen his appeal of the trial court's dismissal of his reconventional demand.

Alwes was hardly a good test of the *Lorenze* dictum. Not only was the *Lorenze* rule unnecessary to the result in the case, but also it was being recited, after a full jury trial, with the knowledge that no acts in excess of the agent's authority really had occurred. *Lorenze* was used in *Alwes* not to resolve a genuine dispute between an agent and a third party about misunderstood authority, but to make the third party's suit against the agent, on grounds later determined to be insufficient, seem even less reasonable than the jury verdict alone might have suggested. It is not clear why the appellate court decided to be so hostile to the creditor's collection efforts in this case (perhaps a suit against a high school principal personally to collect for athletic equipment that obviously had been ordered for his school struck the court as much too aggressive), but it is clear that the court did not have before it the type of dispute that the *Lorenze* rule really purports to resolve.

his intention not to make such a warranty, or that the third party knew about the risks of authority anyway, from some other source.

C. *Mislabeled Exceeding-Authority Cases*

Unfortunately, many of the Louisiana cases that discuss an agent's liability for exceeding his authority are not mandate cases at all, but tort cases.¹²⁶ For example, in *Dupre v. Marquis*,¹²⁷ a lawyer and his client were accused of defaming a physician by naming him as a defendant in a medical malpractice action. In analyzing the lawyer's responsibility for this alleged defamation, the *Dupre* court pointed out that the relationship between a lawyer and client was one of principal and agent. The court then recited mandate law to the effect that agents may be held liable for their unauthorized acts, and noted that the client had told his lawyer that he could not recall having been treated by the plaintiff physician at all. The court treated this statement as an implicit withholding of authority to sue this particular physician, and held the lawyer subject to defamation liability because he had exceeded his authority.¹²⁸

The *Dupre* reasoning misses the mark. Properly speaking, the law of mandate governs primarily the requirements for, and the binding effects of, a mandatary's juridical acts in the name and on behalf of his principal. It also deals with the relations between the principal and mandatary, and with the consequences of a mandatary's professing to bind his principal through juridical acts that he is not really authorized to perform. However, mandate law does not purport to consider whether an agent's conduct should be considered tortious or whether a principal should be held vicariously liable for his agent's allegedly tortious conduct.

Nothing in mandate law says that principals have the power to immunize their agents against tort liability for conduct that would otherwise be considered tortious, merely by authorizing it.¹²⁹ Nor does mandate law say that an agent's conduct is automatically tortious just because it is unauthorized. Thus, an agent

126. *Sondes v. Sears, Roebuck & Co.*, 501 So. 2d 829 (La. App. 4th Cir. 1986); *Dupre v. Marquis*, 467 So. 2d 65 (La. App. 3d Cir.), *writ denied*, 472 So. 2d 38 (1985); *Naulty v. OUPAC, Inc.*, 448 So. 2d 1322 (La. App. 5th Cir. 1984); *Navratil v. Smart*, 400 So. 2d 268 (La. App. 1st Cir.), *writ denied*, 405 So. 2d 320 (1981).

127. *Dupre*, 467 So. 2d at 65.

128. *Id.* at 68. Ultimately, the lawyer was not held liable because the defamation action against him had prescribed. *Id.* at 69. For a case with similar reasoning and a ruling in favor of a lawyer who acted in an authorized manner see *Sondes*, 501 So. 2d at 829.

129. An agent's duties to protect his principal's interests through authorized conduct might be taken into account in determining whether, on balance, the agent's behavior should be considered tortious. See *9 to 5 Fashions, Inc. v. Spurney*, 538 So. 2d 228 (La. 1989) (corporate officer is privileged to cause his corporation to breach its contracts to the extent that his conduct is authorized and reasonably thought by the officer to be in the best interest of the corporation). Nevertheless, the mere presence or absence of a principal's authorization of some specified conduct does not, in and of itself, determine whether that conduct is tortious.

would be liable for battery if he beat up a troublesome customer, even if the beating was administered strictly in accordance with his principal's authorizations, and, conversely, an agent would not be liable to a third party for the tort of "exceeding authority" if he told a troublesome customer to go shop someplace else, in violation of his principal's explicit instructions to the contrary. The authority rules of mandate law simply have nothing to say on these sorts of questions. As the Louisiana Supreme Court has explained,

Civil Code article 2985 et seq., titled "Of Mandate," define the nature of the contractual relationship and the obligation of the parties under a mandate, but do not attempt to fix liability for the tortious acts of a mandatary.¹³⁰

Although it may sometimes be true that an agent who is committing a tort is also exceeding his authority, the liability that the agent incurs because of his tort is still tort liability, not the "exceeding-authority" liability that some of the Louisiana cases say that it is. The agents in the mislabeled tort cases are not being held liable merely because their unauthorized actions failed to bind their principals under mandate law, but rather because their acts, authorized or not, were tortious.

A true exceeding-authority case is different from a case in which an agent's action is tortious in and of itself. Under mandate law, an agent is held liable for exceeding his authority for the simple reason that his acts in the name of his principal have failed to bind the principal as the agent had warranted or represented that they would. His acts need not be tortious in any other sense. It is the failure to bind the principal that is at the heart of the "exceeding-authority" liability imposed by mandate law. If the principal ends up bound by the agent's unauthorized acts (through apparent authority, for example), then under mandate law the third party has no claim against the agent for exceeding his authority.¹³¹

Consider the *Dupre* case once again. Had *Dupre* been a true exceeding-authority case under mandate law, the libeled physician would have been suing the lawyer because the lawyer had failed to obtain from the client some truly binding libelous remarks that the physician had been seeking. The physician

130. *Blanchard v. Ogima*, 253 La. 34, 39-40, 215 So. 2d 902, 904 (1968). See also *Rowell v. Carter Mobile Homes, Inc.*, 500 So. 2d 748, 751 (La. 1987). In both of the cited cases, the court made its remark about the scope of the mandate articles in the context of explaining that a principal is not liable for the physical torts of his nonservant agents.

131. See *Item Co. v. LaPlace Chamber of Commerce*, 16 So. 2d 567 (La. App. Orl. 1944) (if agent is liable to third party for exceeding authority, then principal bears no liability for those unauthorized acts, and if principal is liable, then agent cannot be, unless he guaranteed the contract personally); Restatement (Second) of Agency § 329, cmt. f (1958) (common law rule that agent is not liable to third party for exceeding his authority if the principal nevertheless becomes a party to the contract). Of course, where the agent has exceeded his authority but the principal has nevertheless become bound, the principal may have a claim against the agent.

would have been disappointed when, contrary to the lawyer's representations, it turned out that the lawyer really had no authority to commit his client to make the sorts of libelous statements that the physician had been promised. What really happened, of course, was exactly the reverse: the lawyer provided some libelous remarks that were fully effective as libel in and of themselves, without regard to whether they were binding on the client, and the physician responded by suing the lawyer and client for defamation.

The confusion that arises between tort law and agency law is understandable in the *Dupre* type of case, for tort law does recognize doctrines that are similar to those of mandate law in some sense. Tort law does sometimes permit one person's actions to be attributed to another if those actions could be deemed to have been intended (i.e., "authorized") by the alleged tortfeasor, or to be within the scope of risks covered by some duty of care applicable to the tortfeasor (e.g., a duty of careful supervision) to prevent injuries caused by the conduct of others. However, the policies that control the true mandate law cases have little or nothing to do with the myriad policies that should control the development of indirect or vicarious responsibility for quasi-delictual obligations under tort law. Authority doctrines in mandate law are designed to resolve and allocate the risks of misunderstandings that arise in connection with the juridical acts of the parties, not their delictual or quasi-delictual acts. Hence, the mislabeled "exceeding-authority" cases in Louisiana should be interpreted as inartfully-explained tort cases. They should not be considered controlling, or even influential, in resolving true mandate law issues.

VI. TORT LIABILITY GENERALLY

Corporation law protects shareholders from personal liability for tort obligations in the same way that it protects them from liability for contract debts. It creates a legally separate and distinct person that essentially substitutes for the true human owners in the roles that they might otherwise play as the direct proprietors or partners in the business. Any liability that would otherwise be imposed on the shareholders in their ownership capacities, i.e., as principals on corporate contracts or as liability-bearing masters for the torts of corporate employees, is instead imposed on the legally-distinct corporation. As long as the corporation's separate personality is respected, i.e., its veil is not pierced, shareholders will not bear any liability for these obligations because they are considered to be the obligations of some other, separate person—the corporation.

