FDIC v. Mmahat and Mmahat & Duffy: Is Forewarned Forearmed?

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NOTES

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INTRODUCTION

As the estimated cost to the taxpayer of the savings and loan debacle continues to grow, courts search not only for the deep pocket to help absorb the cost, but also for a villain on whom to lay the blame. The Wall Street Journal recently reported that U.S. District Court Judge Stanley Sporkin, a federal judge in the D.C. Circuit, blamed much of the publicized failure of the Lincoln Savings and Loan on lawyers. According to the article, the Office of Thrift Supervision (OTS), one of the successor agencies to the Federal Savings and Loan Insurance Corporation (FSLIC),1 “plans to make enforcement actions against lawyers—and other professionals, such as accountants, hired by thrifts—a high priority in coming months.”2

As of March, 1989, the FSLIC had filed or been involved in 100 cases against more than 1500 defendants, including officers, directors, and other professionals, seeking damages of more than seven billion dollars for fraud and misconduct.3 By November, 1990, with 505 in-

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1. See Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989) [hereinafter FIRREA], Sections 401(a)(1) and 401(a)(2) abolished both the Federal Savings and Loan Insurance Corporation (FSLIC) and the Federal Home Loan Bank Board (FHLBB) and established the Office of Thrift Supervision (OTS) and the Resolution Trust Corporation (RTC). The FSLIC had been the insurer for federally insured savings and loans (S&Ls). The FHLBB was the supervisory agency for the S&Ls, and alone was authorized to appoint the FSLIC as receiver when an S&L could no longer meet its liabilities or obligations (the OTS took over these duties under FIRREA). Five grounds for appointment of receiver or conservator are outlined in 12 U.S.C. § 1464(d)(6)(A): 1) insolvency; 2) dissipation of assets as the result of unsafe or unlawful practices; 3) unsafe or unsound condition to transact business; 4) deliberate violation of a cease and desist order; and 5) concealment of books or refusal to submit books to examination.

The FSLIC was the original plaintiff; however, the FDIC was substituted as the party in interest when the FSLIC was abolished in 1989. FDIC will be used throughout this note in place of FSLIC.


vestigations underway by the Resolution Trust Corp. (RTC), about one-third were expected to be professional liability claims against lawyers.4

The case of FDIC v. Mmahat5 deals with many of the collateral issues which are likely to arise in future months in actions for legal malpractice and breach of fiduciary duties brought by the FDIC against attorneys based on their relationship to failed S&Ls. Mmahat may serve as a warning to attorneys that the trend of the past decade of increased actions against attorneys for legal malpractice promises to continue and that the scope and availability of insurance coverage for liability continues to diminish.6 It also calls into doubt whether or not law partnerships or legal corporations actually enjoy the freedom from liability they believe they have.

This note will examine the facts of Mmahat, exploring both the published opinion and additional background information not included therein; briefly discuss legal malpractice generally; analyze the Mmahat court’s use of the doctrine of contra non valentem; and consider the insurance indemnity claims of the law firm of Mmahat & Duffy. In doing so, this note will consider alternative analyses using Louisiana statutes and jurisprudence. Finally, this note will examine some of the ramifications of this decision as it now stands and what steps attorneys and their law firms may take to avoid in the future the type of liability that the firm of Mmahat & Duffy encountered here.

BACKGROUND

Before discussing specific issues of Mmahat, it may be helpful to consider some background information. John Mmahat helped found Gulf Federal Savings and Loan in Metairie, Louisiana, in the 1960’s. He was associated with various law firms over the years, the most recent of which was the partnership of Mmahat & Duffy. Each of these successive law firms handled the legal aspects of Gulf Federal’s real estate transactions,7 but Gulf Federal employed a Washington, D.C. firm

5. 907 F.2d 546 (5th Cir. 1990).
6. See Goldfein, Legal Malpractice Insurance, 61 Temp. L.Q. 1285 (1988). According to Goldfein, legal malpractice insurance premiums increased dramatically in the mid 1980’s, between 400% and 1500%, while the actual coverage offered decreased. This premium increase corresponded with an increase in malpractice claims against attorneys in the 1970’s amounting to four times the number reported during the 1960’s. Reductions in coverage have been evidenced by increased deductibles, reduced limits, and increased exclusions.
7. Brief of Appellee/Cross Appellant New England Insurance Co. at 6, FDIC v. Mmahat, 907 F.2d 546 (5th Cir. 1990) (no. 89-3160) (hereinafter Appellee’s Brief, New England). Mmahat & Duffy received fees from Gulf Federal borrowers as a result of
for advice on regulatory matters. John Mmahat served as Chairman of the Board of Gulf Federal for the six years prior to its closure by the Federal Savings and Loan Insurance Corporation (FSLIC) in 1986. Most of Gulf Federal's business was in residential loans until 1982, when, faced with a failing S&L industry, the federal government passed the Garn-St. Germain Act, which eased restrictions on S&Ls, permitting their entry into the business of commercial lending. The Federal Home Loan Bank Board (FHLBB), which preceded the FDIC, and which was the administering agency for the federally insured S&Ls, limited the amount of money which could be loaned to any one borrower or to any group of affiliated borrowers. These limits are referred to as "loans to one borrower limits" (LTOB).

The Gulf Federal Board of Directors had reason to believe that the FHLBB was overlooking loans in excess of these limits, known as overline loans. Gulf Federal, therefore, exceeded these limits in its handling loan closings for Gulf Federal. These fees were the largest source of income of Mmahat & Duffy, amounting to over five million dollars for the period of 1980 to 1985. Mmahat received 70-80% of the net income of the law partnership although he was only a 60% partner. See also Appellee Brief on Behalf of John Mmahat and Mmahat and Duffy at 13, FDIC v. Mmahat, 907 F.2d 546 (5th Cir. 1990) (no.89-3160) [hereinafter Appellee's Brief, Mmahat]. The FSLIC entered into a court sponsored stipulation to the following:

During the time period relevant to these proceedings, it was a common practice in the Louisiana community for lending institutions to have close affiliations with a law firm from which the law firm obtained a large percentage of its legal fees. It was a common practice during the time period relevant to these proceedings for the borrowers from lending institutions to pay such law firms a fee of one percent of the loan amount for title examination services or title insurance policies.


