Woodlawn Park Limited Partnership v. Doster Construction Company, Inc.: Disclosing Undisclosed Agency Law in Louisiana

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NOTES

Woodlawn Park Limited Partnership v. Doster Construction Company, Inc.: Disclosing Undisclosed Agency Law in Louisiana

I. INTRODUCTION

Agency is a common-law legal fiction.\(^1\) Developed to expedite commerce and to overcome the historical inability at common law to assign rights under contract, "simple agency" is the relation created when one party (the principal) manifests his intent to have another (the agent) act for him subject to his control, and the other consents so to act.\(^2\) Although the agency relationship exists solely between principal and agent, the importance of this legal relationship is that it allows the agent, acting within the authority granted him by his principal, to create legal rights and obligations between the principal and the third party with whom the agent transacts. Primarily a commercial device, agency enables one person, through the services of another, to broaden the scope of his activities.\(^3\)

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1. Oliver Wendell Holmes provided credence to this statement in a lecture given by him while a professor at Harvard Law School:

   I propose in these lectures to study the theory of agency at common law . . . . I . . . shall give some general reasons for believing that the series of anomalies or departures from general rule which are seen wherever agency makes its appearance must be explained by some cause not manifest to common sense alone; that this cause is, in fact, the survival from ancient times of doctrines which in their earlier form embodied certain rights and liabilities of heads of families based on substantive grounds which have disappeared long since, and that in modern days these doctrines have been generalized into a fiction, which,although nothing in the world but a form of words, has reacted upon the law and has tended to carry its anomalies still farther. That fiction is, of course, that, within the scope of the agency, principal and agent are one.

   Oliver W. Holmes, Collected Legal Papers 49 (1920).

2. Restatement (Second) of Agency § 1 cmt. a (1958).

3. Harold G. Reuschlein & William A. Gregory, The Law of Agency and Partnership § 1 (2d ed. 1990). Commentators have for some time recognized the important role agency theory plays in the development of a complex commercial society. For example, writing in the midst of the American Industrial Revolution, Francis Wharton noted:

   The subdivision of labor, which belongs to advanced civilization, while it produces men singularly expert in one line of business, leaves these men peculiarly inexpert in all other branches of business.

   [The] right of acting through others, through the relation of principal and agent, . . . enlarges business capacity by multiplying the modes by which the individual acts; so that instead of being restricted to the single acts of industry he is capable of performing by himself, he is able to undertake through others specialties of which they alone are capable. In this way not only is a single administrator able indefinitely to extend his sphere of action, but enterprises which necessitate division of labor, and which no individual could conduct with his unaided powers, can be carried on.
In contrast to the common law, the civil law never fully developed the idea of the direct creation of legal ties between two parties resulting from the juridical acts of an authorized intermediary. The civilian concept of mandate most closely resembles, in effect, common-law agency. This “qualified” form of agency, with its roots in Roman law, has been imported from the French Civil Code into Title XV of Book III of the Civil Code of Louisiana. Like the French Civil Code, the Louisiana Civil Code requires that action by the mandatary be taken on behalf of and, more importantly, in the name of his mandator. Failure to comply with these simple requirements negates the existence of the mandate, and the actions of the mandatary cannot produce any enforceable relationship between his mandator and the third party. Accordingly, Louisiana positive law excludes the idea of non-representative, or undisclosed, agency—a limitation not found at common law.

The Louisiana judiciary has generally perceived the absence of non-representative, or undisclosed, agency as a deficiency in the state’s statutory law. As a result, the courts of this state have consistently refuted the civilian concept of mandate as it exists in the Civil Code in favor of adopting common-law notions of undisclosed agency.

The latest judicial divergence from the Civil Code occurred on September 4, 1987.

Francis Wharton, A Commentary on the Law of Agency and Agents §§ 3, 5 (1876). See also Floyd R. Mechem, Outlines of the Law of Agency §§ 2-5 (1952) (“The Law of Agency is primarily to be considered as one of the two basic constituents of the general law of Business Organizations. . . . (E)xcept in a few situations . . . the operation of agency principles in a noncommercial context is insignificant, both in bulk and importance.”).

4. Louisiana jurisprudence reveals that undisclosed agency is not the only common-law agency principle adopted into our civil-law system. The concept of apparent authority has long been recognized as a viable rule of law by the courts of this state. See, e.g., Interstate Elec. Co. v. Frank Adams Elec. Co., 173 La. 103, 136 So. 283 (1931) (“Apparent scope of authority” is that authority which principal holds agent out as possessing or permits agent to represent he possesses.); Kenneth R. Williams, Note, Apparent Authority in a Civil Law Jurisdiction, 33 La. L. Rev. 735 (1973) (citing, among others, Farrar v. Duncan, 29 La. Ann. 126 (1877)). The courts, however, have ignored the provisions of the Civil Code. La. Civ. Code art. 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 3021 similarly states: “The principal is bound to execute the engagements contracted by the attorney, conformably to the power confided to him. For anything further he is not bound, except in so far as he has expressly ratified it.” La. Civ. Code art. 3021. These articles appear to limit the mandatary’s power, as well as the mandator’s liability, to acts within the scope of the mandate, as conferred between the mandator and his mandatary. The term “apparent authority” is found nowhere in the Louisiana Civil Code. Williams, supra, at 738. Nonetheless, the courts continue to apply apparent authority when the situation allows. See, e.g., Boulos v. Morrison, 503 So. 2d 1 (La. 1987).

Recently, the Louisiana Supreme Court took yet another step in incorporating common-law agency into Louisiana’s law. In Tedesco v. Gentry Dev., Inc., 540 So. 2d 960 (La. 1989), the court, in dicta, drew a distinction between apparent authority and agency by estoppel, as those concepts exist at common law. Id. at 964-65 (“The Louisiana decisions have sometimes used language of estoppel, but have not distinguished between the concepts of apparent authority and agency by estoppel. The Restatement [(Second) of Agency], however, makes a clear distinction.”). See R.G. Passler, Note, Tedesco v. Gentry Development, Inc.: Apparent Authority Without Detrimental Reliance Equals No
ber 3, 1993, when the Louisiana Supreme Court rendered its decision in *Woodlawn Park Ltd. Partnership v. Doster Construction Co.*

After informing the reader of the factual and procedural setting of *Woodlawn Park*, this Note will: (1) briefly trace the historical development of the concept of mandate to develop a better understanding of the scope of the institution at the time of its incorporation into the Louisiana Civil Code; (2) discuss the jurisprudential abrogation of mandate as the guiding principle in Louisiana undisclosed agency situations; (3) analyze the challenge issued in opposition to the jurisprudential importation of undisclosed agency into Louisiana’s civil law; and (4) examine the Louisiana Supreme Court’s response to this challenge and its practical impact on Louisiana’s law.

II. THE SETTING

In 1980, James Maurin, Roger Ogden, and Gerald Songy (“the Group”) were approached by a major supermarket chain. Representatives of the supermarket informed the Group of the chain’s intent to enter the local market. The Group was solicited to develop several shopping centers in the area in which the supermarket would serve as the “anchor tenant.” In April 1981, pursuant to the Group’s normal procedure for handling development projects, James Maurin executed an option to purchase a piece of property on which the shopping center at issue was to be built. The option was executed on behalf of a partnership named therein. At that time, the partnership (Roger H. Ogden and James E. Maurin 1981-D) existed under a verbal agreement between the members of the Group.