The effects of the separate personality theory are not unlimited, however. Separate personality means that corporate debts are not treated as personal debts of the corporation's shareholders, but it does not mean that shareholders or other corporate participants have immunity from personal liability for their own personal torts. A shareholder has no more right to commit a tort for a separate corporate person than he has to commit the same tort for himself or others. Absent immunity, justification, or privilege, if the conduct is tortious, then the

tortfeasor is personally liable. The fact that the tortfeasor happens to be a corporate shareholder, officer, agent, or employee is irrelevant.¹³² The participants in an incorporated business need insurance against their own personal tort liability just as much as the participants in an unincorporated business need this sort of protection.

Still, it is a bit too easy simply to say that any individual, regardless of his corporate position, is always liable for his own personal torts. If one simply assumes that the alleged tortfeasor has indeed committed a tort then certainly he is liable. The more difficult question is whether the conduct of the corporate participant should be considered tortious in the first place.

Certainly, if a corporate officer, driving a corporate automobile on corporate business, negligently runs a stop sign and strikes a pedestrian who is lawfully in the intersection, then that officer has violated his personal tort duty to operate the automobile with due regard for the safety of pedestrians. However, if the same officer "negligently" lets one of the corporation's contracts sit idle on his desk for several months, or "negligently" ships inferior goods in his efforts to fulfill the contract, then the law cannot treat these instances of personal carelessness as if they were personal torts by the corporate officer without overriding normal principles of contract and agency law, which are designed to protect the officer from liability. If a "negligent" failure to cause someone else to fulfill his contracts is itself considered a personal tort on the part of the "negligent" party, then the "negligent" employee or agent will become liable, in effect, for the breach of a contract to which he is not supposed to be a party and for which he is not supposed to be personally liable.¹³³

132. Corporate officers and agents have been held personally liable for:

- 1) Their personal fraud: *Lone Star Indus., Inc. v. American Chem., Inc.*, 461 So. 2d 1063 (La. App. 4th Cir. 1984), *aff'd*, 480 So. 2d 730 (1986); *Dolese Concrete Co. v. Tessitore*, 357 So. 2d 869 (La. App. 1st Cir.), *writ denied*, 359 So. 2d 620, 623 (1978);
- 2) Their personal negligence resulting in personal injury: *Canter v. Koehring Co.*, 283 So. 2d 716 (La. 1973);
- 3) Their personal negligence resulting in accidental physical damage to corporeal property: *United States Fidelity & Guar. Co. v. Ledford*, 244 So. 2d 252 (La. App. 3d Cir.), *writ denied*, 246 So. 2d 681 (1971). *Accord* H.B. "Buster" Hughes, Inc. v. Bernard, 318 So. 2d 9 (La. 1975) (indicating that such liability was possible, but finding it not to exist in the case before it).

The supreme court has also indicated that a court *could* impose liability on an officer or agent who, without proper justification, intentionally interferes with a contract between his corporation and a third party, but the court did not actually impose liability under the facts of the case before it. *9 to 5 Fashions, Inc. v. Spurney*, 538 So. 2d 228 (La. 1989).

133. Asking whether an officer should be held liable for his own "negligent" behavior begs the question of whether the officer owed some duty to protect the interest in question. He is liable if he was not careful in protecting an interest that he owed a duty of care to protect, but the question remains whether the officer owed the duty in the first place. Tort law has never attempted to protect all forms of interest from damage of all types from all persons. Private parties have always enjoyed considerable freedom to determine for themselves, as a matter of contract law, the special duties that they wish to undertake in their consensual dealings with one another. Duties to guard against accidental bodily injury or physical property damage have traditionally been considered part of the

The drawing of boundaries between tort and contract law should determine the outcome of most "officer tort" cases. If the officer has breached a duty traditionally imposed by tort law, he should be held personally liable for the damages that his breach of duty has caused. But if his "negligence" has consisted merely of failing to work hard enough to fulfill his corporate principal's contractual obligations, then he should not be deemed to have committed a tort personally. His contractual status as a corporate agent should be recognized, and the duties to perform the contract should be imposed only on the parties to the contract.

Of course, there may be cases in the future in which the courts will choose to expand the tort duties traditionally recognized in connection with the negotiation and performance of corporate contracts. Duties of this kind are not inconceivable, either technically or as a matter of policy, and some limited duties (such as the duty not to deceive the other party) are already recognized. However, when any proposed new duty is being considered, courts should recognize that the imposition of a personal tort duty on a corporate officer necessarily interferes with the contracting principals' freedom to use their officers or employees strictly as agents—persons who can help the principals negotiate and perform their contracts without bearing any personal liability. Sometimes this type of judicial interference with freedom of contract might be justified (as in the case of fraud or deceit), but usually it is not.¹³⁴

For a brief period in the mid- to late eighties, some Louisiana courts had indeed approved some broad new "tort" theories of liability that would have made active corporate shareholders, officers, and employees personally liable to corporate creditors for their negligent failure to see to it that the corporation

law of torts, but the duty to protect a contract obligee's economic interests in the performance of its contracts has generally been left to contract law, with little intervention by tort law. Subject to a few aberrational cases decided in the mid-eighties, Louisiana courts have strongly rejected the tort of negligent interference with contract. See *infra* notes 135 and 153.

134. Two competent business persons, negotiating about the risks associated with a particular transaction, should be able to decide for themselves, in a legally-enforceable way and without judicial interference, how they wish to allocate the risks they see. They should not be forced by the courts to accept a deal in which their agents' tort duties to monitor or supervise their contract performances as principals may cause the agents to behave in uneconomically risk-averse ways. When a court is called upon to impose contract-related tort duties beyond those traditionally recognized, it should realize that the tort duties that it is being asked to impose are requested precisely because they will modify, perhaps inexpertly and unfairly, the deal that the contracting parties themselves had considered appropriate. If the contract itself could be interpreted to contain the duties claimed by the plaintiff, then the plaintiff's arguments could be made under a contract theory. While contract and tort arguments are often made in the alternative, a rejection of the contract argument (or a failure by one of the parties to make such an argument), followed by an acceptance of the tort argument, necessarily means that the court is imposing some legal duty on the parties that the court has found not to be a part of their agreement, either expressly or tacitly. Rarely will such a judicially-imposed modification of the contract be justified in dealing with the purely commercial relations between the contracting parties.

performed its contracts.¹³⁵ Fortunately, however, the trend now seems to have been reversed, and the more recent decisions are rejecting the theory that a corporate employee owes some tort duty to corporate creditors to exercise due care to cause the corporation to meet its contractual obligations. The only "tortious breach" theories that seem to have survived are those associated with professional malpractice, where privity of contract requirements have been relaxed to allow affected third parties to sue the negligent professional, and those involving intentional interference with contract. Professional malpractice issues are outside the scope of this work. Intentional interference with contract is discussed in the next section.

A. *Tortious Interference with Contract*

For many years, Louisiana was the only state in the country that refused to recognize any form of tortious interference with contract. One supreme court justice had hinted on several occasions in the early to mid-eighties that the court might be persuaded to change the law in an appropriate case,¹³⁶ but it was not until 1989, in a difficult and surprising setting, that the change finally came.