10. The FSLIC and the FHLBB were abolished by FIRREA of 1989. The FDIC stepped into the shoes of the FSLIC including for purposes of pursuing any ongoing litigation. See supra note 1.

11. Brief of the Federal Deposit Insurance Corporation as Manager of the FSLIC Resolution Fund, as Appellant with Respect to New England Insurance Company at 8, 9, FDIC v. Mmahat, 907 F.2d 546 (5th Cir. 1990) (no. 89-3160) [hereinafter FDIC Appellant's Brief]. The FHLBB restricted federally insured S&Ls to a maximum loan to one borrower of the S&L's net worth or 10% of its withdrawable accounts. For Gulf Federal and other institutions of low or negative net worth, the LTOB limit was a maximum of $500,000 as of May 23, 1983. Prior to 1983 the maximum was set at $200,000.

12. Appellee's Brief, New England, supra note 7, at 5. Joe Mmahat, president of Gulf Federal and brother of John Mmahat, attended a seminar sponsored by the FHLBB where the policy was expressed that the FHLBB was forebearing on enforcement of the LTOB limits. This information, coupled with the delays of four to eight months in
effort to increase profitability. Gulf Federal had an interest in making overline loans and would have benefitted from them had they not gone into default. It could have appeared that Mmahat had the financial welfare of Gulf Federal in mind by ignoring these limits and that he relied on his business judgment, as a director, in making this decision. Further evidence of Mmahat’s interest in the welfare of Gulf Federal’s viability is the fact that Mmahat and others made a capital contribution of over 1.9 million dollars to Gulf Federal shortly before the takeover. In fact, Mmahat had reason to believe that regulators deliberately forbore in taking over Gulf Federal until this infusion of capital was completed.

Mmahat discussed Gulf Federal’s overline loans with the supervisory agent for the FHLBB, and, while the board of directors of Gulf Federal was instructed to bring the loan portfolio into compliance with these regulations, no effort was made by the FHLBB to force them to do so. Ironically, in 1985, one year before the FDIC filed this suit for malpractice, and while aware of the overline loans made by Gulf Federal, the FHLBB requested that Mmahat take over as chief executive officer. Mmahat retained that position until Gulf Federal’s closure in 1986.

Gulf Federal, like so many other S&Ls, failed. The FDIC took over as receiver of Gulf Federal and filed suit against the officers and directors of Gulf Federal, an architectural firm, an advertising firm, an

responding to Gulf Federal’s inquiries regarding their plan to gradually phase out loans in excess of LTOB limits, led the Gulf Federal board to believe the FHLBB was, indeed, exercising forbearance.

13. The law firm of Mmahat & Duffy handled title transfers for Gulf Federal; the fees for this service were paid not by Gulf Federal, the lender, but by the debtor. Gulf Federal collected a three percent origination fee in addition to the interest paid over the term of the loan. At the time the loans were made, Mmahat apparently had every reason to believe they would be repaid as planned.


15. Id.

16. Appellee’s Brief, New England, supra note 7, at 12, 13. In 1983, a letter was issued by the supervisory agent for the FHLBB which noted that there were thirty-five loans over the LTOB limits and that the firm of Mmahat & Duffy was receiving substantial legal fees for real estate closings generally. The supervisory agent had the authority to prevent further loans in excess of the LTOB limits through issuance of a cease and desist order; he also had the power to terminate any attorney/client relationship between Gulf Federal and Mmahat & Duffy, to force Mmahat off the Board of Directors, to require Gulf Federal to pursue a malpractice suit against Mmahat, to terminate Gulf Federal’s relationship with Mmahat & Duffy, or to place Gulf Federal in receivership. See supra note 1.

17. For an interesting discussion of how the declining real estate market is now also affecting an otherwise normally stable insurance industry, see New Victims of the Realty Slump: Insurers, N.Y. Times, Aug. 21, 1990, § D, at 1, col. 3.
The suit was filed by the FDIC on the same day as its closure of the S&L. Numerous claims and cross-claims were involved, but, by the time of trial, all claims except those against Mmahat and Mmahat & Duffy had been resolved.

The claims against Mmahat were that he had committed legal malpractice and breached his fiduciary duty to Gulf Federal by failing to give advice and, subsequently, in giving improper advice, to Gulf Federal's Board of Directors as to limits on the amount of money Gulf could loan to one borrower. He was accused of giving this advice for the sole purpose of gaining fees for his law firm of Mmahat & Duffy. Damages were claimed against Mmahat and Mmahat & Duffy for default on seven particular overline loans, totalling thirty-five million dollars. These claims were joined with Mmahat's voluntary, personal suit in bankruptcy court and were tried in the federal court for the eastern district of Louisiana.

The FDIC presented testimony that John Mmahat had deliberately caused Gulf Federal to make overline loans so that his law firm of Mmahat & Duffy could earn fees for handling these transactions. An expert for the FDIC testified that if Mmahat caused Gulf Federal to make loans for the purpose of generating fees for himself and his law firm, then his conduct violated professional fiduciary duties owed by Mmahat and Mmahat & Duffy. After a trial by jury, the jury found that John Mmahat and Mmahat & Duffy breached their fiduciary duties by giving erroneous advice to Gulf Federal concerning limits on LTOB. Judgment was in solido against Mmahat and Mmahat & Duffy for damages totalling thirty-five million dollars. Because the judgment against Mmahat was for breach of fiduciary duty, it was held to be non-dischargeable in bankruptcy. The parties stipulated to the trial judge's determination of the insurance issues.