The Group then engaged Maurin-Ogden, Inc. (“Maurin-Ogden”) to perform a feasibility study concerning the project and to oversee all matters preliminary to the development. After completion of the study, the members of the Group exercised the option in their capacity as representatives of the partnership. The purchase took place in May 1982. During the preliminary development phase of the project, Soil Testing Engineers, Inc. (“STEI”) submitted a proposal to provide engineering services. Maurin-Ogden accepted STEI’s proposal in June 1982, and STEI thereafter submitted a report detailing the results of its soil-testing procedures to Maurin-Ogden.

Approximately one month after Maurin-Ogden accepted STEI’s proposal, the Group executed a formal partnership agreement, and in November 1982, the partnership purchased the land. In 1984, the partnership first noticed damage to

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*Sale, 64 Tul. L. Rev. 976 (1990), for a discussion of the court’s application of these doctrines to the sale of immovables. See also Everett v. Foxwood Properties, 584 So. 2d 1233 (La. App. 2d Cir. 1991) (recognizing the distinction drawn in *Tedesco* and refusing to find apparent authority or agency by estoppel applicable).*

5. 623 So. 2d 645 (La. 1993).
7. Id. at 2.
the shopping center. It attributed this damage to faulty performance on the part of STEI and Doster Construction Company, Inc. ("Doster"). Accordingly, the partnership brought suit under its current name, Woodlawn Park Limited Partnership ("Woodlawn"), against STEI and Doster for breach of contract.\(^8\)

Woodlawn alleged that Maurin-Ogden acted as agent for the Group, or, alternatively, the partnership, when it contracted with the defendants. Therefore, as the undisclosed principal of Maurin-Ogden, the partnership claimed the right to sue in its own name. The trial court sustained STEI's exception of no right of action as it pertained to Woodlawn, and Woodlawn appealed.\(^9\) The first circuit court of appeal, relying solely on its previous opinion in Teachers' Retirement System v. Louisiana State Employees' Retirement System,\(^10\) affirmed the dismissal of Woodlawn and held that an undisclosed principal has no right to sue in its own name the party who contracted with his agent.\(^11\) The Louisiana Supreme Court granted certiorari\(^12\) and reversed.\(^13\)

In holding that an undisclosed principal does have the right to bring suit in his own name to enforce a contract against the party who transacted with his agent, the supreme court recounted the law of undisclosed agency as it exists in our sister states.\(^14\) After setting forth the Restatement (Second) of Agency rule on the undisclosed principal's right to sue on the contract of his agent, Justice Lemmon, writing for a unanimous court, indicated that the court was "restat[ing] [its] approval of the use of common law agency notions in commercial transactions."\(^15\) This statement, combined with the court's implicit refusal to refer to the Civil Code articles on mandate in undisclosed agency situations,\(^16\) evidences the judiciary's willingness to reject Louisiana civilian tradition in favor of national uniformity in the law concerning commercial transactions.

III. THE HISTORY OF MANDATE

The concept of mandatum at Roman law involved "[t]he undertaking of an act by one person at the request or authorisation of another [the mandator], the person undertaking the act being usually called . . . mandatarius [mandatary]."\(^17\) Originally, the concept was nothing more than a mere request to do a friendly act, but it later became an immensely important commercial institution.\(^18\) In its

\(^8\) Id. at 1-2.
\(^11\) Woodlawn Park, 602 So. 2d at 1031.
\(^12\) 608 So. 2d 155 (La. 1992).
\(^13\) 623 So. 2d 645 (La. 1993).
\(^14\) Id. at 647 (cases cited therein).
\(^15\) Id. at 648.
\(^16\) See discussion infra Part V.
\(^18\) Id. See also W. W. Buckland & Arnold D. McNair, Roman Law & Common Law: A
early form, the concept of mandate concerned only rights and obligations between the mandator and the mandatary. The mandatary was obligated to carry out the mandate with due care and to account to his mandator for the proceeds generated by the execution of his commission. The mandator, on the other hand, was obligated to ensure that his mandatary suffered no financial loss as a result of the undertaking. This included reimbursing his mandatary for normal expenses incurred in the execution of the mandate. Although the mandate commonly involved entering into legal relations with a third party, due to the personal nature of contract in Roman law, the mandator neither incurred any obligation nor acquired any right with respect to the third party who dealt with his mandatary. Instead, only the mandatary was considered privy to the contract, and only he was liable and entitled under it.

Nonetheless, as the concept of mandate grew into a commercially significant tool, the Roman praetor began to recognize situations in which expediency required a direct right of action against a mandator, such as when he set his mandatary up as a shipmaster or business manager. Likewise, it was soon realized that the mandatary’s right of action against the third party with whom he dealt could be “assigned” to his mandator under a subsequent contract of mandate. Thus, through ingenuity, Roman law achieved its closest parallel to the concept of agency.

Comparison in Outline 308 (2d ed. 1952).
22. Weir, supra note 20, at 1631. See also W. W. Buckland, A Text-Book of Roman Law from Augustus to Justinian 516-17 (2d ed. 1952). The actions resulting from the contract of mandate at Roman law were the actio mandati, against the mandatary, and the actio mandati contraria, against the mandator. Id. at 518.
23. Buckland, supra note 17, § 117; Watson, supra note 19, at 78-79.
24. Buckland, supra note 17, § 118.
26. Buckland, supra note 17, § 118.
27. Watson, supra note 19, at 79. The actions against the mandator arising from his setting his mandatary up as manager of a trading ship or other business were commonly known as actio exercitoria or actio institoria. Id.
28. Buckland, supra note 17, § 118. Rights under contract could not be assigned at Roman law. The same result could be obtained, however, by giving the person to whom one desired to assign such rights a mandate to sue on behalf of the person originally entitled to enforce those rights with the understanding that the mandatary was not accountable for the proceeds. Id. Of course, this technique was imperfect because the mandator could revoke this subsequent mandate almost at will, the mandate would be revoked by the death of either party prior to its fulfillment, and the obligor/third party could discharge himself by rendering performance to the mandator. Buckland & McNair, supra note 18, at 309.
29. Buckland & McNair, supra note 18, at 308.
The concept of mandate arrived in the civil law of France with a slight modification. Article 1984 of the French Civil Code defines *mandat* as an act by which one person gives to another the power to do something for the mandator and in his name.\(^{30}\) Read literally, this definition means there can be no mandate unless the mandatary acts in the name of his mandator.\(^{31}\) Accordingly, in French civil law, mandate has become synonymous with representative agency.\(^{32}\) As a result, only when there has been representation by the mandatary of his charge to transact for an identified mandator can liability arise between the mandator and the third party.\(^{33}\)

Planiol, in his treatise on French civil law, considered this definition of mandate as too narrow.\(^{34}\) He was consoled, however, because the concept of non-representative mandate finds life in the French commercial law concept of *commission* and in the French civil law under the judicially-created contract of *prête-nom*.\(^{35}\) Thus, while it is recognized in French law that there can be mandate without representation,\(^{36}\) the French Civil Code does not contain a

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30. Article 1984 of the French Civil Code provides: "Le mandat ou procuration est un acte par lequel une personne donne à une autre le pouvoir de faire quelque chose pour le mandant et en son nom. Le contrat ne se forme que par l'acceptation du mandataire." Code Civil art. 1984 (Fr.). An accurate translation is: "[Mandate] or procuration is an act whereby one person gives to another the power to do something for the [mandator] in his name. The contract is formed only through acceptance by the [mandatary]." The French Civil Code 358 (John H. Crabb trans., 1977). *See also* Yiannopoulos, *supra* note 25, at 784.