The source of the change was one of several reported cases involving efforts by creditors of the insolvent New Orleans World's Fair corporation to hold the chief executive officer of the corporation (and his director and officer insurer) personally liable in connection with various Fair-related corporate transactions.¹³⁷ The plaintiff in the case, a uniform supplier to the Fair, convinced

135. Compare *9 to 5 Fashions, Inc. v. Spurney*, 520 So. 2d 1276 (La. App. 5th Cir. 1988), *rev'd*, 538 So. 2d 228 (1989); *Hemphill-Kunstler-Buhler, Auctioneers & Appraisers v. Davis Wholesale Elecs. Supply Co.*, 516 So. 2d 402 (La. App. 1st Cir. 1987), *writ denied*, 520 So. 2d 751 (1988), *later appeal*, 555 So. 2d 4 (La. App. 1st Cir. 1989), *writ denied*, 558 So. 2d 571 (1990); *Scariano Bros., Inc. v. Hammond Constr.*, 428 So. 2d 564 (La. App. 4th Cir. 1983) (imposing breach-of-contract-like liability under a personal tort theory) *with Bergman v. Nicholson Mgt. and Consultants, Inc.*, 594 So. 2d 491 (La. App. 4th Cir.), *writ denied*, 600 So. 2d 646 (1992); *Fine Iron Works v. Louisiana World Exposition, Inc.*, 472 So. 2d 201 (La. App. 4th Cir.), *writ denied*, 477 So. 2d 104 (1985); *Donnelly v. Handy*, 415 So. 2d 478 (La. App. 1st Cir. 1982); *Unimobil 84, Inc. v. Spurney*, 797 F.2d 214 (5th Cir. 1986) (rejecting liability on this ground). For a discussion and criticism of these cases, see Glenn G. Morris, *Business Associations*, 50 La. L. Rev. 211 (1989).

136. Justice Lemmon mentioned the point in published opinions or writ denials at least three times. See *PPG Industries, Inc. v. Bean Dredging*, 447 So. 2d 1058, 1059 n.1 (La. 1984) (Although the intentional interference issue was not posed in the case before it, the court found that "[t]here is considerable sentiment for permitting recovery in Louisiana for intentional interference with contracts, such as by the deliberate inducing of breach of contract."); *Sanborn v. Oceanic Contractors, Inc.*, 448 So. 2d 91, 95 (La. 1984) (Lemmon, J., concurring with majority on abuse of rights theory, but "tending to the view that the petitioners sufficiently stated a claim for intentional interference with contractual relations . . ."); *Moss v. Guarisco*, 412 So. 2d 540 (La. 1982) (Lemmon, J., dissenting from denial of writs; "[T]his denial does not necessarily mean that a majority of this court still subscribes to the theory that there is no cause of action in Louisiana for tortious interference with a contract.").

137. Other reported cases include *Dutton & Vaughn, Inc. v. Spurney*, 496 So. 2d 1126 (La. App. 4th Cir. 1986), *writ denied*, 501 So. 2d 208 (1987); *Fine Iron Works*, 472 So. 2d at 201; and

both the trial and the appellate court to impose personal liability on the executive, Peter Spurney, on the theory that Spurney had committed some kind of personal tort in his dealings with the creditor. The "tort" was said to be Spurney's failure—perhaps through simple negligence, perhaps as part of some unexplained "personal vendetta"—to see to it that the plaintiff in the case, a uniform supplier to the Fair, received accurate information from the Fair concerning the number of uniforms to be required. As a result of this tortious personal failure on Spurney's part, the lower courts reasoned, the uniform supplier had ordered too much material, and so had expended more than it should have in connection with its work for the Fair. Hence, Spurney was liable for the excess in expenditures.¹³⁸

At the supreme court level, the majority opinion declined even to state, much less examine, the theories that the lower courts had utilized. The reasoning in the courts below was characterized as "unclear"¹³⁹ and "loosely associated with several legal theories."¹⁴⁰ Similarly, the plaintiff's arguments were construed as little more than a plea for relief of some kind, under whatever theory seemed appropriate.¹⁴¹

Facing these purportedly incomprehensible rulings and arguments, the supreme court determined that what the plaintiff was really seeking, apparently without realizing it, was a remedy for tortious interference with contract. So construed, the plaintiff's position was said to require the court to reexamine the traditional bar against such suits in Louisiana.¹⁴² Following this reexamination, the court concluded that the old absolute bar against all forms of tortious interference suits should be lifted, and that at least some limited form of tortious interference claim should be recognized. However, cautioned the court,

It is not our intention . . . to adopt whole and undigested the fully expanded common law doctrine of interference with contract, consisting of "a rather broad and undefined tort in which no specific conduct is proscribed and in which liability turns on the purpose for which the defendant acts, with the indistinct notion that the purposes must be considered improper in some undefined way."¹⁴³

Unimobil 84, Inc., 797 So. 2d at 214.

138. *9 to 5 Fashions*, 520 So. 2d at 1276.

139. *9 to 5 Fashions*, 538 So. 2d at 230.

140. *Id.* at 231.

141. *Id.*

142. "In effect," the court said, "without labeling the delict, [the plaintiff] urges this court to recognize an action that it has refused to allow since 1902, viz., an action for tortious interference with a contractual relationship. We must [therefore] reexamine the basic precepts of our delictual law in the light of modern conditions . . ." *Id.* Three of the justices refused to join in the opinion, but concurred in the result. One of the concurring justices criticized the decision even to take up the issue of tortious interference with contract under the facts of the case before it. *Id.* at 235 (Marcus, J., concurring).

143. *Id.* at 234 (quoting William L. Prosser & W. Page Keeton, *Prosser and Keeton on the Law of Torts* § 129, at 979 (5th ed. 1984)).

The court then outlined these elements of the tort that it was prepared to recognize:

(1) the existence of a contract or a legally protected interest between the plaintiff and the corporation; (2) the corporate officer's knowledge of the contract; (3) the officer's intentional inducement or causation of the corporation to breach the contract or his intentional rendition of its performance impossible or more burdensome; (4) absence of justification on the part of the officer; (5) causation of damages to the plaintiff by the breach of contract or difficulty of its performance brought about by the officer.¹⁴⁴

Strangely, however, after describing the elements of the new tort, the court concluded that the required new elements had *not* been satisfied in the case presented.¹⁴⁵ The court had thus taken the initiative to reexamine a rule of law that the lower courts had not mentioned, about a tort that had not occurred, and then had changed the law to the extent necessary to permit recovery for the type of tort that might have occurred in the case had the facts just been different.¹⁴⁶

The supreme court's decision in *9 to 5* seemed to have much less to do with correcting errors in the case actually before it than with the court's desire to write some new law in the area of tortious interference with contracts. Had the court been concerned merely with exonerating the defendants, it could easily have reversed the lower courts on the legal theories actually presented and considered. That the court chose to consider yet another theory under which the defendants were not liable (undoubtedly the defendants were not liable under all kinds of other theories) suggests that the court had something to say on this particular theory that its normal set of cases was just not letting it say. Hence, in reviewing a case that *might* have been argued as a tortious interference case, the majority in *9 to 5* seemed to see a choice between deciding the case on the issues argued below, with perhaps another tortious interference hint to future litigants, and reinterpreting the arguments in a way that allowed the court finally to reach the tortious interference issue in the case before it. Seemingly impatient for change, the court took the latter course and produced a decision that appeared designed to provide a new foundation for tortious interference analysis in Louisiana.

Unfortunately, *9 to 5* was far from an ideal case for establishing this sort of conceptual foundation. In contrast to the usual tortious interference problem, in which some genuinely separate third party is alleged to have interfered in the

144. *9 to 5 Fashions, Inc.*, 538 So. 2d at 234.

145. *Id.* at 235.

146. The change in the law made by *9 to 5* was more in the nature of rule-making than adjudication, so that, in contrast to most case-based changes in the law, the change was not accompanied by any concrete example of how the change was to be applied in a real case. The change remained purely an abstraction, so the scope of the change was difficult to determine.

contractual relations existing between two other genuinely separate persons,¹⁴⁷ the *9 to 5* case posed the problem of a fictionally separate person, a corporation, breaching its own contract in the only way that it could possibly do so, through some act or omission by one of its own officers or agents.

The supreme court faced real difficulties in using this type of case to change tortious interference law. The court had to recognize a possibility of tortious interference in the peculiar context of an officer's acts or omissions in connection with his own corporation's contracts; otherwise, the old law would not have to be reconsidered. Yet the court could not let the new tort be so defined that every breach of contract by a corporation would become a tort by the corporation's officers or agents, or lead these corporate officers and agents to believe that their traditional, legally-mandated loyalties to the corporation's interests were now supposed to be tempered by their competing "tortious interference" duties to the corporation's various creditors.