19. Id.
20. Id. at 3. New England Insurance, the professional liability insurer of both Mmahat and Mmahat & Duffy was also sued under Louisiana's direct action statute, La. R.S. 22:655 (1978 and Supp. 1991).
22. Id.
25. Id. at 7. Ironically, after having presented testimony that the law firm of Mmahat & Duffy was itself dishonest, which caused it to be excluded from liability insurance coverage, the FDIC then tried to make a case that the firm was only vicariously liable for the malpractice of Mmahat and should be covered by insurance. It could be that this fact alone, as much as any other, accounted for the court's finding.
In his defense, Mmahat claimed that he was not Gulf Federal's attorney for regulatory matters and had given no legal advice at all concerning LTOB limits.\( ^{27} \) Mmahat argued that he served in a dual capacity as an attorney and a director and that any advice he gave as to LTOB limits was done in his role as a director. Therefore, he argued that he could not be guilty of malpractice because there was no attorney-client relationship between himself and Gulf Federal as to regulatory advice. He also claimed that his actions should be evaluated under the business judgment standard.\( ^{28} \) He did not serve on the loan committee and thus did not vote on the acceptance of particular loans, nor did he direct the loan committee to approve any of the loans in question.\( ^{29} \) Therefore, he claimed that the decisions on the loans were made by a disinterested committee and should be evaluated as such.\( ^{30} \)

Another interesting aspect to this case is that although more than one year had passed since default on the seven specified loans, the court held that the doctrine of contra non valentem interrupted the normal one year prescriptive period on malpractice actions\( ^{31} \) until the FDIC could have known of the acts. Likewise, it held that, based on the actions of Mmahat alone, not only Mmahat personally, but also the

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28. 2 R. Mallen and J. Smith, Legal Malpractice § 20.13, at 281 (3d ed. 1989). An often quoted definition of the business judgment rule is that:

It is a presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action was in the best interest of the company. Absent an abuse of discretion that judgment will be respected by the courts. The burden is on the party challenging the decision to establish facts rebutting the presumption.

29. Appellee's Brief, New England, supra note 7, at 27-29. According to New England, there was no evidence that Mmahat acted as attorney in giving regulatory advice to Gulf Federal when decisions on these loans were made.
30. Mmahat contended that because he took no part in the decisions on the loans any taint of conflict present would have been removed by the vote of the disinterested committee. See La. R.S. 12:84 (1969); but see La. R.S.12:81(C)(8) (1969) which holds directors accountable for the actions taken by the committees. See also Rivercity v. American Can Co., 600 F.Supp. 908 (E.D. La. 1984) and Woodstock Enterprises v. International Moorings, 524 So. 2d 1313 (La. App. 3d Cir. 1988).
31. See La. Civ. Code art. 3492 which says: "Delictual actions are subject to a liberative prescriptive period of one year. This prescription commences to run from the day injury or damage is sustained."

In the 1990 regular legislative session, Act 683 provided for the adoption of the new La. R.S. 9:5605 (Supp. 1991), which regulates the prescriptive period which is now applicable to all actions for legal malpractice whether based in tort or in contract. Like the rule for medical malpractice actions, a cause of action must be brought within one year of the date of the alleged negligence, error, or omission or within one year of its discovery or when it should have been discovered, but in all cases, not more than three years from the date of the alleged negligence, error, or omission.
law partnership with which he was affiliated, was dishonest within the exclusion clause of its malpractice insurance coverage.\(^2\) Also, counter-claims of negligence against the FDIC were rejected.

In finding that the malpractice was not within the scope of the law firm's insurance coverage, the court stated that it did not "perceive that minimizing the deliberate conduct here in question and engaging in result oriented reasoning to force insurance coverage is the solution to the nation's Savings and Loan crisis."\(^3\) The Fifth Circuit Court of Appeals affirmed the lower court's decision on these issues. Some of the issues presented by *Mmahat* will now be examined, with a critical view to the application of Louisiana law to the facts of the case.

**Malpractice and Breach of Fiduciary Duty**

The malpractice claims against Mmahat and Mmahat & Duffy were originally divided into three categories: the negligence claims, claims of bad advice, and claims of breach of fiduciary duties. The claims which were based on negligence and mistake in handling the real estate transactions themselves, which were closer to our traditional understanding of malpractice claims, were settled out of court.\(^4\) The only claims to reach the trial court were the malpractice claims based on Mmahat's breach of fiduciary duty for failure to advise, and for giving erroneous advice as to the federal LTOB limits.

The elements necessary for a legal malpractice cause of action are the same as for other negligence actions.\(^5\) First, there must be the existence of a duty which is owed, then a showing that the duty owed was breached, and finally that there was damage which was proximately caused by this breach.\(^6\)

The first inquiry then to arise is whether Mmahat owed a duty, as an attorney, to advise Gulf Federal properly on the LTOB limits. Mmahat contended that no attorney-client relationship existed with Gulf Federal as to these regulatory limits. On the contrary, Mmahat claimed that any advice given to Gulf Federal was in his role as Chairman of the Board of Gulf Federal.\(^7\) Indeed, the FDIC brought suit separately against the officers and directors of Gulf Federal, presumably including

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32. FDIC v. Mmahat, 907 F.2d 546, 549 (5th Cir. 1990).
33. FSLIC v. Mmahat, 97 Bankr. 293, 301 (E.D. La. 1988), aff'd sub nom., 907 F.2d 546 (5th Cir. 1990).
34. Original Appellant's Brief, supra note 14, at 3. Mmahat, in his role as a director, was included in the settlement of the claims against the officers and directors.
35. 1 Mallen, supra note 28, § 8.10, at 425.
36. Id. See also Cherokee Restaurant Inc. v. Pierson, 428 So. 2d 995 (La. App. 1st Cir.), writ denied, 431 So. 2d 773 (1983).
37. See Appellee's Brief, New England, supra note 7, at 27.
Mmahat, for breach of fiduciary duty. These claims were settled out of court prior to trial for $1.9 million dollars.\(^{38}\)

The existence of an attorney-client relationship is based on contract and "[a]greement or consent of an attorney to represent a client as to a particular matter does not create an agency relationship as regards other business affairs of the client."\(^{39}\) An attorney-client relationship does not arise when an attorney is retained for non-legal services, even if incidentally his legal knowledge may come into play.\(^{40}\) Likewise, the fact that a person is also an attorney does not create a fiduciary relationship.\(^{41}\) Unless there is a specific showing that there is an attorney-client relationship as to a particular transaction, the attorney cannot be held liable for any professional negligence.\(^{42}\)

According to Mmahat, none of the allegations by the FDIC involved professional services by John Mmahat in his capacity as a lawyer. Neither Mmahat nor Mmahat & Duffy received any fees or retainer for this advice. There was no formal consultation or opinion, or evidence of any kind that Mmahat was acting as an attorney regarding regulatory advice as to any of the overline loans.\(^{43}\) Other directors testified that they did not remember ever soliciting advice from Mmahat regarding the particular loans in question or receiving any advice from him in that regard.\(^{44}\)

Despite all of these arguments, the existence of an attorney-client relationship is a question of fact and the jury found that an attorney-client relationship existed between Gulf Federal and Mmahat.