32. *Id.* at 783.


35. *Id.*. *See also* Jones, *supra* note 33, at 410. A *commissionnaire* is one who transacts business in his own name for the account of his principal. Robert A. Pascal, *Materials on Agency* 3 (1948) (unpublished manuscript, on file with the Louisiana State University Law Library). In the contract of *commission*, because the third party is guaranteed the personal responsibility of the commission agent, the identity of his principal becomes somewhat irrelevant, and the third party is content knowing only that there is someone standing behind the agent. Planiol & Ripert, *supra* note 34, at 301. A *prête-nom* is one who lends his name to another for the other's use. *See* Teche Concrete, Inc. v. Moity, 168 So. 2d 347, 353 n.1 (La. App. 3d Cir. 1964) (citing Peterson v. Moresi, 191 La. 932, 186 So. 737 (1939)), *application denied*, 247 La. 251, 170 So. 2d 509 (1965). For example, it may be that a principal wishes both to conceal his identity and to have the third party believe another is the actual party at interest. In employing another to transact in this other's own name, thereby concealing the principal's existence from the third party, the principal and his intermediary have engaged in a contract of *prête-nom*. Planiol & Ripert, *supra* note 34, at 301. Third persons, however, do not know and are not considered to know anyone but the intermediary or *prête-nom*, thus only the *prête-nom* is given the ability to sue or be sued on the transaction. *Id.* at 303.

general institution of agency distinguishable from the contract of mandate. Instead, the question of liability between principal and third party is resolved according to whether or not there has been representation.

A comparison of the French Civil Code articles on mandate and the corresponding provisions of the Louisiana Civil Code reveals that the Louisiana articles were taken largely from their French counterparts. The Louisiana Civil Code details the concept of mandate in Articles 2985 to 3034. Mandate is defined as "an act by which one person gives power to another to transact for him and in his name, one or several affairs." Being faithful to its civil-law heritage, Article 2985, like the remaining articles in this Title, delineates the rights and duties between the mandator and his mandatary. The Civil Code fails to define specifically the relationship between the mandator and the third party who contracts with the mandatary. According to one scholar, "the Civil Code does not even mention the liability of the third party, although Article 2985 might be considered as implying such." This aspect of the provisions on mandate is consistent with the emphasis of the civil law on privity as essential to the creation of contractual rights and obligations.

More importantly, Article 2985 requires that the mandatary act in the name of his mandator. Like the French Civil Code, Louisiana positive law provides for only one agency situation—mandate or representative agency. In Louisiana, as in France, the redactors provided for the creation of judicially enforceable rights and duties between one who transacts through the acts of an authorized intermediary and the party engaged by that intermediary. Unlike France, however, Louisiana does not statutorily recognize concepts equivalent to the French commission or prête-nom. Thus, nowhere in Louisiana positive law

37. Id. at 783.
38. Jones, supra note 33, at 410.
41. In 1870, at the time of the Civil Code revision, Louisiana was dominated by an agrarian economy, and its agricultural landowners, who often depended upon the fidelity of an agent to dispose of their products, were logically the intended beneficiaries of the mandate provisions. See, e.g., Wogan, supra note 39, at 123-24. Because of this influence, the code articles on mandate regulate only the internal relationship between the mandator and the mandatary, thereby reflecting the agricultural landowner's desire for security of ownership rather than security of transaction. Id. at 124. Although the state's economic structure has changed dramatically in the last century, the civil law dealing with mandate has remained static.
42. Pascal, supra note 35, at 118.
43. Id.
44. Jones, supra note 33, at 412.
is reference made to the idea of non-representative, or undisclosed, agency.\textsuperscript{46}

\begin{itemize}
\item First, Louisiana Civil Code article 2816 provides:
\begin{quote}
An obligation contracted for the partnership by a partner \textit{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. If the partnership is so bound, it can enforce the contract in its own name.
\end{quote}

\begin{flushleft}
La. Civ. Code art. 2816 (emphasis added). A literal reading of this provision suggests that a partner, who is a mandatary of the partnership under Article 2814, may bind the partnership by signing his own name to a contract, without first disclosing his representative capacity, so long as he intends to contract on behalf of the partnership at the time he signs, and the transaction either benefits the partnership or is one in its ordinary course of business.
\end{flushleft}

This interpretation, however, was refuted in Creaghan-Webre-Baker v. Le, 534 So. 2d 94 (La. App. 3d Cir. 1988). In \textit{Le}, the plaintiff, a partnership named Creaghan-Webre-Baker and operating as CWB, instituted suit against Pierre L. Le and Edward J. Lafont for specific performance of an exclusive marketing agreement allegedly existing between the parties. The defendants filed an exception of no right of action claiming the partnership had no right to sue because the contract in question was between defendants and the plaintiffs' partners, individually, and because the contract clearly showed no partnership was a party thereto. The plaintiff argued that even if the three partners allegedly contracted with the defendants in their own names, they did so for the partnership, and, therefore, under Article 2816 the partnership could enforce the contract in its own name.

The court found no mention in the contract that any one or all of the individual partners were contracting on the partnership's behalf. Further, no evidence presented at trial established that the defendants were informed of the individuals' status as mandataries or of the existence of the partnership at or prior to the signing of the agreement. Accordingly, the court sustained the defendants' exception holding that the plaintiff failed to establish the existence of any agency relationship or to prove disclosure of the partnership to the defendants when the contract was made. Thus, the court effectively implied that Article 2816 is only applicable when the partner/mandatory discloses his representative capacity to the third party prior to contracting.


In particular, La. R.S. 10:3-402(a) (1993) (effective Jan. 1, 1994) provides:
\begin{quote}
If a person acting . . . as a representative signs an instrument by signing . . . the name of the signer, the represented person is bound by the signature to the same extent the represented person would have been bound if the signature were on a simple contract. If the represented person is bound, . . . the represented person is liable on the instrument, whether or not identified in the instrument.
\end{quote}

This statute is followed by 1990 Uniform Commercial Code Comment 1 which embarks upon a lengthy discussion of how this language, combined with La. R.S. 10:3-401(a)(ii), reforms the law on negotiable instruments to allow an undisclosed principal to become a party to a negotiable instrument.