The court adopted a twofold solution to the problem it faced. First, it recognized only a narrow version of tortious interference, requiring *intentional* interference with a *known* contract of the corporation.¹⁴⁸ Second, even within the confines of this narrow version of the tort, it treated interference as "justified" or "privileged" if it was carried out by an officer within the scope of his authority,¹⁴⁹ and in the reasonable belief that his acts were for the benefit of the corporation (or without knowledge that the acts were adverse to the best interests of the corporation).¹⁵⁰ "Justification" was not described as an

147. See Prosser & Keeton, *supra* note 143, § 129, at 982-89 (describing various types of tortious interference); Restatement (Second) of Torts § 766 & cmts. (1977). *But see* Annotation, Corporate Officer's Liability for Tortious Interference with Contracts of Corporation, 72 A.L.R. 4th 492 (listing cases in which tortious interference theory is used against officers of the breaching corporation, principally in connection with employment disputes).

148. *9 to 5 Fashions, Inc. v. Spurney*, 538 So. 2d 228, 234 (La. 1989).

149. If the court's authority language were to be interpreted literally and technically, many officers of small business corporations might be held liable even for good faith acts on behalf of the corporation that were not properly authorized in accordance with the corporation statute. A technical approach to the authority issue does not seem appropriate, however, for it seems unlikely that the supreme court really intended to impose tortious interference liability on a corporate officer for conduct that in any other context would be considered authorized. Particularly in a small business corporation, actions are often taken on behalf of the corporation without formal authority of any kind. If this type of informal authority is sufficient in other contexts, it should be sufficient in the context of tortious interference law as well.

150. *9 to 5 Fashions*, 538 So. 2d at 231. Both formulations, reasonable belief in benefits and lack of knowledge of adverse effects, are set forth in the opinion without any indication as to which of the two is the controlling test. However, a literal approach to the court's requirement of "reasonable" belief for the justification of an officer's actions could undermine the broader forms of managerial discretion traditionally recognized under the business judgment rule. *See* *Watkins v. North Am. Land & Timber Co.*, 107 La. 107, 113-14, 31 So. 683, 686-87 (1902); *Bordelon v. Cochrane*, 533 So. 2d 82, 86-87 (La. App. 3d Cir. 1988), *writ denied*, 536 So. 2d 1255 (1989); American Law Institute Principles of Corporate Governance § 4.01 (Proposed Final Draft, 1992). The officer could become liable to the third party under the "reasonable" belief standard for actions that normally would be considered within his lawful discretion as far as the corporation was

affirmative defense, to be pled and proven by the defendant officer. Rather, "absence of justification" was listed as one of the elements of the plaintiff's case.¹⁵¹

1. Interpreting 9 to 5

9 to 5 could be read either narrowly or broadly on two different issues: on the scope of the new tort and on the scope of the countervailing new privilege. The first issue, the scope of the tort itself, has received most of the attention in the lower courts, and that attention has been almost entirely hostile.¹⁵² The

concerned. As a result, in contravention of the paramount importance seemingly attached by the 9 to 5 court to an officer's fiduciary duties to his corporation, his tortious interference duties to a third party, rather than his corporate duties, would more strongly influence the corporate officer's behavior.

It seems unlikely that the language of 9 to 5 was really intended to have these potentially harmful implications. The court was concentrating on changing the law of tortious interference with contract, not with reworking the rules of internal corporate governance. Indeed, the court's "justification" discussion seemed directed at retaining the traditional rules concerning the fiduciary duties owed by corporate officers to their corporations. 9 to 5 should therefore be interpreted in a way that preserves these traditional rules and not in a way that changes them.

151. *9 to 5 Fashions*, 538 So. 2d at 234. See *Yarbrough v. Fed. Land Bank Ass'n of Jackson*, 616 So. 2d 1327 (La. App. 2d Cir. 1993) (justification not an affirmative defense; lack of justification an element of plaintiff's cause of action).

152. *Gulf South Bus. Sys. and Consultants, Inc. v. La. Dept. of Environmental Quality*, 625 So. 2d 697 (La. App. 1st Cir. 1993) (defendant lessee's request that lessor purchase certain office equipment for leased premises from one vendor rather than another was neither intentional nor unjustified interference with vendor's contract); *Belle Pass Terminal, Inc. v. Jolin, Inc.*, 618 So. 2d 1076 (La. App. 1st Cir.), *writ denied*, 626 So. 2d 1172 (1993) (no cause of action for tortious interferences because no privity of contract); *First Downtown Dev. v. Cimochowski*, 613 So. 2d 671 (La. App. 2d Cir.), *writ denied*, 615 So. 2d 340 (1993) (no interference cause of action stated against president of lessor medical corporation who caused his corporation to breach its three-year office lease because of president's decision to move his medical practice to another state); *Hampton v. Live Oak Builders, Inc.*, 608 So. 2d 225 (La. App. 5th Cir. 1992) (no 9 to 5 claim stated against officer of corporate contractor that was alleged to have constructed defective house; any interference alleged was privileged under 9 to 5); *Carter v. Smith*, 607 So. 2d 6 (La. App. 2d Cir. 1992) (uninjured driver who alleged that she had been fired because of an accident involving her car and a negligently-operated school bus was effectively seeking recovery for negligent interference with contract, a theory that had been rejected by 9 to 5); *Lewis v. Aluminum Co. of Am.*, 588 So. 2d 167 (La. App. 4th Cir. 1991), *writ denied*, 592 So. 2d 411 (1992), criticized and distinguished); *Green v. Beauregard Fed. Sav. Bank*, 604 So. 2d 1351 (La. App. 3d Cir.), *writ denied*, 608 So. 2d 153 (1992) (bank officers' administration of loan commitment by bank to real estate developer was justified within the meaning of that term in 9 to 5; jury's verdict that officers had tortiously interfered with loan commitment contract between bank and developer was manifestly erroneous); *Greene v. Roy*, 604 So. 2d 1359 (La. App. 3d Cir.), *writ denied*, 607 So. 2d 544 (1992) (9 to 5 did not lift traditional bar against claim for alienation of affection or create a cause of action for tortious interference with the contract of marriage); *Korson v. Independence Mall I, Ltd.*, 595 So. 2d 1174 (La. App. 5th Cir. 1992) (agent/officers of lessor who commenced eviction proceedings against lessees did not tortiously interfere with lease; officers were justified in their actions by lessees' admitted breaches of the lease); *Everything on Wheels Subaru, Inc. v. Subaru South, Inc.*, 593 So. 2d 1269 (La. App. 1st Cir. 1991), *writ granted*, 594 So. 2d 1305 (1992) (no 9 to 5 cause of action stated where complaint contained

no allegations that acts complained of were intentional, rather than negligent, and where plaintiff acknowledged in its brief that acts of interference did not affect an existing contract); *Lynn v. Berg Mechanical, Inc.*, 582 So. 2d 902 (La. App. 2d Cir. 1991) (alleged interference by corporate officers with employment of corporate employee was not alleged to have been the cause of the loss of its job, so no 9 to 5 claim was stated, and 9 to 5 did not create a cause of action for interference by corporate officers with efforts of former corporate employee to find another job); *Chaffin v. Chambers*, 577 So. 2d 1125 (La. App. 1st Cir.), *rev'd*, 584 So. 2d 665 (1991) (intermediate appellate court could not recognize tortious interference claim by one lawyer against another lawyer who was alleged to have induced personal injury client to fire first lawyer and to hire the second, as supreme court had exclusive power to regulate the legal profession); *Butler v. Reeder*, 573 So. 2d 1159 (La. App. 5th Cir. 1991) (9 to 5 did not create cause of action for intentional interference with contract of marriage); *Frisard v. Eastover Bank for Sav.*, 572 So. 2d 343 (La. App. 5th Cir. 1990) (allegations that bank had been negligent in notifying tenant that leased property was to be seized by bank did not state cause of action under 9 to 5 for interference with contract between landlord and tenant; negligent interference with contract was not recognized as a tort); *Herbert v. Placid Ref. Co.*, 564 So. 2d 371 (La. App. 1st Cir.), *writ denied*, 569 So. 2d 981 (1990) (allegations of negligent drug testing by laboratory, causing termination of employment contract, did not state a cause of action under 9 to 5; negligent interference with contract was not recognized as a tort); *Spencer-Wallington, Inc. v. Service Merchandise, Inc.*, 562 So. 2d 1060 (La. App. 1st Cir.), *writ denied*, 567 So. 2d 109 (1990) (reading 9 to 5 in a rather odd way—that the source of an officer's duty to a third party was his fiduciary relationship to corporation, and finding no such duty was owed by a purchaser of a corporation to a corporate supplier to refrain from causing the corporation to breach its pre-existing contract with the supplier); *Tallo v. Stroh Brewery Co.*, 544 So. 2d 452 (La. App. 4th Cir.), *writ denied*, 547 So. 2d 355 (1989) (brewery owed no duty to prospective purchaser of beer distributor not to act unreasonably in withholding its consent to the proposed transfer of ownership); *Farrell v. Boyer*, 541 So. 2d 398 (La. App. 4th Cir. 1989) (9 to 5 did not provide a basis for overruling the Louisiana rule against recognizing a cause of action for alienation of wife's affections). Even the supreme court itself, in an opinion by Justice Dennis, the author of the 9 to 5 decision, has declined the invitation to expand 9 to 5 to impose new duties as between primary and excess insurers. *Great Southwest Fire Ins. Co. v. CNA Ins. Cos.*, 557 So. 2d 966 (La. 1990) (no duty of reasonable care, or even of good faith, owed by primary insurer to excess insurer).