The FDIC contended that Mmahat, as an attorney, directed loans to be made for the sole purpose of collecting fees for his law firm.\(^{45}\) Mmahat argued in response that he did not have the power or the authority, as an attorney, to send loan closing work to his law firm or to cause loans to be made at all. He claimed that any fees gained by

\(^{38}\) FDIC v. Mmahat, 907 F.2d 546, 550 (5th Cir. 1990). The court below failed to make a determination of proportionate fault as to the seven loans in question. Therefore, the Fifth Circuit court remanded that portion of the case so that the judgment against Mmahat and Mmahat & Duffy would be reduced by the amount of fault of the settling officers and directors.


\(^{40}\) 1 Malen, supra note 28, § 11.2, at 636. See also Grand Isle Campsites, 262 La. at 29-30, 262 So. 2d at 359.

\(^{41}\) 1 Malen, supra note 28, § 11.2, at 636.

\(^{42}\) See cases cited supra note 39.

\(^{43}\) See Appellee’s Brief, Mmahat, supra note 7, at 10.

\(^{44}\) Id.

\(^{45}\) Id. at 5.
Mmahat & Duffy in this regard would stem from his recommendations made in his capacity as a director of Gulf Federal.\textsuperscript{46}

Mmahat claimed his actions should have been considered under the business judgment rule because the power to decide to make loans was delegated to a committee. An attorney, serving as a director, however, may not abdicate his responsibility by claiming he took no part in the decision making. Louisiana Revised Statutes 12:81(C)(8) states that: “The designation of and delegation of authority to a committee shall not relieve the directors of any responsibility imposed on them by law.”\textsuperscript{47}

In Boisdore v. Bridgeman,\textsuperscript{48} an attorney, Bridgeman, assumed the dual role of attorney and director in a small, closely held corporation. An attorney-client relationship was established, and the court found that Bridgeman could be sued in either capacity, as director or as attorney. He was sued for fraud in his capacity as an attorney and was found to have taken unjust advantage of Boisdore by withholding information and misrepresenting the truth.\textsuperscript{49} The court stated that an attorney, serving as a director, is held to a higher standard of care and that actions taken in a dual role may be acceptable for a director, yet not meet standards of conduct required of an attorney.\textsuperscript{50}

Once an attorney-client relationship has been established and a breach of duty found, the question of causation remains. There was no evidence presented that any legal advice as to the loans in question was the cause of the default on the loans. The passage of the Garn-St. Germain Act in 1982, which allowed S&Ls to make commercial loans in addition to home loans, was evidence of the crisis in the S&L industry, and was an indication that the crisis was at least in part the result of the failing economy. A direct causal relationship between the loan failures and Gulf Federal’s exceeding the LTOB limits was not established.\textsuperscript{51}

Using a “but for” approach to causation, one may argue that “but for” these loans having been made, there would have been no default. However, this type of argument can lead on endlessly, i.e. “but for” the passage of the Garn-St. Germain Act, these loans would not have been made at all. Mmahat did not create the S&L crisis and should

\textsuperscript{46} Id. at 27.
\textsuperscript{48} 502 So. 2d 1149 (La. App. 4th Cir. 1987).
\textsuperscript{49} Id. at 1155.
\textsuperscript{50} Id. at 1151.
\textsuperscript{51} Act no. 602 of the 1991 Regular Session of the Louisiana legislature enacted Sections 1351 through 1354 of Chapter 18, Title 6 which provides that unless agreed in writing attorneys and their law firms owe no greater duty in their dealings with financial institutions than that normally required of attorneys under the Rules of Professional Conduct and that an attorney shall be held liable only under traditional concepts of legal malpractice.
not be blamed for losses on loans which may have failed due to economic factors beyond his control.

It appears that the hunt for a deep pocket is on and that attorneys are the target of choice. As the hunt progresses, time limitations on the institution of actions will become increasingly important. Each state has its own applicable prescriptive periods, and there are corresponding federal rules. How these rules interact is an unsettled question which may affect the ultimate outcome in cases brought by the FDIC.

LIMITATION OF ACTIONS

Contra Non Valentem

Next to be considered is the Louisiana law on prescription for malpractice actions and how it was applied in Mmahat. Then the doctrine of contra non valentem and some problems in its application will be explored.

According to Louisiana jurisprudence, a cause of action for legal malpractice is considered a tort unless an express warranty of result has been made, or unless an attorney agrees to perform certain work and then does nothing whatsoever. Therefore, in Mmahat, the tort prescriptive period would apply. Louisiana has a one year prescriptive period on tort actions. Therefore, any action against Mmahat for malpractice relating to his advice to Gulf about its LTOB limits should have prescribed after one year, unless prescription was interrupted, either by legislative exception, or by the doctrine of contra non valentem.

There is no legislative exception to interrupt prescription under the circumstances of Mmahat. The court, however, found that the one year prescriptive period was interrupted under the doctrine of contra non valentem, stating that the "FDIC did not own, nor could it enforce the claims until it took over as receiver" and that the doctrine of contra non valentem interrupted prescription until the end of the attorney-client relationship.

The doctrine of contra non valentem is derived from customary law, not from legislation; nonetheless, Louisiana courts have adopted it into their jurisprudence as an exception to the legislation governing prescrip-

53. La. Civ. Code art. 3492. See also supra note 31 and accompanying text.
55. For a discussion of legislative exceptions interrupting prescription, see Comment, 31 Loy. L. Rev. 93, 108 (1985).
56. FDIC v. Mmahat, 907 F.2d 546, 551 (5th Cir. 1990).
The doctrine's main precept is that prescription cannot run while a cause of action is unknowable, whether from a legal cause, or as the result of actions taken by the injuring party himself. The doctrine is best illustrated by Corsey v. State Department of Corrections. Corsey involved a prison inmate who was prevented from suing for negligent injury within the prescriptive period because his mental condition, a result of that injury, prevented him from knowing that he had a cause of action. The Corsey court stated that the doctrine of contra non valentem applies in the following situations:

1) Where there was some legal cause which prevented the courts or their officers from taking cognizance of or acting on the plaintiff's action;
2) Where there was some condition coupled with the contract connected with the proceedings which prevented the creditor from suing or acting; or
3) Where the debtor himself has done some act effectually to prevent the creditor from availing himself of some cause of action.