Despite this discussion, this statute cannot support the existence of the concept of undisclosed agency in Louisiana written law. First, it must be noted that this discourse on the undisclosed principal's right to be party to a negotiable instrument is contained in the comments to La. R.S. 10:3-402. The comments to a statute, however, are not the law. \textit{See, e.g.,} Ramirez v. Fair Grounds Corp., 575 So. 2d 811 (La. 1991). Secondly, and more importantly, a represented person under this article is reference made to the idea of non-representative, or undisclosed, agency.\textsuperscript{46}
Because the code articles on mandate make no reference to the rights and liabilities between a mandator and a third party that may arise when a mandatary contracts in his own name but on behalf of his mandator, early Louisiana courts took the responsibility to remedy this perceived gap in the law. In 1828, the Louisiana Supreme Court in *Williams v. Winchester* held that "[w]hen goods are sold to an agent for an unknown principal, the latter will be liable, when discovered." This case appears to have been the first step in the jurisprudential development of undisclosed agency law in Louisiana. Although the supreme court cited no codal authority or other civilian support for its holding in *Williams*, the courts of Louisiana advanced the rule that a third party may, upon discovering the principal’s existence and identity, elect to sue the previously undisclosed principal. Unfortunately, like the *Williams* opinion, these subsequent opinions lacked any reference to Louisiana’s mandate provisions. Instead, these later opinions found support for their conclusions by resorting to common-law authorities, prior Louisiana jurisprudence, or a combination thereof. A few cases even stated the principle without reference to any supporting authority.

is bound only “to the same extent the represented person would be bound if the signature were on a simple contract.” Prior to the Louisiana Supreme Court’s decision in *Woodlawn Park*, an agent could only bind his principal if he acted on the principal’s behalf and in his name. La. Civ. Code art. 2985. Thus, as this Note advocates, under a proper interpretation of the Civil Code articles on mandate, a mandatary’s signature will neither bind his undisclosed mandator to a simple contract nor, then, will it bind him to a negotiable instrument under La. R.S. 10:3-402(a).

47. See, e.g., Pascal, supra note 35, at 2.
48. 7 Mart. (n.s.) 22 (La. 1828).
49. *Id.* at 24. The defendant in *Williams* employed the firm of Bedford, Breedlove & Roberson to locate and import sugar boilers on his behalf. The firm wrote to the plaintiff stating, “A friend of our’s, a sugar planter, wishes to procure from your city a set of sugar kettles . . . .” Accordingly, defendant thereby informed the plaintiff of the existence of its principal but did not expose his identity. *Id.* at 23. Under common law agency concepts, this is a case of partially disclosed, rather than undisclosed, agency: the existence of the principal was disclosed but not his identity. *See* Restatement (Second) of Agency § 4(2) (1958). Despite this distinction, Article 2954 of the Civil Code of 1825, like its successor article, current Article 2985, required that a mandatary transact in his principal’s name. *See* 3 Louisiana State Law Institute, Compiled Edition of the Civil Codes of Louisiana 1636 (1942). Thus, the concept of partially disclosed agency was also not within the scope of the concept of mandate.

50. See Jones, supra note 33, at 412.
52. See, e.g., *Valmont Serv. Station*, 3 La. App. at 336 (citing 2 C.J. Agency § 522(b)(1) (1914)).
54. See, e.g., *Johnson*, 1 Pelt. at 83.
The development of the undisclosed principal's right of direct action against the third party arose under similar circumstances. In 1919, the court of appeal for the Parish of Orleans held:

[If an agent contracting in his own name without disclosing his principal] create[s] such an obligation between the other party and the undisclosed principal as to entitle the former to hold the latter, it must necessarily be such an obligation as to entitle the principal to come forward and hold the other party . . . .

This principle was later refined by the second circuit court of appeal in 1928; it held "that a direct action by an undisclosed principal is permitted whenever the person contracting with the agent may not be injured."

Thus, it appears that early in this state's judicial history courts elected to ignore the civil-law institution of mandate and its requirement of representation as a prerequisite to the establishment of a direct legal relationship between parties who deal with one another through an intermediary. Instead, perceived deficiencies in the Louisiana system were cured at the outset by the jurisprudential adoption of common-law notions of undisclosed agency.

Accordingly, Louisiana courts freely decided the issue of liability between principal and third party in non-representative agency cases in conformity with Anglo-American rather than civilian rules.

In 1947, the Louisiana Supreme Court intensified the demise of this civil-law institution by expressly rejecting representation on the part of the mandatary as necessary to the existence and effect of mandate. In Sentell v. Richardson, Dr. Charles Sentell signed an agreement with Dr. Thomas Richardson, whereby Dr. Richardson agreed to purchase stock for Dr. Sentell. At some point after consummating the sale of the stock, Dr. Richardson decided not to follow through with delivery of the stock certificates, and instead attempted to return Dr. Sentell's money to him, while keeping the stock for himself and his partners. After making repeated requests for delivery of the certificates, all of which were refused by Dr. Richardson, Dr. Sentell filed suit to be declared the owner of the

56. Desoto Bldg. Co. v. Kohnstamm, 3 Pelt. 54, 62 (La. App. 1919). Again, the court's only authority for this proposition came from Corpus Juris. Id. (citing 2 C.J. Agency §555(b)(1) (1914)).

57. Childers v. Police Jury, 9 La. App. 490, 491, 121 So. 248, 249 (2d Cir. 1928). The court recognized that this principle was similar to the rule at common law. Id. at 491-92, 121 So. at 249.

58. Yiannopoulos, supra note 25, at 795.

59. See Jones, supra note 33, at 414.

60. 211 La. 288, 29 So. 2d 852 (1947).

61. Id. at 292, 29 So. 2d at 853. The agreement called for Dr. Richardson to purchase stock in the Minden Sanitarium, Inc., from the wife and heirs of Dr. Paul Crutsinger. The agreement stipulated that upon purchasing the stock, Dr. Richardson would have the new stock certificates reissued in his own name, and on the day he received these new certificates he would indorse and deliver them to Dr. Sentell. Id.

62. Id. at 293-94, 29 So. 2d at 854.
stock. Dr. Sentell rested his claim of ownership upon the theory that Dr. Richardson was his agent when he negotiated the sale of the stock, therefore title immediately vested in Dr. Sentell when the contract of sale was completed by Dr. Richardson. Dr. Richardson argued that the agreement was not a mandate under Louisiana Civil Code article 2985 because it did not give him authority to purchase the stock in Dr. Sentell's name. The court held in favor of Dr. Sentell, finding that a contract of mandate existed between the two doctors:

Our opinion is that the words "and in his name" are not essential to the definition of a procuration or power of attorney, as defined in article 2985 of the Civil Code. If those words were essential to the definition there could be no such thing as a procuration or power of attorney to buy property for an undisclosed principal. This last statement evidences the court's implicit recognition of the concept of undisclosed agency as a settled tenet of Louisiana law. Chief Justice O'Neill, writing on behalf of the court, declared the contract a mandate, thereby effectively blue-penciling the element of representation out of the concept despite the express language of Article 2985.