But see *Neel v. Citrus Lands of La., Inc.*, No. 93-CA-1366, 1993 WL 521208 (La. App. 4th Cir. Dec. 16, 1993) (narrow reading of 9 to 5 rejected; alleged intentional interference with plaintiff's employment by another company stated a cause of action); *WKG-TV Video Electronic College, Inc. v. Reynolds*, 618 So. 2d 1023 (La. App. 1st Cir. 1993) (affirming tortious interference judgment against corporate officer and shareholder who "manufactur[ed] reasons" to postpone sale of corporate business to one buyer, due to higher offer from another buyer); *Yarbrough v. Federal Land Bank Ass'n of Jackson*, 616 So. 2d 1327 (La. App. 2d Cir. 1993) (cause of action stated against bank officer for alleged interference with former bank debtor's contractual rights of first refusal on land earlier *dationed* to bank); *Constance v. Jules Albert Constr., Inc.*, 591 So. 2d 1238 (La. App. 4th Cir. 1991), *writ denied*, 597 So. 2d 1030 (1992) (successor to mortgagor of condominium property stated a cause of action under 9 to 5 against corporate officer of corporate mortgagee where he alleged that the mortgagee's officer had notified prospective purchasers of his condominium that the corporate mortgagee would exercise approval rights over their purchase of the condominium, even though the mortgagee had no such rights under the terms of the mortgage; *Stroh*, 544 So. 2d 452, distinguished); *Colbert v. B.F. Carvin Constr. Co.*, 600 So. 2d 719 (La. App. 5th Cir.), *writ denied*, 604 So. 2d 1309, 1311 (1992) (no cause of action for negligent interference with contract, but under professional negligence theory, an architect may be liable to building contractor for damages caused to contractor by his reliance on architect's poorly-drawn plans and specifications); *Nehrenz v. Dunn*, 593 So. 2d 915 (La. App. 4th Cir. 1992) (employee stated cause of action under general negligence law against drug testing firm that was alleged to have negligently reported a positive result; 9 to 5 rejection of

hostility has been expressed through three different rules: first, that Louisiana still does not recognize the tort of negligent interference with contract,¹⁵³

negligent interference with contract was no bar to such suit); *Lewis*, 588 So. 2d 167 (although negligent interference with contract was not recognized as a tort under 9 to 5, prospective employee who alleged that his job opportunities and reputation had been injured by a drug-testing laboratory's negligent, and falsely-positive, urinalysis had stated a cause of action under general tort law principles of negligence; *Herbert*, 564 So. 2d 371, distinguished); *Jarrell v. Carter*, 577 So. 2d 120 (La. App. 1st Cir.), writ denied, 582 So. 2d 1311 (1991) (recognizing possible expansion of tortious interference law from narrow grounds recognized in 9 to 5, but avoiding direct consideration of 9 to 5 issue by treating the plaintiff's allegations of interference in negotiations for the purchase of beer distributorship as sufficient to a state cause of action for "unfair trade practices" under La. R.S. 51:1405). *But cf.* *Peacock v. Brightway Signs, Inc.*, 545 So. 2d 649 (La. App. 5th Cir.), writ denied, 551 So. 2d 636 (1989) (reversing judgment based on pre-9 to 5 law, and remanding for reconsideration in light of that case; nature of alleged tortious interference not reported).

153. *Carter*, 607 So. 2d 6; *Colbert*, 600 So. 2d 719; *Frisard*, 572 So. 2d 343; *Herbert*, 564 So. 2d 371. Despite the perceived reaffirmation of Louisiana's traditional bar against negligent interference suits, several well-reasoned post-9 to 5 cases have permitted recovery for what amounted to interference with contract caused by the negligence of the defendant. *See Colbert*, 600 So. 2d 719 (no cause of action for negligent interference with contract, but under professional negligence theory, an architect may be liable to building contractor for damages caused to contractor by his reliance on architect's poorly-drawn plans and specifications); *Nehrenz*, 593 So. 2d 915 (employee stated cause of action under general negligence law against drug testing firm that was alleged to have negligently reported a positive result; 9 to 5 rejection of negligent interference with contract was no bar to such suit); *Lewis*, 588 So. 2d 167 (although negligent interference with contract was not recognized as a tort under 9 to 5, prospective employee who alleged that his job opportunities and reputation had been injured by a drug-testing laboratory's negligent, and falsely-positive, urinalysis had stated a cause of action under general tort law principles of negligence). *But see Herbert*, 564 So. 2d 371 (allegations of negligent drug testing by laboratory, causing termination of employment contract, did not state a cause of action under 9 to 5; negligent interference with contract was not recognized as a tort).

These cases suggest that the purported "bar" against negligent interference suits may be overstated. What the rule against negligent interference suits really rejects is not the recovery of the contract-interference damages that may arise out of the negligence of a defendant (damages for lost earnings in a personal injury suit compensate the plaintiff for a particular type of contractual interference), but rather the supposition that a person is negligent merely because he fails to exercise care to protect all of the contractual interests of all other persons whose contracts may be affected by his behavior. The law does not impose a general duty to be careful to avoid damage to every contractual interest. But it may, and does, impose more narrow forms of duties to avoid injury to some interests of some persons under some circumstances. *See PPG Indus., Inc. v. Bean Dredging*, 447 So. 2d 1058 (La. 1984). *Cf. Barrie v. V.P. Exterminators, Inc.*, 625 So. 2d 1007 (La. 1993) (rejecting privity requirement in negligent misrepresentation action against termite inspector).

Thus, as indicated in the drug testing cases cited above, a duty is imposed by some courts on drug-testing firms to be careful in analyzing the urine samples submitted by the employees of the firm's clients. *Nehrenz*, 593 So. 2d 915; *Lewis*, 588 So. 2d 167. It seems appropriate to impose such a duty because it should be obvious to the testing firm that erroneously positive results might cost an employee his job and interfere with his future employment prospects. The employee is not in a position to negotiate adequate contractual protections against the losses that the testing firm's negligence might cause him, even though it is principally the employee who will suffer from a falsely-positive test result. Similarly, though perhaps less compellingly, it may be considered appropriate to impose a duty of care on an architect for economic losses caused to a contractor as a result of the architect's negligence in preparing his drawings and specifications. *Colbert*, 600 So.

second, that Louisiana still does not recognize the tort of alienation of affection, or tortious interference with a contract of marriage,¹⁵⁴ and, finally, that Louisiana still does not recognize a claim for tortious interference brought against a complete stranger to the contract; only where the defendant is an officer or agent of a corporation and has interfered with his own corporation's contract with the plaintiff will a 9 to 5 claim be recognized.¹⁵⁵

The last rule, allowing claims against officers of one of the contracting parties and rejecting claims against true third parties, produces something of an irony. And it is an irony that the supreme court did not likely intend. Under this interpretation of 9 to 5, Louisiana law now provides tortious interference protection *only* to those plaintiffs who have had the opportunity to negotiate contractual protections against the losses in question (e.g., to get security from the corporation or personal promises or guarantees from the controlling corporate officers). It denies protection to the very persons who would seem to need it most: those having no contractual relationship with the interfering party or with his employer, and so no opportunity to bargain for appropriate contractual protections. A recent Fourth Circuit decision rejected this narrow interpretation of 9 to 5,¹⁵⁶ but the narrow interpretation remains the majority view.