Modern jurisprudence recognizes a fourth situation in which contra non valentem is applicable: where the cause of action is not known or reasonably knowable by the plaintiff, even though his ignorance is not induced by the defendant. However, mere ignorance is insufficient to invoke this doctrine. A deliberate concealment by the defendant or a situation which is beyond the control of the plaintiff is required.

In a fairly recent line of jurisprudence, the Louisiana second and third circuits developed, as a logical concomitant of the doctrine of contra non valentem, the idea that prescription in legal malpractice cases is automatically suspended until the end of the attorney-client relationship. The Fifth Circuit Court of Appeals in Mmahat used this line of cases as the basis for affirming that prescription had not run on the legal malpractice cause of action, even though more than one year had passed since default on the loans.

Although these cases hold that contra non valentem operates to suspend prescription until the end of the attorney-client relationship, the wisdom and necessity of extending this concept to form the basis of a

57. Comment, supra note 54, at 108.
58. 375 So. 2d 1319 (La. 1979).
59. Id. at 1321-22.
new rule of law is questionable. Because the Civil Code specifically provides that prescription runs unless there has been legislative exception, any attempt to judicially expand a rule of law which is derived from custom should be impermissible. There is no customary law which states that prescription is suspended until the end of the attorney-client relationship. Without an expression of legislative intent, this purported rule of law is contrary to the specific provisions of the Civil Code and without the legitimation of having been derived from custom.

A better approach may be to continue the application of contra non valentem according to the custom on which it has its foundation. Doing so may, of course, lead to the same result, but at the same time, adherence to the original doctrine would be maintained by requiring a determination that the circumstances fall within one of the four customary categories.

This view was adopted by the Louisiana first circuit in the recent case of Succession of Bilwood Smith v. Kavanaugh. Bilwood Smith involved an action for legal malpractice in which the plaintiff contended, among other things, that because of the continuing representation by the attorneys who handled her husband's succession, prescription for a malpractice action against these attorneys was suspended until the end of the attorney-client relationship. Although the court recognized that a continuing attorney-client relationship may suspend the running of prescription, it made clear that the "rule" used was actually the third form of contra non valentem cited in Corsey, where "the defendant has done some act effectually to prevent the plaintiff from availing himself of his cause of action." The court found that the relationship between the attorney and client should be examined to determine if and when representation ended, and whether an attorney-client relationship continued to exist for the specific services in question, namely the administration of her deceased husband's estate.

Adherence to this approach would result in prescription having run on the malpractice action against Mmahat by the FDIC, since the facts do not fall squarely within any of the four permissible categories of contra non valentem. Two prongs of the Corsey contra non valentem approach were used by the court in Mmahat: the second, "where there is some condition coupled with contract which prevented the creditor from suing," and the fourth, "where the cause of action is not known or reasonably knowable by the defendant." The court said, "FDIC

62. La. Civ. Code art. 3467 provides: "Prescription runs against all persons unless exception is established by legislation."
64. Id. at 994.
65. Id. at 995.
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did not own, nor could it enforce the claims until it took over as receiver; no amount of notice would have allowed FDIC to sue before that time. What the court did not recognize in its opinion was the fact that the FDIC was a successor agency of the Federal Home Loan Bank Board (FHLBB), which oversaw Gulf Federal prior to its placement in receivership.

Regulators for the FHLBB, as far back as 1983, knew Gulf Federal was making loans in violation of the LTOB limits. Mmahat made no act of concealment as to these loans. The FHLBB had the authority and power to remove the officers and directors, to place the S&L in receivership, and to force the prosecution of any suits on behalf of the S&L, including this one against Mmahat. When FIRREA went into effect in August of 1989, the FDIC stepped into the shoes of the FHLBB for the purposes of prosecuting or defending any ongoing litigation. Therefore, while the FDIC had no specific statutory enforcement rights prior to its takeover of Gulf Federal in 1986, it had constructive enforcement rights and the ability to bring suit through its predecessor agency, the FHLBB. The court, then, was technically accurate in finding that the FDIC could not have enforced the claims against Mmahat and Mmahat & Duffy until it took over as receiver, but this same action, had it been pursued by the FHLBB, would have passed into the hands of the FDIC intact.

In summary, the court applied an aberrant line of reasoning to conclude that the malpractice cause of action against Mmahat had not prescribed due to the interruption of prescription under the doctrine of contra non valentem. The FDIC had both actual and constructive knowledge of the default on the loans through its predecessor the FHLBB, as well as the ability to pursue this cause of action through that same agency. Therefore, the doctrine of contra non valentem should not have interrupted prescription in the cause of action against Mmahat and Mmahat & Duffy. Was it the intent of the court to allow the defeat of state statutory prescriptive rights through the transfer of causes of action from one federal agency to the next?

67. FDIC v. Mmahat, 907 F.2d 546, 551 (5th Cir. 1990).
68. See supra note 1.
69. Appellee's Brief, New England, supra note 7, at 5.
70. Id. at 13.
71. See supra note 1.
72. Id.
73. Id.
74. See Bellamy v. Janssen 477 So. 2d 928 (La. App. 4th Cir. 1985) (a case finding constructive notice sufficient to begin the running of prescription); see also Cherokee Restaurant, Inc. v. Pierson, 428 So. 2d 995 (La. App. 1st Cir.), writ denied, 431 So. 2d 773 (1983).
EXCLUSION OF INSURANCE COVERAGE OF Mmahat & Duffy

The next issue to be discussed is the issue of exclusion of liability coverage for the partnership of Mmahat & Duffy. As malpractice claims have risen in number over the past years, insurance premiums for professional liability have increased, while coverage has decreased. This decrease has been reflected in both increased deductibles and expanded areas of exclusion.75

The contract of insurance governs the rights of the insured to indemnification. Professional liability contracts typically exclude coverage for lawsuits involving other than professional conduct and for situations where attorneys are serving in a dual role. An example is when an attorney serves as both an officer or director of a corporation and as corporate general counsel. Liability contracts also typically exclude any unlawful, criminal, fraudulent or dishonest acts or omissions.76 Although the frequency and types of exclusions are increasing, insurance contracts have generally been construed narrowly against the insurer because public policy favors finding coverage.77 In Mmahat, however, the court construed the policy narrowly against the insured, Mmahat & Duffy.