The court, by literally reading words out of the statute, has run afoul of established civilian rules of interpretation. Clear and unambiguous statutory language is to be applied as it is written, and all words and phrases of a statute are to be given effect, i.e. nothing is presumed to be surplusage. Professor Robert A. Pascal criticized the approach taken by the court to recognize undisclosed agency in Louisiana as "little less than outright judicial reform of the law." Nevertheless, the supreme court's ruling in Sentell

63. Id. at 294-95, 29 So. 2d at 854.
64. Id. at 296, 29 So. 2d at 854.
65. Id. at 297-98, 29 So. 2d at 855.
66. Id. at 298, 29 So. 2d at 855 (emphasis added). Louisiana Civil Code article 2985 defines the terms mandate, procuration, and power of attorney as though they are synonymous concepts. Article 2985 provides, "A mandate, procuration or letter of attorney is an act by which one person gives power to another to transact for him and in his name, one or several affairs." (emphasis added).
70. Pascal, supra note 67, at 224. Professor Pascal suggested that the omission of undisclosed, or non-representative, agency from Louisiana's statutory law was not merely an oversight on the part of the redactors. Rather, he postulated that the civil law never fully developed a "trust theory" whereby liability extended between principal and third party except in situations of representative agency where it could rely on the theory of privity between the parties. Id.
negated the civil-law definition of mandate and adopted the common-law concept of "simple agency" in Louisiana.\footnote{71}

IV. THE CHALLENGE

After \textit{Sentell}, undisclosed agency appeared to be an established doctrine in Louisiana. For almost forty years the concept existed without challenge to its basis in Louisiana's civilian legal system.\footnote{72} Another ten years passed before the supreme court stepped forward to address this challenge in \textit{Woodlawn Park Ltd. Partnership v. Doster Construction Co.}.\footnote{73} The first circuit court of appeal was the first to challenge the incorporation of undisclosed agency into Louisiana's civil-law system.\footnote{74} This challenge, though based on dubious reasoning in favor of abrogating non-representative agency, deserves recognition for its attempt to oust from Louisiana's legal system a concept completely incompatible with this state's civil-law heritage.

The challenge to the existence of undisclosed agency as a principle of Louisiana's civil law first arose in 1983, some thirty-six years after \textit{Sentell}. In that year, the first circuit, in \textit{Teachers' Retirement System v. Louisiana State Employees Retirement System (Teachers')},\footnote{75} held that an undisclosed principal has no right of action to sue in his own name the party with whom his agent dealt.\footnote{76} In so holding, the first circuit attempted to establish that Louisiana's civil law provides no basis upon which the concept of undisclosed agency can stand. More specifically, the court attempted to deny that an undisclosed principal has the right to sue in his own name to enforce a contract entered into by his agent.

The dispute in \textit{Teachers'} arose when a real estate developer defaulted on a loan, and his interim lender brought suit against the permanent lender to enforce a buy-out agreement. Harry J. Hart, representing West Side Twelve Corporation ("West Side"), sought financing for acquisition and development of a certain parcel of land from Great American Mortgage Investors ("Great American"). Before providing the interim financing, Great American required Hart to secure a "take out commitment" from another lender for permanent financing. This commitment was obtained from Louisiana State Employees' Retirement System

\footnote{72. The forty-year period mentioned at this point refers to the approximate time between the supreme court's 1947 opinion in \textit{Sentell} and the first circuit court of appeal's 1983 decision in Teachers' Retirement Sys. v. Louisiana State Employees Retirement Sys., 444 So. 2d 193 (La. App. 1st Cir. 1983), rev'd on other grounds, 456 So. 2d 594 (1984).}
\footnote{73. 623 So. 2d 645 (La. 1993).}
\footnote{74. See, Teachers' Retirement Sys. v. Louisiana State Employees Retirement Sys., 444 So. 2d 193 (La. App. 1st Cir. 1983), rev'd on other grounds, 456 So. 2d 594 (1984).}
\footnote{75. \textit{Id.}}
\footnote{76. \textit{Id.} at 197.
("LASERS"). After executing the interim financing agreement with West Side, Great American, on the same day, entered into a "Participation Agreement" with five other parties, including Teachers' Retirement System of Louisiana ("Teachers"). In this participation agreement, the contracting parties agreed to participate in the loan from Great American to West Side in varying proportionate amounts. The following day, Great American, West Side, and LASERS entered into a "Tri-Party Agreement" in which LASERS agreed to repay Great American the unpaid balance of the loan made by it to West Side. This type of agreement is commonly referred to as a "take-out" or "buy-out" agreement.\footnote{Id. at 194.}

Prior to the end of the interim financing period, West Side defaulted on the loan. Great American then requested that LASERS "take them out" of the loan pursuant to the Tri-Party Agreement, but LASERS refused. Great American and the other parties to the Participation Agreement then filed suit against LASERS. LASERS responded by filing a peremptory exception of no right of action which was sustained by the trial court as to all the plaintiffs but Great American. The plaintiffs appealed this ruling claiming to be undisclosed principals of Great American and, thus, parties to the Tri-Party Agreement entitled to sue to enforce its "buy-out" provision.\footnote{Id. at 195.}

In support of its decision to deny an undisclosed principal the right to sue in his own name to enforce a contract entered into on his behalf by his agent, the first circuit made four basic arguments. The court, looking first to the Louisiana Civil Code, stated: "Nowhere in [the articles on mandate] do we find authority for an undisclosed principal suing a third person on a contract made by an agent. In fact, 'undisclosed agency' is not recognized at all by the code."\footnote{Id. at 196.} Finding no authority in the positive law of Louisiana, the court turned to the jurisprudence. After commenting on the scarcity of case law on this issue, the court focused on the only two decisions which appear to support the undisclosed principal's right of action.\footnote{Id. (discussing Childers v. Police Jury, 9 La. App. 490, 121 So. 248 (2d Cir. 1928) and DeSoto Bldg. Co. v. Kohnstamm, 3 Pelt. 54 (La. App. 1919)).} Without elaboration, the court gave little credence to the correctness of these "older appellate decisions" and declined to follow them.\footnote{Id. (referring to Jones, supra note 33).} Thus, unable to establish a foundation upon which the civil law of Louisiana could support concepts of undisclosed agency, the court advanced its argument for denying the undisclosed principal a right under the contract.

on behalf of the first circuit, developed the French concepts underlying Louisiana mandate law. The court extracted from these sources the postulate that French law resolves the question of liability between principal and third party according to whether or not the agent represented himself as acting for another. The court then expounded upon the distinction between mandat, commission, and prête-nom in French law. The first circuit found that the transaction at issue, while not a mandate under Louisiana law, was instead a contract of prête-nom, as defined in the French civil law, thereby affording only Great American the right to sue to enforce the "buy-out" provision of the Tri-Party Agreement. Finally, to bolster its conclusion, the court cited the Louisiana Supreme Court's opinion in Turner v. Snye as disallowing an undisclosed principal a right of action to sue a third party on a contract. 

Superficially, the court's reasoning in Teachers' appears fundamentally sound under traditional civilian methodology. A more critical examination of the authority cited in the opinion, however, reveals substantial defects in the court's logic, defects which greatly weaken the position advocated.

First, the court's observation that no codal support for the concept of undisclosed agency exists ignores the effect of Sentell. In Sentell, the supreme court judicially amended Article 2985 to eliminate action in the name of the principal as a prerequisite to the establishment of a mandate. Accordingly, that decision from this state's highest tribunal expanded the codal definition of mandate, and the application of the principles encompassed in that civilian institution, to include undisclosed agency.