The privilege issue has received mixed treatment. In most cases, it has been used, like the three rules described above, to provide grounds for the rejection of a tortious interference claim.¹⁵⁷ In two cases, however, the privilege has been interpreted narrowly enough to allow the plaintiff to recover. In the first case, *Constance v. Jules Albert Construction, Inc.*,¹⁵⁸ an officer of a corporate mortgagee was held liable for causing his company to assert a purported right of approval on the sale of the mortgaged property. The court found that no such right of approval existed, and held that the officer was not privileged to cause his corporation knowingly to assert a right that it really did not possess.¹⁵⁹ In the

2d 719. The architect knows that the contractor is going to have to rely on those drawings in constructing the building, even though, in practice, the architect will typically be in privity of contract only with the owner of the project. The torts recognized in these sorts of cases should be viewed as particular forms of professional malpractice, where courts recognize the inadequacies of purely contractual protections. These cases should not be interpreted as imposing a general duty of care on all persons to avoid interference with all of the contractual interests of all other persons.

154. *Greene*, 604 So. 2d 1359; *Butler*, 573 So. 2d 1159; *Farrell*, 541 So. 2d 398.

155. *Belle Pass Terminal*, 618 So. 2d 1076; *Spencer-Wallington, Inc.*, 562 So. 2d 1060; *Tallo*, 544 So. 2d 452. *But see Neel*, slip op. 93-CA-1366, 1993 WL 521208 (cause of action stated despite lack of privity).

156. *Neel*, slip op. 93-CA-1366, 1993 WL 521208.

157. *Hampton*, 608 So. 2d 225; *Green*, 604 So. 2d 1351; *Korson*, 595 So. 2d 1174.

158. 591 So. 2d 1238 (La. App. 4th Cir. 1991), *writ denied*, 597 So. 2d 1030 (1992).

159. *Id.* at 1239. It is not clear whether the court was holding the officer liable merely because the officer knew that he was imposing the purported contractual requirement, or because he knowingly imposed the requirement when he knew that the requirement did not exist. At a minimum, the latter should be required. An officer should be able to take a position on the legal rights of his corporation, deliberately but in good faith, and to take steps to enforce that position without risking tort liability if the position is later rejected by a court.

second case, *WKG-TV Video Electronic College, Inc. v. Reynolds*,¹⁶⁰ an officer caused his corporation to begin asserting excuses (later determined to be unjustified) for terminating a contract with a buyer of the corporation's video college, so that the college could be sold to another buyer at a higher price.¹⁶¹ The court held that the officer had no privilege under 9 to 5 to act "fraudulently or unethically,"¹⁶² and affirmed the trial court's imposition of liability.¹⁶³

It is impossible to tell from the language of the first of these two "narrow privilege" cases, *Constance*, whether the officer was simply taking a position, deliberately but in good faith, concerning his corporation's legal rights, or whether he was acting in bad faith, as the court concluded about the officer in the second case. However, some of the language used in *Constance* suggests that the court may have been confusing the question of whether the corporation was "justified" in its actions, in the sense of complying with its contractual rights, with whether the officer was "justified" in the sense required to treat his conduct as privileged under 9 to 5.

These two concepts, justified corporate conduct and justified behavior by the officer, must not be confused if the 9 to 5 privilege is to serve any purpose. To say that a corporation's conduct in connection with its contract was not contractually justified is just another way of saying that the corporation breached its contract. If a simple corporate breach of contract were enough to impose liability on the responsible officer under 9 to 5, the 9 to 5 privilege would be worthless. Without a breach, the privilege would be unnecessary and with a breach the privilege would not apply. The purpose of the 9 to 5 privilege is not to protect an officer's actions where no breach has occurred, but to give to corporations, acting through their officers, the same ability to take legal positions concerning their contractual rights and duties, and even the same ability to breach their contracts, as other persons have. Under the *Constance* interpretation, this purpose would be frustrated. An officer would be encouraged to sacrifice his corporation's interests to those of a third party in order to avoid personal exposure to tort liability. The *Constance* interpretation of the 9 to 5 privilege thus seems erroneous and should be rejected.

The second of the narrow privilege cases, *Reynolds*, poses a more difficult question than *Constance*. In *Reynolds*, the court concluded that the defendant officer was deliberately and dishonestly "manufacturing reasons" to block a sale of property that his corporation was contractually obliged to carry out, so that the same property could be sold to a second buyer at more than twice the first buyer's price. *Reynolds* thus posed the question whether the 9 to 5 privilege would protect even the bad faith conduct of a corporate officer as long as that conduct was carried out in accordance with the officer's authority, and in the

160. 618 So. 2d 1023 (La. App. 1st Cir. 1993).

161. *Id.* at 1025-26.

162. *Id.* at 1027.

163. *Id.*

reasonable belief that the conduct was in the best interests of the corporation. The literal language of *9 to 5* would seem to say yes, yet it is easy to see why the *Reynolds* court might have had trouble with that interpretation. The separate personality of the corporation has never protected corporate officers against liability for their own personal fraud,¹⁶⁴ and the conduct of the officer in this case was at least unethical, if not fraudulent.

Reynolds purported to follow *9 to 5*, but actually had little in common with that case. *9 to 5* had posited a tort in which a corporate officer would deliberately cause his corporation to breach one of its contracts even though the breach was not in the best interests of the corporation. How such a situation might actually occur in practice the court did not say,¹⁶⁵ but presumably the interfering officer would be motivated by some personal motive of pecuniary gain, by unlawful prejudice, or by personal animosity toward the corporate obligee that was not justified by any legally cognizable¹⁶⁶ corporate interest.¹⁶⁷ In these types of cases, the *9 to 5* privilege would not apply because the

164. La. R.S. 12:95 (1969); *Lone Star Indus., Inc. v. American Chem., Inc.*, 461 So. 2d 1063 (La. App. 4th Cir. 1984), *aff'd*, 480 So. 2d 730 (1986).

165. Absent some sort of kickback or other self-dealing arrangement, it seems fairly unlikely that very many corporate officers are going to interfere with their corporation's contracts without thinking that they have a pretty good corporate reason for doing so. Few officers are going to risk sacrificing their own careers merely to gain the satisfaction of seeing some corporate obligee suffer. Hence, unless *9 to 5* was designed to repeal the business judgment rule (and to call on courts to begin second-guessing disinterested business decisions by corporate managers), it seems unlikely that very many situations actually will arise in which the contract-interfering acts of the corporate officer ought not be considered privileged in the sense required by *9 to 5*. *But see infra* note 167.

166. An officer might have some animosity toward some ethnic group because of an honestly-perceived, but socially-condemned, prejudice about their work ethic or honesty. In the officer's mind, these might appear to be legitimate corporate interests, but legally they are not likely to be acceptable as justifications for contract interference.

167. For a collection of cases involving alleged tortious interference by corporate officers or agents with their own corporations' contracts, see 72 A.L.R. 4th 492 (1989). Most of these cases involve efforts by fired employees to sue their supervisors for interfering with their contracts of employment with their companies. Most such efforts are unsuccessful, at least in the reported cases, but a fair number are not. Several cases have imposed liability (or at least have refused to grant dismissal or summary judgment for the defendants) where corporate officers have fired employees for refusing to submit to sexual advances (*Lewis v. Oregon Beauty Supply Co.*, 733 P.2d 430 (Or. 1987); *Tash v. Houston*, 254 N.W.2d 579 (Mich. Ct. App. 1977)), for refusing to commit perjury or to destroy evidence (*Borecki v. Eastern International Management Corp.*, 694 F. Supp. 47 (D.N.J. 1988); *Favors v. Alco Mfg. Co.*, 367 S.E.2d 328 (Ga. Ct. App. 1988); *Troy v. Interfinancial, Inc.*, 320 S.E.2d 872 (Ga. Ct. App. 1984)), for reporting violations of law or company policy to the appropriate officials (*Haupt v. International Harvester Co.*, 582 F. Supp. 545 (N.D. Ill. 1984); *Mailhoit v. Liberty Bank & Trust Co.*, 510 N.E.2d 773 (Mass. App. Ct. 1987)), or even for firing the employee because of personal animosity or malice, a deteriorated friendship, or for other reasons considered legally insufficient (*Morriss v. Coleman Co., Inc.*, 738 P.2d 841 (Kan. 1987); *Presto v. Sequoia Systems, Inc.*, 633 F. Supp. 1117 (D. Mass. 1986); *Wagenseller v. Scottsdale Memorial Hosp.*, 710 P.2d 1025 (Ariz. 1985); *Stanfield v. National Elec. Contractors Ass'n*, 588 S.W.2d 199 (Mo. Ct. App. 1979); *King v. Schaeffer*, 154 S.E.2d 819 (Ga. Ct. App.), *aff'd*, 155 S.E.2d 815 (1967)).

law would have no interest in protecting the officer's freedom to make self-interested decisions that were harmful to a corporate obligee, yet not lawfully beneficial to the corporate obligor either.