In Mmahat, not only was John Mmahat excluded from professional liability coverage, but so was the partnership of Mmahat & Duffy. This exclusion was based on a jury determination that both the firm of Mmahat & Duffy and John Mmahat, as insureds, were dishonest, placing them within the policy exclusion.78

The applicable insurance policy provision reads:

III—Exclusion
The policy shall not indemnify the Insured for any damages or claim expenses as the result of any claim:

A—that results in a final adjudication that any Insured has committed a dishonest, fraudulent, or malicious act, error, omission or personal injury with deliberate purpose and intent. Nothing contained in the foregoing shall exclude coverage to any other Insured who is not so adjudged to have committed any such act, error, omission or personal injury as described above.
This policy shall then only pay in excess of the deductible

75. For discussions of such exclusions see 2 Mallen, supra note 28, § 28.19, at 753, and Goldfein, supra note 6, at 1291-92.
76. Goldfein, supra note 6, at 1291. By 1987, deductibles for large law firms were as high as $500,000, whereas only five years earlier, in 1982, deductibles ranged from $0 to $15,000.
77. Id. at 1291-92.
78. FDIC v. Mmahat, 907 F. 2d 546, 549 (5th Cir. 1990).
and of the full extent of the assets in the firm of any Insured who was so adjudged to have committed any such act, error, omission or personal injury as described above, and any other personal assets of such Insured recovered by the firm shall inure, to the extent of the amount paid by this policy, to the benefit of the Company. However, the Company will provide a defense for any such claims.  

The question then becomes: How did a law partnership, having no corporeal existence and acting only through its mandataries commit a dishonest act so as to be excluded from insurance coverage?

Before answering this question, a discussion of the plain wording of the insurance contract is needed to determine the extent of the exclusions contemplated therein. The policy stated that it would pay only in excess of the deductible and of the full extent of the assets in the firm of any insured. It also specified that any other assets recovered by the firm would inure to the benefit of the insurer.

Specifically, the policy language did not contemplate the firm of Mmahat & Duffy under this exclusion, as evidenced by the express language used. The exclusion of the firm was not contemplated because the firm itself could not be adjudicated to have committed a dishonest act with deliberate purpose and intent. It could not be so adjudicated because a partnership, as the firm of Mmahat & Duffy was, can only act through its mandataries or agents and thus can only be vicariously liable for the torts of its partners as servants of the partnership.

The court failed to apply Louisiana law. As a federal court with pendent jurisdiction, the court is obligated to apply the law of the state in tort actions, under *Erie Railroad v. Tompkins*.

The sources of law in Louisiana are legislation and custom. It is appropriate to look first to the Louisiana Civil Code for guidance as to Louisiana partnership law. Civil Code articles 2801-28 govern partnerships. Article 2801 provides that a partnership is a distinct entity with independent personality. Despite this legal personality, having no corporeal existence, a partnership can only act through its mandataries or agents. Civil Code article 2814 provides that every partner is the mandatary of the partnership in the ordinary course of business.

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79. See FDIC Appellant’s Brief, supra note 11, at 15, 16. A “Named Insured” includes the firm of Mmahat & Duffy and any of its lawyer/partners, whereas an “Insured” refers to the “Named Insureds” and any employees or partners of the “Named Insureds.”
80. 304 U.S. 64, 58 S. Ct. 870 (1938) which calls for the application of state law in all matters not specifically authorized or delegated to the United States.
Likewise, vicarious liability is the type of issue usually considered to be a question of law, not of fact. Although there is no distinct codal authority in Louisiana for the vicarious liability of a partnership for the acts of a partner, by analogy, Civil Code article 2320\(^84\) can be applied to partnerships as it is applied to other principal/agent or mandatory relationships. Therefore, when the court charged the jury "that the acts of the partners ... in the course of employment ... [are] the acts of the law firm,"\(^85\) it adopted a false premise and thereby precluded the possibility of a finding of vicarious liability and concomitant liability insurance for Mmahat & Duffy as a covered insured.

The court relied on the Fifth Circuit case of *Ashland Oil, Inc. v. Miller Oil Purchasing Co.*\(^86\) in finding insurance coverage was precluded for Mmahat & Duffy. In *Ashland*, the court found that several officers and employees of Rollins Corp. conspired together to intentionally cause the improper disposal of toxic waste materials for which Rollins had assumed responsibility. *Ashland* involved the interpretation of specific policy language as to whether an accident or occurrence resulted in damages expected or intended by the insured. The court found that Rollins, itself, through its officers and employees, knew that hazardous waste would be improperly disposed of and, therefore, from Rollins' point of view, the damages were both expected and intended.\(^87\)

The *Ashland* court, rather than finding vicarious liability for the individual acts of its agent/employees, found that the injury was "the authorized intentional act of Rollins, itself."\(^88\) While this reasoning may have yielded an equitable result from the court's frame of reference, it does not adhere to Louisiana law.

Both the *Ashland* and the *Mmahat* courts distinguished the cases of *Rivers v. Brown*\(^89\) and *Baltzar v. Williams*,\(^90\) which found insurance coverage for corporate entities for the intentional acts of the insured's agents. In *Rivers*, the president and principal stockholder of a construction company, Brown, was alleged to have pistol whipped the plaintiff. Brown's insurer argued that since Brown was the principal shareholder and president of the construction company, any assault and battery committed by Brown was "by or at the direction of the insured" and therefore excluded from coverage. The "insured" referred to was the

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84. La. Civ. Code art. 2320 states in part: "Masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed."

85. FDIC Appellant's Brief, supra note 11, at 15.

86. 678 F.2d 1293 (5th Cir. 1982).

87. Id. at 1309.

88. Id. at 1317.

89. 168 So. 2d 400 (La. App. 3d Cir. 1964).

90. 254 So. 2d 470 (La. App. 3d Cir. 1971).
corporation L.T. Brown. The court rejected this argument, finding that the corporation as "named insured" is vicariously responsible for the torts of its agents or employees in the course of employment.

_Baltzar_ similarly involved an intentional tort by an employee. There, the dispute involved policy language as to whether the town of Glenmora either expected or intended the use of force by its town marshall. The court found that the injury was neither expected nor intended from the viewpoint of the town and, therefore, the town was covered by its liability policy.

Although these cases may not seem totally persuasive to Mmahat & Duffy's case, neither do they suggest that a corporation or a partnership can _act_ other than through its agents or partners. Nor do these cases suggest that a partnership may be other than vicariously liable for the torts of its partners.