Furthermore, the first circuit's rejection of the decisions in Childers v. Police Jury and DeSoto Building Co. v. Kohnstamm is unwarranted. Although these two appellate decisions appear to be the sum total of the jurisprudential support for the position asserted by the plaintiffs in this case, the court failed to recognize the numerous decisions of the supreme and appellate courts of this state that have upheld the third party's right to sue an undisclosed principal once he is discovered. According to these decisions, undisclosed agency exists in

84. Id.
85. Id. at 196-97. The court recognized that while mandat requires representation by the mandatary and creates rights between the principal and third party, the latter two concepts reject both notions. See supra notes 27-46 and accompanying text.
87. 162 La. 117, 110 So. 109 (1926). For a brief discussion of the facts of this case, see infra notes 96-98 and accompanying text.
88. Teachers' Retirement Sys., 444 So. 2d at 197. See infra notes 100-01 and accompanying text for a discussion of this case.
89. See supra notes 60-71 and accompanying text.
90. 9 La. App. 490, 121 So. 248 (2d Cir. 1928).
91. 3 Pelt. 54 (La. App. 1919).
92. See, e.g., Williams v. Winchester, 7 Mart. (n.s.) 22 (La. 1828); Teche Concrete, Inc. v. Moity, 168 So. 2d 347 (La. App. 3d Cir. 1964), application denied, 247 La. 251, 170 So. 2d 509.
favor of the third party's right to sue the undisclosed principal; however, the first circuit denied a reciprocal right of action to the undisclosed principal. The seemingly illogical and inequitable nature of the position taken by the first circuit is further exemplified by its own decision rendered in favor of a third party against an undisclosed principal less than one year after its decision in Teachers'.

Next, the court's reliance on a 1948 Comment in the Louisiana Law Review also requires qualification. Though Judge Cole fairly and accurately recounted French law as outlined in this article, he failed to follow that discussion to its ultimate conclusion. The article's author, in assessing the supreme court's action in Sentell, appeared to champion two distinct positions: (1) that the incorporation of undisclosed agency into Louisiana's legal system was a desirable result supportable by numerous important policy considerations; and (2) despite the desirability of the end achieved by the supreme court, the means by which it chose to accomplish its objective were suspect. Nonetheless, the article's author concluded that the supreme court made the right decision by incorporating undisclosed agency into Louisiana's legal system. Thus, while the first circuit appears to be advancing this article in support of its position to refute the undisclosed principal's right to sue directly the third party who contracted with his agent, that article actually advocated acceptance of the exact opposite conclusion.

Finally, one must examine more closely the supreme court's decision in Turner v. Snype to determine if the stool upon which the first circuit rested its decision has even one leg left to stand on. Judge Cole read this case to hold that an undisclosed principal could not sue a third party who transacted with his agent, and thus found the case to espouse the supreme court's repudiation of this undisclosed agency principle. The facts of that case, however, are distinguishable. In Turner, a real estate broker made an offer on behalf of one of his clients to another client to purchase the latter's house. After the seller accepted the offer, the existence of the offeror was made known to the seller, and the previously undisclosed principal, the purchaser, tendered the agreed upon deposit to the broker. Subsequently, upon the seller's failure to perform, the purchaser demanded that the seller appear before a notary, accept the full contract price, and deliver to him valid title to the property. When the seller informed the purchaser of her inability to comply with his demand, the purchaser brought an...
action seeking specific performance of the contract of sale.\textsuperscript{98} The supreme court affirmed the lower court's rejection of the purchaser's demand, thereby not allowing the previously undisclosed principal/purchaser to judicially enforce the contract.\textsuperscript{99} The court's reason for its affirmance, however, was not that an undisclosed principal has no right of direct action against a third party under Louisiana law. Rather, the court found that the purchaser's contract of agency with the real estate broker was based on a verbal agreement. According to the court:

A verbal mandate or power of attorney to buy or sell real estate is not a valid or enforceable contract. As the law requires that a contract to buy or sell real estate must be in writing, so also must a power of attorney to make such contract be in writing.\textsuperscript{100}

Thus, though the court found the agreement constituted a binding contract between the seller and the real estate broker, it concluded that the undisclosed principal could only acquire rights under the contract if it had been assigned to him by his agent, the broker.\textsuperscript{101} In the final analysis, the first circuit's reliance on \textit{Turner v. Snype} is misplaced.

After taking the first circuit's opinion in \textit{Teachers'} and critically dissecting its reasoning, one must take an additional step in evaluating the strength of its challenge to undisclosed agency as a concept of Louisiana civil law. As alluded to previously, less than one year after handing down its opinion in \textit{Teachers'}, the first circuit court of appeal rendered a decision in \textit{Frank's Door & Building Supply, Inc. v. Double H. Construction Co.}\textsuperscript{102} In this decision, the first circuit held that a third party to a contract may sue not only the agent, who personally bound himself by failing to disclose his intermediary status and his principal's existence, but also the undisclosed principal. With both of these opinions on record, the first circuit has apparently taken the position that while a third party may sue directly the undisclosed principal to enforce a contract, the undisclosed principal is to be denied a reciprocal right of action on the same contract against the party with whom his agent dealt. This fundamentally counter-intuitive statement of law pains the ear of common sense.

Despite the logical deficiencies of the \textit{Teachers'} opinion, the first circuit should be commended for stepping forward and attempting to preserve a portion of this state's civilian heritage. For over a century and a half, Louisiana courts have willfully shunned their responsibility to this state's civil-law system by

\textsuperscript{98.} \textit{Turner}, 162 La. at 118-19, 110 So. at 109.

\textsuperscript{99.} \textit{Id.} at 120-21, 110 So. at 110.

\textsuperscript{100.} \textit{Id.} at 120, 110 So. at 110 (citations omitted). The concept embraced here by the court is commonly referred to as the "equal dignity rule." See Reuschlein & Gregory, \textit{supra} note 3, § 196. "This rule . . . requires an agent's authority to execute an instrument to be in writing if the instrument itself is required to be in writing." \textit{Id.}

\textsuperscript{101.} \textit{Turner}, 162 La. at 120, 110 So. at 110.

\textsuperscript{102.} 459 So. 2d 1273 (La. App. 1st Cir. 1984).
refusing to acknowledge that the positive law establishes only one form of agency-like relationship, that of mandate or representative agency. Before this decision, Louisiana courts did not criticize the importation of common-law undisclosed, or non-representative, agency as being repugnant to our civil-law background.

Notably, the Supreme Court of Louisiana reviewed this decision and reversed it on other grounds. Because the supreme court did not address the undisclosed agency issue in reviewing Teachers', the first circuit relied solely upon its earlier decision in that case to again deny an undisclosed principal the right to sue directly the third party who dealt with his agent, thereby resubmitting its challenge to the judicial incorporation of common-law notions of undisclosed agency into Louisiana's legal system. The Louisiana Supreme Court again elected to review the action of this appellate court and, on this occasion, chose to accept the challenge before it.

V. THE RESPONSE AND AN ANALYSIS

The Louisiana Supreme Court succinctly states the issue before it in Woodlawn Park Ltd. Partnership v. Doster Construction Co. ("Woodlawn Park"), as "whether an undisclosed principal has a right of action ... against the party who contracted with the undisclosed principal's agent." The court resolves this issue in favor of the undisclosed principal's right to sue. Basing its opinion on concepts derived wholly outside the civil law, the supreme court refutes the applicability of the Louisiana law of mandate and adopts common-law notions of undisclosed agency. Such action, taken in the face of the challenge concerning the lack of civilian foundation for undisclosed agency law in Louisiana, warrants criticism.