However, the 9 to 5 theory did not fit the facts in *Reynolds*. It was clear in *Reynolds* that the actions of the corporate officer were enormously beneficial both to the corporation and to the corporate officer, and that the corporate officer, as 60% shareholder of the company, had the power to authorize himself to do what he did. It may well be that this type of behavior should be condemned, but 9 to 5 did not condemn it. 9 to 5 proscribed contract interference that was not authorized or not reasonably thought to be in the best interest of the corporation, where the corporation's interests truly were separate and distinct from those of the interfering officer. *Reynolds* dealt with interference that was unquestionably authorized¹⁶⁸ and undoubtedly beneficial,¹⁶⁹ where

Tortious interference doctrine in the corporate employment context serves as a limitation on the traditional employment-at-will doctrine, for a corporation can fire a person only through the acts of its agents. Unless a corporate employer wishes to have its supervisors afraid of firing people, the employer is going to have to indemnify its supervisors when they are sued for "interfering" with the fired person's employment contract with the company. And unless the employer wishes to make a lot of indemnity payments, it is going to have to provide instructions to the supervisors on how to avoid such suits. As a practical matter, therefore, the tortious interference suits put pressure on employers and supervisory employees not to exercise the rights that they are supposed to have under the employment-at-will doctrine, but rather to make employment decisions that can be defended under the tortious interference "privilege" that is granted to corporate officers and agents. Tortious interference doctrine thus gives to the corporation, acting through its supervisory agents, the "privilege" to fire people, not at will, but only to the extent that the firings can be justified as reasonable business decisions by the agents.

Whether tortious interference doctrine will serve this sort of function in Louisiana is difficult to say, but it would seem more appropriate to revisit the employment-at-will doctrine openly than to back into limitations on the doctrine by imposing personal liability on supervisory corporate employees. *But cf. Neel*, slip op. 93-CA-1366, 1993 WL 521208 (refusal to allow fired employee on former employer's property could constitute tortious interference with employee's job with another employer where the other employer required access to that property).

Outside the employment context, most of the reported decisions are 9 to 5-style cases in which some corporate obligee has tried, unsuccessfully, to attach personal liability to a corporate officer who found it in the best interest of the corporation to cause his company to do business with someone else. Occasionally, however, the plaintiff has won or at least has been successful in avoiding dismissal or summary judgment for the defendant. *See Olympic Fish Prods., Inc. v. Lloyd*, 611 P.2d 737 (Wash. 1980) (50% corporate shareholder liable for shifting corporation's sales from one customer to another to obtain a higher price for the corporation's products); *Chanay v. Chittenden*, 563 P.2d 287 (Ariz. 1977) (insurance company vice president alleged to have terminated agent's contract with company so that the vice president could take over his business); *McIntosh v. Magna Sys., Inc.*, 539 F. Supp. 1185 (N.D. Ill. 1982) (malicious amendment of corporate articles to eliminate plaintiff's stock options). Most of these cases, like the *Reynolds* case discussed in the text, might be better analyzed under a veil-piercing or personal fraud theory, for the tortious interference theory is used in these cases to prevent conduct that is beneficial to both the corporation and to the controlling shareholder(s) of the corporation, something that the 9 to 5-type of privilege is supposed to allow.

168. Although formal defects might have been found in the majority shareholder's authority (the opinion does not mention any board resolution authorizing his conduct), these defects would indeed

the corporation's interests very much coincided with the interests of the corporate officer.¹⁷⁰ The gravamen of the 9 to 5 tort was intentional interference by a corporate officer with a corporate contract, where the interference was not justified by some reasonably perceived corporate interest. The gravamen of the *Reynolds* tort was dishonest and unethical personal behavior by a controlling corporate shareholder that was so far beyond the bounds of propriety that it could not be justified by the mere fiction that it was done for the benefit of someone else, the dishonest shareholder's own 60%-held company.

Reynolds actually had much more in common with Louisiana's traditional forms of veil-piercing and personal fraud cases than it did with the tortious interference analysis used in 9 to 5. Long before 9 to 5 was decided, Louisiana courts were already imposing personal liability on the shareholders of closely-held corporations for the type of behavior described in *Reynolds*.¹⁷¹ *Reynolds* is better understood as yet another example of these traditional decisions. As a tortious interference decision, it seemed erroneous. Had the 9 to 5 privilege actually been respected, *Reynolds* would have reached the opposite result. As decided, it appeared to reach the right result for the wrong reason.

2. The Effects of 9 to 5

Read narrowly, 9 to 5 proscribed a type of conduct that is not likely to occur very often in practice. It is a type of conduct that has yet to be found in any reported Louisiana decision.¹⁷² It seems unlikely that it was concern over this

be strictly formal. There could be no real doubt that the 60% shareholder ultimately had the power to authorize himself to do exactly what he did (by electing the necessary directors and having them adopt the appropriate resolution), nor any real doubt that what he did was beneficial to the corporation.

169. By causing the corporation to breach its contract with the first buyer, and by causing it to sell its property to the second buyer instead, the corporate officer got for his company more than double the price that had been promised to it in the first contract.

170. The 9 to 5 corporation was an enormous 200-director nonprofit company that was set up to operate the 1984 World's Fair in New Orleans. The *Reynolds* corporation was a relatively small company, owned 60/40 by just two individuals. In 9 to 5, the collective interests of the World's Fair participants did not overlap with those of the defendant officer, except to the extent that the officer would enhance his reputation by doing a good job. In *Reynolds*, there was a very great overlapping of interests; the officer would enjoy 60% of any profits made by the company, and would suffer 60% of any loss, up to the amount of his investment.

171. *Terry v. Guillory*, 538 So. 2d 317 (La. App. 3d Cir. 1989); *Egudin v. Carriage Court Condominium, Dehrvill Group, Inc.*, 528 So. 2d 1043 (La. App. 5th Cir.), writ denied, 532 So. 2d 136 (1988); *Lone Star Indus., Inc. v. American Chem., Inc.*, 461 So. 2d 1063 (La. App. 4th Cir. 1984), aff'd, 480 So. 2d 730 (1986); *Dolose Concrete Co. v. Tessitore*, 357 So. 2d 869 (La. App. 1st Cir.), writ denied, 359 So. 2d 620, 623 (1978); *Smith-Hearron v. Frazier, Inc.*, 352 So. 2d 263 (La. App. 2d Cir. 1977), writ denied, 353 So. 2d 1337 (1978); *Altex Ready-Mixed Concrete Corp. v. Employers Commercial Union Ins. Co.*, 308 So. 2d 889 (La. App. 1st Cir.), writ denied, 312 So. 2d 872 (1975).

172. Some courts outside Louisiana have imposed tortious interference liability on corporate officers under facts similar to those in *Reynolds*. See *Olympic Fish Prods., Inc. v. Lloyd*, 611 P.2d

rather narrow, unlikely type of misconduct that prompted the 9 to 5 decision. Something more important seemed to be at stake, namely, a fresh start in the Louisiana jurisprudence concerning tortious interference with contract. The common law on the subject was not to be adopted whole and undigested, but neither was the old absolute bar to be used to block all reasoning on the subject. Starting with the unfortunately peculiar facts of 9 to 5, the supreme court was going to lift the old absolute bar, and invite further development in the law.