No authority was offered for making this leap of faith. On the contrary, the Civil Code provides that the partnership acts _through_ its mandataries. Rather than adding to the law a rational rule based on statute (as Louisiana laws are designed to be), the _Ashland_ court has pulled a red herring out of a hat, and the _Mmahat_ court has gone after the same fish.

The court seems to be drawing on an exception to the normal rule of liability in master-servant relationships which has been used in certain toxic tort cases. In tort cases involving improper handling or disposal of hazardous wastes, Louisiana courts have held that a partnership or corporation may be primarily liable for the torts involving hazardous wastes despite the fact that no master-servant relationship existed between the corporation and the subcontractor who actually handled the hazardous materials. This is a result of a strong policy against the mishandling and negligent exposure of others to hazardous materials. This policy is reflected in the absolute liability imposed by Louisiana Revised Statutes 30:2276 and in Louisiana Civil Code article 2315.3, which provides for one of only two exceptions to the prohibition of assessing punitive damages in a tort action—for the negligent handling of hazardous materials.

These same policies do not apply to _Mmahat_. Here the court seems to confuse the distinction between the principal-agent relationship of a

92. Id.
93. La. R.S. 30:2276 (1989). This statute provides for absolute liability for actual or potential endangerment to health or the environment due to disposal or discharge of hazardous waste. The defendant under this statute need only be the generator, transporter or disposer of the waste, owner of the facility which produced the waste, or have contracted for the disposal of the waste.
partnership and a partner, and a partnership’s responsibility for the
torts of its partners as servants of the partnership.

A partner is the mandatory or agent of a partnership, and when
the partner acts for the partnership, it is as if the partnership itself is
acting. This principal-agency relationship is consensual in nature and
confers contractual authority from the principal to the agent.94 Civil
Code article 2816 provides that “an obligation contracted for the part-
nership by a partner in his own name binds the partnership if the
partnership benefits by the transaction or the transaction involves matters
in the ordinary course of its business.”95 This article is a reflection of
policies prohibiting a principal from denying contracts made in its name.
This article, therefore, is inapplicable to tort liability.

In contrast, different policies are involved in assessing tort liability,
including loss allocation and deterrence. A principal-agent relationship
cannot exist for the commission of torts. An agent’s torts are not
imputable to the principal, and the principal is not liable unless a master-
servant relationship exists.96 If a master-servant relationship exists, then
the principal, as master, is vicariously liable for the torts of the agent,
it servant.97

There are no Civil Code articles which specifically delineate the
liability of a partnership for the torts of its partners. Louisiana Civil
Code articles 2317 and 2320, however, set out Louisiana’s theory of
vicarious liability of a master for the acts of its servants, also known
as the theory of respondeat superior. Article 2317 says that “[w]e are
responsible, not only for the damages occasioned by our own act, but
for that which is caused by the act of persons for whom we are
answerable.” Article 2320 more specifically states that “masters and
employers are answerable for the damage occasioned by their servants
and overseers, in the exercise of the functions in which they are em-
ployed.” These articles reflect a policy of liability based on the status
of the master as the party most able to prevent the tort, a policy matter
involving both deterrence and risk-spreading. Article 2817 adds to the
theory of vicarious liability of a partnership for its partner’s acts. It
states, “[a] partnership as principal obligor is primarily liable for its
debts. A partner is bound for his virile share of the debts of the
partnership but may plead discussion of the assets of the partnership.”

Additionally, Louisiana courts have adopted common law principles
in imposing vicarious liability.98 As in common law, under Louisiana

94. See ODECO Oil & Gas Co. v. Nunez, 532 So. 2d 453 (La. App. 1st Cir.), writ
denied, 535 So. 2d 745 (1988).
98. Arceneaux v. Texaco, 623 F.2d 924 (5th Cir.), cert. denied, 450 U.S. 928, 101
S. Ct. 1385 (1980).
law, a principal may be held liable for the negligence of its agent if there is a master-servant relationship.

The existence of a master-servant relationship is tested by the master's control or right to control over the servant.99 Liability is tested by whether the servant acted within the scope of employment.100 Under this theory a partnership is bound for the torts of its partners in the ordinary course of business. Under the Uniform Partnership Act, the partnership is vicariously liable for the torts of its partners without further proof.101

By answer to a special interrogatory which charged that "the acts of the partners (or other members of the firm) in the course of employment should be considered the acts of the law firm,"102 the jury found the law firm of Mmahat & Duffy to be dishonest. Instead, the court should have charged the jury as to whether or not Mmahat's actions were those of a servant within the ordinary course of business. If so, then Mmahat & Duffy should have been held vicariously liable for Mmahat's actions and consequently afforded coverage under its malpractice insurance policy.

RECOMMENDATIONS FOR THE FUTURE

The decision in Mmahat103 leaves unclear the liability of a partnership for the torts of its partners and the extent of any liability insurance covering the partnership. Perhaps the safest course of action is for law firms to take preventive measures to avoid situations which may put them at risk. With this in mind, many law firms are opting for the organizational structure of a professional law corporation, both for tax advantages and in seeking to limit tort liability. Lest the law corporation naively assume that it is protected from liability such as was found in Mmahat, the corporation should be aware that there has been disagreement among courts as to the liability of a law corporation for the malpractice of an individual shareholder.

Courts have generally held that the professional law corporation is liable to the extent of its corporate assets.104 In many cases, however, courts have found that attorney/shareholders of the corporation could be liable for the malpractice or other torts of another shareholder.105

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100. McCaskill v. Welch, 463 So. 2d 942 (La. App. 3d Cir. 1985).
101. 1 Bromberg, supra note 99, at 4:79.
102. FDIC Appellant's Brief, supra note 11, at 15.
103. FDIC v. Mmahat, 907 F.2d 546 (5th Cir. 1990).
105. Id. See also, generally, Comment, Incorporated Lawyers—The Veil Rises and Falls, 55 U. Cin. L. Rev. 785 (1987), which contains a thorough and informative survey of state law.
Under the Fifth Circuit *Ashland* analysis, had Mmahat & Duffy been a professional corporation, the result would likely have been the same.