The court's opinion is not completely devoid of any reference to Louisiana statutory provisions. Indeed, the opinion examines two separate articles of the Civil Code. The court acknowledges that under the definition of mandate provided in Article 2985 a mandatary, or agent, must always act in a representative capacity. Recognizing this divergence from the common-law concept

105. 623 So. 2d 645 (La. 1993).
106. Id. at 645.
107. Id. at 648.
108. Id. at 647-48.
109. Id. at 648.
110. Id. at 647-48.
111. Id. at 647. The court acknowledges the effect of its decision in Sentell as changing this definition. Id. at 647 n.8. However, in what appears to be an attempt to avoid rekindling the criticisms heaped upon this approach originally, Justice Lemmon relegates this decision to a footnote.
of agency, the court finds "[t]he Civil Code has never fully developed the concept of agency and representation with respect to the direct acquisition of rights and liabilities through the contractual action of a properly authorized intermediary" acting on behalf of an undisclosed principal. The court, finding no direct statutory authority applicable to the situation, turns to the numerous cases in which Louisiana courts have afforded a third party the right to sue an undisclosed principal to enforce the contract of his agent. Finding that these courts relied on common-law notions in support of their conclusions, the court then adopts and applies those same notions of simple agency to the case sub judice.

Following a string citation of Louisiana jurisprudence relied on by the court, Justice Lemmon cites Fred W. Jones' 1948 Comment in the Louisiana Law Review. In doing so, Justice Lemmon may have tipped his hand as to the approach which the court here attempted to advance for the adoption of common-law undisclosed agency concepts. In criticizing the supreme court's earlier action in Sentell, this Comment suggested:

The better course [for incorporating undisclosed agency into the civil law of Louisiana] would seem to be a recognition by our supreme court that Louisiana jurisprudence, through a line of consistent decisions, created a set of rules, analogous to those governing "simple agency," to be applied to a situation not provided for in our written law.

The critical flaw of this approach, and the approach presently advocated by the supreme court, is the underlying assumption that Louisiana positive law does not provide for undisclosed agency. On the contrary, the Louisiana Civil Code has expressly developed the concept of mandate, which is the civil-law approximation of common-law simple agency, and the only statutory concept by which legally enforceable relations may be created between a party acting through an intermediary and the party who contracts with that intermediary. Mandate, by definition, requires that the intermediary act in the name of his principal. Failure of the intermediary to disclose the existence and identity of his principal defeats the confection of a mandate between him and his principal and, likewise, prevents the flow of rights and obligations between his principal and the party with whom he has dealt. Mandate, therefore, excludes the creation of legal ties between a principal and a third party when the

112. Id. at 647 (citing Yiannopoulos, supra note 25, at 781, 795).
113. Id. The cases cited by the court at this point in its opinion are essentially the same as those listed in supra note 51.
114. Id. at 648.
115. Jones, supra note 33, at 415 (emphasis added).
principal’s agent contracts with that third party and does so without full representation. Thus, to say that the civil-law institution of mandate excludes undisclosed agency from its purview is not the equivalent of saying that undisclosed agency is merely unprovided for in the positive law of this state. Thus, the Louisiana Supreme Court’s approach in Woodlawn Park, in so far as it concludes that undisclosed or non-representative agency is simply unprovided for in Louisiana positive law, must be rebuked as an overt act of judicial overreaching.

The court made a second attempt to bolster its decision with codal support by citing Louisiana Civil Code article 3021 for the proposition that “a principal in Louisiana is bound by the authorized or ratified acts of his attorney in fact.”\(^\text{118}\) The court found no valid reason for declining to extend this rule to situations involving an undisclosed principal.\(^\text{119}\) This assertion is, however, untenable in light of the court’s previous recognition in its opinion that “a mandatary always acts in a representative capacity and is therefore different from a common law agent.”\(^\text{120}\)

Article 2985 indicates that the terms “mandate” and “attorney in fact” are synonymous.\(^\text{121}\) This synonymity permeates the articles comprising the Title “Of Mandate.”\(^\text{122}\) As such, an “attorney in fact” is also defined as one who acts in his principal’s name.\(^\text{123}\) Therefore, when Article 3021 states “[t]he principal is bound to execute the engagements contracted by the attorney, conformably to the power confided in him,” this principle, read \textit{in pari materia} with the definition in Article 2985, is applicable only when the attorney has represented his capacity as intermediary by disclosing his principal to the other party. Accordingly, since the court previously indicated in its opinion that the concept of mandate was inapplicable to the issue of undisclosed agency, it may not later refer to a principle encompassed within this institution to provide codal support to its present conclusion. Such reasoning only creates the semblance of codal authority.

VI. THE STATE OF THE LAW

Once the smoke from this “civil war” has cleared, the fact remains that the Louisiana Supreme Court has incorporated into Louisiana’s civil law the right of


\(^\text{119}\) Id.

\(^\text{120}\) Id. at 647.

\(^\text{121}\) Louisiana Civil Code article 2985 provides that “[a] mandate, procuration, or letter of attorney is an act . . . .” (emphasis in original).


an undisclosed principal to sue in his own name the party who contracts with his agent. Before discussing the practical effect of this importation of the law of our sister states, attention must be given to the policy underlying this action.

With less than marked conviction, the supreme court advances the need for national uniformity in the law governing commercial transactions. Despite the court's hesitance to rely fervently upon this policy, numerous scholars have advocated this idea as the sole impetus for the reformation of Louisiana agency law. In this civil-law jurisdiction, however, the legislature alone is vested with the power to revise the written law. Accordingly, in attempting to advance public policy through its decisions, this state's judiciary has encroached upon that domain constitutionally reserved for the Louisiana Legislature.

Additionally, the generality of the court's opinion, and the problems likely to be created by such overreaching, deserves comment. The court proclaimed its acceptance of the common-law rule that allows the undisclosed principal a right of action by "restat[ing] approval of the use of common law agency notions in commercial transactions." Two elements of this statement require comment. First, the issue before the court involved only the right of the undisclosed principal to sue the party with whom his agent contracted on his behalf. The court, therefore, need only look to those principles of simple agency that concern such matters. Instead, the court proclaims acceptance of common-law agency notions in general. Such a loose, unqualified generalization by the supreme court invites the Louisiana bar to expel from the law of the state governing commercial transactions a settled civilian institution. Clearly, the supreme court could not have intended such a result. Rather, reading this statement in context, one must conclude that the court's purpose was to advance the use of such foreign principles in those situations, such as undisclosed agency, which the court believes the Civil Code has failed to address. Thus, in cases

125. See Yiannopoulos, supra note 25, at 790 795 n.125; Jones, supra note 33, at 414; Muller-Freienfels, supra note 71, at 78. The concept of uniformity among the states in commercial law must be recognized as an important catalyst in Louisiana's adoption of significant portions of Articles 2-5, 7, 8, and 9 of the Uniform Commercial Code. See, e.g., Title 10 of the Louisiana Revised Statutes; see also supra note 46.
127. La. Const. art. III, § 1(A) ("The legislative power of the state is vested in a legislature . . . . "); La. Const. art. II, § 2 ("[N]o one of these branches [legislative, executive, or judicial] . . . . shall exercise power belonging to either of the others."). See, e.g., Tullier v. Tullier, 464 So. 2d 278 (La. 1985); LeBlanc v. Hoffman, 175 La. 517, 143 So. 393 (1932); Wasson v. Wasson, 439 So. 2d 1208 (La. App. 1st Cir.), writ denied, 443 So. 2d 592 (1983).
128. Woodlawn Park, 623 So. 2d at 648.
129. Besides following this theory to incorporate the concept of undisclosed agency into Louisiana's law, the courts appear to have taken a similar approach in adopting apparent authority
where the agent or mandatary has disclosed either the existence or identity of his principal or mandator, the Civil Code articles on mandate should still apply.