But if 9 to 5 was indeed an invitation to further developments, most lower courts have declined the invitation. It appears that they were happy enough with the simplicity and certainty that was provided by the old absolute bar. One judge has candidly acknowledged that the supreme court probably had something a little broader in mind in rendering the 9 to 5 decision, but has nevertheless refused to speculate on what that broader something might have been: "If the [tortious interference] cause of action is to be expanded [beyond the 9 to 5 type of case] I consider it to be the Supreme Court's function to do so and not ours as an intermediate appellate court."¹⁷³ With few exceptions, the federal courts have been equally cautious. Most have refused to guess what Louisiana law might be on this subject beyond the narrow confines of 9 to 5 itself.¹⁷⁴ They

737 (Wash. 1980) (50% corporate shareholder liable for shifting corporation's sales from one customer to another to obtain a higher price for the corporation's products). These cases are subject to the same sort of criticism as *Reynolds* itself: they use tortious interference analysis where the issue is more one of veil-piercing or personal fraud.

173. *Tallo v. Stroh Brewery Co.*, 544 So. 2d 452, 455 (La.App. 4th Cir.) (Schott, J., concurring), writ denied, 547 So. 2d 355 (1989). But see *Neel*, slip. op. 93-CA-1366, 1993 WL 521208 (rejecting narrow interpretation of 9 to 5).

174. *Junior Money Bags, Ltd. v. Segal*, 970 F.2d 1 (5th Cir. 1992) (dictum approving of district court's unappealed dismissal of tortious interference claim; proper to interpret 9 to 5 restrictively); *American Waste & Pollution Control Co. v. Browning-Ferris, Inc.*, 949 F.2d 1384 (5th Cir. 1991) (interpreting 9 to 5 as applying only to officer's interference with their own corporation's contracts, and refusing to allow "unfair trade practices" theory as substitute for tortious interference theory; *Jarrell v. Carter*, 577 So. 2d 120 (La. App. 1st Cir. 1991) distinguished); *Ingraffia v. NME Hosps., Inc.*, 943 F.2d 561 (5th Cir. 1991) (rejecting tortious interference claim by radiologist against officers of hospital corporation because the "extremely limited circumstances" of 9 to 5 did not exist); *Oreman Sales, Inc. v. Matsushita Elec. Corp. of Am.*, 768 F. Supp. 1174 (E.D. La. 1991) (no tortious interference claim stated under Louisiana or New York law); *Matrix Essential, Inc. v. Emporium Drug Mart, Inc.*, 756 F. Supp. 280 (W.D. La. 1991) (9 to 5 applied only to interference by officer with his own corporation's contract); *Nowling v. Aero Servs. Int'l, Inc.*, 752 F. Supp. 1304 (E.D. La. 1990) (9 to 5 interpreted narrowly, did not extend to interference with one's own contract; contractual obligation of best efforts created no specific contractual or juridical rights with which a third party could interfere, and directors of contracting corporation were entitled to cause corporation not to deal with plaintiff); *Union Sav. Am. Life Ins. Co v. North Cent. Life Ins. Co.*, 813 F. Supp. 481 (S.D. Miss. 1993) (narrow interpretation, rejecting claim); *MedX, Inc. v. Ranger*, 1993 WL 21250 (E.D. La. 1993) (same); *International Marine & Indus. Applicators, Inc. v. Avondale Indus., Inc.*, 1992 WL 193550 (E.D. La. 1992) (same); *Powers v. Carlisle Corp.*, 1992 WL 165636 (E.D. La. 1992) (same); *Radiophone, Inc. v. Pricellular Corp.*, 1992 WL 124389 (E.D. La. 1992) (same); *Walle v. Polymer Devel. Lab., Inc.*, 1991 WL 195492 (E.D. La. 1991) (same); *SMP Sales Management, Inc. v. Fleet Credit Corp.*, 1991 WL 349564 (W.D. La. 1991) (same), *aff'd*, 960 So. 2d 557 (5th Cir. 1992) (affirmed on prescription grounds, but also approving of dismissal on merits); *Popeyes, Inc. v.*

are taking the *9 to 5* decision literally, and they are declining to take any further steps in the tortious interference field without first acquiring some more guidance from the supreme court.¹⁷⁵ The old absolute bar against tortious interference suits thus stands virtually intact in nearly all the cases in which it is relevant.

It is difficult to say at this point that *9 to 5* was a landmark case. So far, the decision has succeeded only in producing a large number of new appellate decisions that say tortious interference suits are *almost* never to be recognized in Louisiana. The real impact of *9 to 5* seems to be the encouragement it has provided to litigants to include tortious interference claims in the suits that they file. This renewed attention may eventually produce a case that allows the supreme court to endorse a broader, more useful version of tortious interference theory than the one approved in *9 to 5* itself. If so, then *9 to 5* will have made an important impact on the development of the law. It may still not merit attention as a landmark in its own right, but at the very least it will have to be recognized as the case that made the landmark decision possible.

VII. CONCLUSION

Corporate veil-piercing gets the lion's share of the attention in writings that discuss the personal liability of corporate investors and managers, but veil piercing is not the theory that produces the lion's share of liability. Most of the liability that is reported in the jurisprudence arises out of the personal behavior of a corporation's active shareholders and officers, and not out of a disregard of the corporation's separate personality.

The separate personality of a corporation is important only in protecting a shareholder against the liability that would otherwise arise out of the shareholder's status as an owner of the business. If ownership alone is not the source of the shareholder's liability, then the separate personality theory has little application. The separate personality of a corporation can no more protect a shareholder against liability for the shareholder's own personal conduct than can the separate existence of his mother, spouse, or neighbor. If the shareholder personally commits a tort or personally signs a contract without disclosing his agency, he becomes personally liable without regard to whether some other person, either his corporation or his neighbor, happens to exist.

The main source of the "limited liability"¹⁷⁶ of corporate officers, agents, and employees, is not corporation, but agency law. If its rules are followed

YCALWB, Inc., 1989 WL 145979 (E.D. La. 1989) (claim rejected).

But see Huggs, Inc. v. LPC Energy, Inc., 889 F.2d 649 (5th Cir. 1989) (holder of overriding interest in mineral lease could recover in tort law for negligence of operator in losing the lease, even though royalty owner was not in privity of contract with the operator); Eastover Corp. v. Rhodes, 1992 WL 245568 (E.D. La. 1992) (denying motion to dismiss tortious interference claim, even though facts alleged were outside those described in *9 to 5*).

175. *Id.*

176. Actually, the liability is not limited; it simply does not exist, period.

properly, agency law does permit one person to engage in juridical acts in the name and on behalf of another (regardless of whether this other person is a human being or a corporation) and to avoid personal responsibility for those acts. Personal exposure arises when the agent has violated some rule of agency law (or has personally guaranteed the obligation) or when the liability in question does not arise merely from the juridical act of the principal. If the agent has committed a tort personally, then absent some special form of immunity, the agent will be personally liable for the resulting damages. Agency law does not provide some broad grant of tort immunity to agents, nor otherwise protect them from personal liability for their own tortious conduct.

The most difficult cases to decide are those in which an agent is said to owe some sort of tort duty to cause his principal to perform the juridical obligations that agency law would say are not binding on the agent. A few cases, confusing contract and tort law, have indeed imposed a form of tort obligation on an agent to see to it that his principal performs its contracts. The supreme court has recognized a narrow version of this sort of duty—the duty of a corporate officer not to interfere intentionally and unjustifiably with the contracts of his corporation—but in recognizing this narrow duty has seemed also to overrule the earlier, broader line of “tortious breach” cases. Under the more recent supreme court guidance, a corporate officer is not to be held liable for his corporate principal’s failure to perform its contract unless the officer has intentionally and unjustifiably interfered with the corporation’s efforts to perform.

Although much is written on the subject, corporate veil-piercing explains only part of the cases in which a corporate participant is held personally liable in connection with his corporation-related activities. Conversely, the recognition of a separate corporate personality explains only part of the cases in which active corporate participants are protected from liability. This article was written as a follow-up to an earlier veil-piercing discussion¹⁷⁷ in an effort to help complete the picture.

177. Morris, *supra* note 1.