A professional corporation, like other corporations, is created by state statute, and the nature and extent of the corporation's liability is usually delineated within the statute, although case law may further refine its applicability. Because the purpose of allowing the formation of professional corporations was ostensibly to allow professional partnerships to take advantage of corporate tax incentives, limits on liability, which are normally a benefit of incorporation, are not necessarily equivalent to that of general corporate entities.

Four different approaches to liability of officers and shareholders of professional corporations appear to have been adopted by the states:

1. Liability remains the same as in a partnership with shareholders retaining liability as partners;
2. Shareholders remain personally liable only concerning the provision of professional services;
3. The corporation and tortfeasor alone are liable; and
4. The corporation and tortfeasor alone are liable if specific requirements for security for liability have been met.

Louisiana Revised Statutes 12:801-815 govern the Louisiana professional law corporation. Louisiana Revised Statutes 12:807 states in part:

(B) [a] shareholder shall not be personally liable for any debt or liability of the corporation.

(C) Nothing in this Chapter shall be construed as in derogation of any rights which any person may by law have against an incorporator, subscriber, shareholder, director, officer or agent of the corporation, because of any fraud practiced upon him, or because of any breach of professional duty or other negligent or wrongful act, by such person, or in derogation of any right which the corporation may have against any such person because of any fraud practiced upon it by him.

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106. I Mallen, supra note 28, § 5.4, at 272.
107. Id. See also Annotation, supra note 104, at 558.
110. La. R.S. 12:807 (1969). The official comment to this section says: This Section provides expressly for limited liability for shareholders as such, and for unlimited liability of corporate agents for their own wrongs, both normal incidents of all corporations and their agents, and of the status of all professional men who render services as agents for others.
While it appears that shareholder attorneys in a professional law corporation enjoy limited liability in some instances, paragraph (B) specifies that this limited liability does not apply in the case of fraud, breach of professional duty or other negligent or wrongful acts for which the law provides rights to the injured party. Conceivably, this could be interpreted to include fiduciary duties generally owed in a professional capacity.

Louisiana's professional corporations statute is more favorable than most to shareholder attorneys for the breach of professional duties owed to the firm's clients by other shareholder attorneys. No doubt, however, a result oriented court could interpret this statute to find liability, thus negating the advantage of limited liability generally offered by the corporate form.

One way in which law firms can reduce their liability risks is by prohibiting partners or associates from sitting on the boards of financial, or other institutions. In recent years, there has been a decline in the number of corporations with outside counsel on boards of directors. This is the result, in large part, of substantial verdicts awarded against directors, the frequency of these claims, and the uncertainty as to whether or not insurance will provide coverage.

According to a recent study, claims against directors increased 162% from 1974 to 1984, with an average cost per claim of over one million dollars. In addition, the malpractice insurance of many law firms excludes coverage for attorneys who serve on corporate boards, leaving the possibility of corporate exposure for liability for the actions of the firm's attorneys.

Other negative aspects of attorneys serving as board members include increased exposure to RICO suits, claims of "conflicts of interest," and disqualification of the firm for future audit requests, representation in corporate litigation, and bankruptcy representation. Therefore, an attorney serving as a board member may actually reduce law firm opportunities rather than increase them.

Despite the risks to the law firm, many attorneys justify their service on the boards of institutions based on the need to establish a close

111. Id.
112. 2 Mallen, supra note 28, § 20.11, at 270.
114. 2 Mallen, supra note 28, § 20.12, at 275.
115. Id., § 28.22, at 760.
117. 2 Mallen, supra note 28, § 20.11, at 271-78. Many times in insolvency proceedings prior counsel are disqualified due to potential conflicts.
118. See generally 2 Mallen, supra note 28, § 20.11, at 271-72.
relationship with a particular client, or even in order to obtain or retain the corporation as a client.\textsuperscript{119} Another justification is that, through informal contacts with management and other directors, the law firm can obtain referrals they would not ordinarily have had, but the same results can be achieved by serving as outside counsel and regularly attending the same board meetings.\textsuperscript{120} Particularly in smaller communities, service as a board member may be considered a necessary part of doing business, and some corporations may try to save legal fees by having attorneys as board members.\textsuperscript{121} Law firms should carefully review their own particular circumstances to determine if the benefits of board membership outweigh the risks.

Had John Mmahat not served as a board member, the claims against him may have been easier to defend. The distinction as to what was legal advice and also what advice was actually given may have been easier to prove had he served in only one capacity, attorney. The court refused to accept that he served in one capacity, as a director, and held him responsible for violations of fiduciary duties as an attorney. The court found these violations despite Mmahat's acting, from his perspective as a director, within what he thought was the best interest of Gulf Federal.

If law firms choose, despite the risks, to allow partners or associates to serve as officers or directors in outside institutions, they should take measures to limit the exposure of the law firm. These steps include having a separate law firm provide legal services, limiting personal participation to only one role, abstaining from any vote on issues with which the law firm may be or may become involved, and keeping a separate accounting of any fees derived from such service.\textsuperscript{122}

There is, however, no guarantee that these steps will prevent law firm liability. John Mmahat took steps to avoid liability, including having a separate law firm handle regulatory matters, yet the court construed recommendations made as part of his duties as a director to be a breach of his fiduciary duties as an attorney, despite his protestations that he was not general legal counsel for Gulf Federal Savings and Loan as to regulatory matters.

**Conclusion**

This case is one which will be haunting attorneys for years to come. There has been a tendency in the past to stray away from Louisiana's civil law foundations and to ignore codal authority. No place is that

\textsuperscript{119} 2 Mallen, supra note 28, § 20.12, at 273.
\textsuperscript{120} Id., § 20.12, at 271.
\textsuperscript{121} Id., § 20.12, at 274.
\textsuperscript{122} Id., § 20.13, at 278.
more evident than here, in *Mnahat*. "The sources of law in Louisiana are legislation and custom."  However, when state courts begin straying from these principles, for example, by adopting their own categories of contra non valentem, it is no wonder that federal courts have difficulty applying Louisiana law.

This case calls into doubt basic principles of Louisiana partnership law, agency law, and vicarious liability. As it stands now, in the Fifth Circuit, a partnership or corporation may be found to have itself committed a tort, through its agents or mandataries, by some unquantified combination of agency and culpability known only to the court when it sees it.

While the court says it will not strain to find insurance coverage where none was intended, it appears eager to find liability and blame and to ignore precepts of Louisiana law in doing so.

**Pam Ashman**

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