This broad statement by the court interjects another, possibly more obvious, complication into our legal system. The court restricts the use of the common law to "commercial transactions." Unfortunately, the term "commercial transaction" is neither defined by the court nor given generally established meaning in the law. Accordingly, the court has tantalized the palate of a Louisiana bar that suffers from an unquenchable thirst for litigation. Thus, it appears, despite the definitive stance taken by the court on matters of undisclosed agency law in Woodlawn Park, the court has not settled the issue of agency in our state, but has only created a need for further clarification of its position.

This discussion would be incomplete without an assessment of the practical effect of the supreme court’s granting to an undisclosed principal the right to enforce the contract of his agent. An undisclosed principal is a person for whom an agent acts such that, while the agent is interacting with a third party, the third party has no notice that the agent acts for another. Based on these premises, one’s first impression of the court’s holding might be one of contempt. The court advocates that T, who dealt with and relied on A, may now be subject to liability to P, someone T never knew existed. Would not such a possibility generate reluctance on the part of T to freely contract when beforehand he is unable to ascertain to whom his potential liability might extend? Likewise, would not the free flow of commerce be interrupted if parties to a contract feel that it may be in their best interest to inquire into the true motivations of every prospective contractual partner? Such questions, of course, are premised on the assumption that T may find himself exposed to potentially greater liability if he contracts with A, but later is held liable to a stranger, P. A summary of the common-law principles of undisclosed agency, as those principles now appear to be incorporated into Louisiana law, should dispel any fears that one who finds himself in T’s position may harbor.

As Louisiana cases indicate, a third party may sue a previously undisclosed principal upon discovering his existence and identity. The common law agrees with this contention. In such a situation, the principal’s liability on the contract exists by operation of law. Thus, while the third party may assert against the principal all claims arising from the contract, the principal may avail himself only of those defenses which arise out of the transaction and not agency by estoppel. See supra note 4.

130. Woodlawn Park, 623 So. 2d at 648.
133. See Restatement (Second) of Agency § 186 (1958).
134. See Reuschlein & Gregory, supra note 3, § 95. The basic fiction underlying the concept of agency is qui facit per alium facit per se (He who acts through another, himself acts). Id. § 1.
of those regarded as personal to the agent. The principal is given only such rights as he would have if he were an assignee. And, clearly, it makes sense to hold the principal liable as a party to a transaction which he initiated for his own benefit.

On the other hand, it is only with the decision in *Woodlawn Park* that the law of this state confirms upon an undisclosed principal the right to sue an unsuspecting third party on a contract forged on the principal's behalf. The court noted "[a] person who contracts with the agent of an undisclosed principal, when the agent intended to contract on behalf of the principal within his power to bind the principal, is generally liable to the principal." The court, however, recognized obvious limitations on the liability of the third party when the contract is in the form of a negotiable or sealed instrument, or when the contract expressly excludes liability to this or any undisclosed principal.

Besides these apparent defenses to the third party’s liability to an undisclosed principal, to afford the unwary third party a sense of security in his dealings, the common law provides numerous exceptions to the undisclosed principal's right of action. For example, if an agent has knowledge of the third party’s refusal to deal with his principal, but the agent misrepresents his status to induce the third party into a contract with his principal, the third party may rescind the contract. Likewise, though the principal may generally require the third party to render performance to him rather than to his agent, many limitations apply to this rule in the case of an undisclosed principal. This rule does not apply if rendering performance to the principal would subject the third party to a substantially different liability than that owed to the agent.

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135. *Id.* § 101.
139. *Id.* at 647 n.7.
140. Restatement (Second) of Agency § 304 (1958). The *Sentell* court, in dicta, alluded to this principle. Dr. Richardson raised as a defense that the contract between himself and Dr. Sentell "contemplated the perpetration of a deception or fraud upon Mrs. Crutsinger" because she had originally refused to sell the stock to Dr. Sentell at any price. *Sentell v. Richardson*, 211 La. 288, 297, 29 So. 2d 852, 855 (1947). The court refuted this claim recognizing that Dr. Richardson was not the proper person to raise it. *Id.* at 301, 29 So. 2d at 856. However, the court indicated that had Mrs. Crutsinger been a party to the suit she would have the right to protest the contract between the doctors as a fraud perpetrated to circumvent her previous decision not to sell to Dr. Sentell. *Id.*

Note, according to comment (c) following § 304 of the Restatement, this rule does not apply when the third party would be willing to deal with the principal, but the agent hopes by secreting the principal's identity to obtain better terms for him.
142. *Id.* For example, if the third party to a contract for the sale of goods binds himself to absorb the cost of delivery and the undisclosed principal's place of business turns out to be a much greater distance from him than the agent's, then the third party will have a basis for rescission of the contract.
Also, if the services to be performed are personal or intimate in nature, then the third party cannot be compelled to deliver them to the principal. Finally, while the third party can assert any defense arising from his transaction with the agent against the principal, including set-off, if the third party gives complete performance to the agent before learning of the principal’s identity and existence, the third party is discharged of his obligation to either party.

Before concluding, two more general observations of the impact of *Woodlawn Park* deserve attention. First, under Louisiana law, a third party may elect to sue both the agent and the principal and obtain a judgment in solido against these parties. After *Woodlawn Park*, the opportunity to sue or be sued directly on a contract is reciprocal as between the undisclosed principal and third party. As such, the third party who has dealt with the agent of an undisclosed principal avoids what he would initially perceive as a total loss on the contract should the agent thereafter become insolvent. Instead, the third party is provided a “second bite at the apple,” if you will, because upon discovering the principal’s existence and identity, the third party is provided a second defendant to pursue. This idea coincides with the tendency of the law to place the burden of financial responsibility on the solvent party, which in most cases will be the undisclosed principal. Secondly, one other policy consideration which weighs in favor of recognition of corresponding rights and obligations between third parties and undisclosed principals merits discussion. In the majority of cases, to make the third party directly liable to an undisclosed principal for breach of contract would generally impose no greater responsibility on the third party. He would already be liable to the agent, and as previously discussed, his liability to the undisclosed principal can be no more onerous than that owed to the agent.

**VII. CONCLUSION**

With the pronouncement of its decision in *Woodlawn Park*, the Louisiana Supreme Court has addressed the challenge before it by simply importing common-law principles of undisclosed agency into Louisiana. Accordingly, the Louisiana practitioner who finds himself confronted with an issue concerning undisclosed agency may now be better served by placing his Civil Code aside.
and reaching for a copy of the Restatement (Second) of Agency. But is this infusion of such foreign concepts a satisfactory response to the inquest for a civilian-based solution to nonrepresentative agency situations? As the tenor of this Note suggests, the answer to this question is "no." While the impact of this decision will serve to advance Louisiana's commercial compatibility and competitive position with respect to its sister states, the adoption of these common-law notions of undisclosed agency is in direct contradiction to Louisiana's civil-law system. 151

Thomas P. LeBlanc

151. As a final comment, at the time of this writing the Louisiana State Law Institute is in the process of revising Title XV of Book III of the Louisiana Civil Code entitled "Of Mandate."
* The author would like to thank Professor Wendell H. Holmes for all of his assistance in the development of this Note.