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Nonfiduciary Liabilities of Corporate Agents

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NONFIDUCIARY LIABILITIES OF CORPORATE AGENTS

M. Thomas Arnold*

I. INTRODUCTION	2
II. AUTHORIZED CONTRACTS FOR FULLY DISCLOSED CORPORATE PRINCIPAL	4
III. UNAUTHORIZED CONTRACTS	4
IV. FAILURE TO DISCLOSE AGENCY.....	6
A. <i>In General</i>	6
B. <i>Election Rule vs. Satisfaction Rule</i>	10
C. <i>Use of Extrinsic Evidence to Show Agency</i>	12
D. <i>Disclosing Agency in a Written Contract</i>	12
V. <i>ULTRA VIRES</i> CONTRACTS	14
VI. TORTIOUS ACTS	15
A. <i>In General</i>	15
B. <i>Interference with a Contract or Prospective Contract</i> ..	17
C. <i>Defamation</i>	19
D. <i>Joint and Several Nature of Agent's Liability</i>	22
E. <i>Principal's Right to Indemnity</i>	23
VII. CRIMINAL ACTS	25
A. <i>In General</i>	25
B. <i>The Responsible Corporate Officer Doctrine</i>	26
C. <i>Intracorporate Conspiracy</i>	28

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VIII. STATUTORY LIABILITIES.....	29
IX. CONCLUSION	30

I. INTRODUCTION

Although a corporation is a legal entity in the eyes of the law, it must act through its agents. A vast body of law has developed the contractual, tort, criminal, and statutory liabilities of corporations for the acts of their agents. For purposes of imposing liability upon the corporation in these different contexts, the law in effect treats the acts of a corporate agent as the acts of the corporation.

While a corporation is often a tempting target of litigation because of its financial resources or visibility, the liability of corporate agents in various contexts should not be overlooked for a number of important reasons. First, a corporate agent may have substantial personal assets or insurance, particularly where the agent is a high managerial agent of a large corporation or the major shareholder in a closely-held corporation.

Second, a small closely-held corporation may be thinly capitalized or even insolvent. In this situation, the corporation may not be an attractive party to pursue. In some cases a court might be persuaded to disregard the corporate entity and impose liability upon some of the corporate shareholders, but this is usually an uphill battle.¹ The concept of limited shareholder liability serves the important policy of encouraging capital formation,² and the presumption is that the corporate entity will be respected.³ As a result, theories which permit a court to impose liability on parties associated with the corporation without taking the drastic step of disregarding the corporate entity can be very attractive.

Third, the deterrent functions of tort and criminal liability cannot be adequately served solely by imposing liability on the corporate entity. Imposing liability on a corporation for the torts of its servants may encourage the corporation to exercise care in the hiring, training

1. See *DeWitt Truck Brokers, Inc. v. W. Ray Fleming Fruit Co.*, 540 F.2d 681, 683 (4th Cir. 1976) (stating that the power to pierce the corporate veil is to be exercised "reluctantly" and "cautiously").

2. See *Johnson v. Kinchen*, 160 So.2d, 296, 299 (La. Ct. App. 1964) ("The protection of limited liability for venture or investment capital is essential to the efficient operation of a system of free enterprise.").

3. *DeWitt Truck Brokers*, 540 F.2d at 683 (presuming that a corporation and its shareholders are separate and distinct).

and supervision of its servants.⁴ A servant, however, will lack adequate incentives to exercise care without the possibility that he or she will be liable for his or her torts either to the injured party or to the corporate master on an indemnity claim.⁵ The liability of the servant is particularly important since generally it is less expensive for him or her to reduce the risk of accident by exercising additional care than it is for the employer to reduce the risk through additional supervision, training, and discipline.

In the criminal area, it is not clear that criminal fines imposed upon a corporation adequately deter corporate agents from engaging in criminal behavior on behalf of the corporation. In some cases the actual cost of the fine may be passed on to consumers in the form of higher prices, to employees in the form of lower wages, or to shareholders in the form of lower dividends.⁶ To actually deter corporate criminal behavior, it may be necessary to impose criminal sanctions on the actual arms and legs of the corporation, the corporate agents.

This article surveys the potential contractual, tort, criminal, and statutory liabilities that a corporate agent may incur as a result of his or her actions on behalf of the corporation. This discussion will show that the question of the liability of a corporate agent for a particular act must be considered separately from the question of whether his or her act imposes liability on the corporation. In some cases only the corporation is liable as a result of the agent's actions. In other cases only the agent is liable, and in still others both are liable. Full appreciation of rules of law governing the liability of a corporate agent can assist an attorney in deciding in a particular situation whether to pursue the agent, or in counselling the corporate agent regarding his or her risk of personal liability.

4. See Harold J. Laski, *The Basis of Vicarious Liability*, 26 *YALE L.J.* 105, 114 (1916). "If we allow the master to be careless of his servant's torts we lose hold upon the most valuable check in the conduct of social life." *Id.* Thus, the vicarious liability of a corporate master for the torts of its servants has "managerial as well as financial functions." C. Robert Morris, Jr., *Enterprise Liability and the Actuarial Process - The Insignificance of Foresight*, 70 *YALE L.J.* 554 (1961) (citing William O. Douglas, *Vicarious Liability and Administration of Risk*, 38 *YALE L.J.* 584, 720 (1929)).

5. See generally, *infra* part V.E.

6. See John C. Coffee, Jr., "No Soul to Damn: No Body to Kick": an Unscandalized Inquiry Into the Problem of Corporate Punishment, 79 *MICH. L. REV.* 386, 400-02 (1981).

II. AUTHORIZED CONTRACTS FOR FULLY DISCLOSED CORPORATE PRINCIPAL

A corporate agent who makes a contract on behalf of a corporation within his or her authority is not liable on the contract if he or she clearly discloses the identity of the corporate principal to the other party.⁷ The corporate agent incurs no liability because it was clear to the party with whom the agent dealt that the agent was acting solely in a representative capacity.⁸ Therefore, if the party is able to hold the corporation liable on the transaction, he or she receives everything for which he or she bargained and has no grounds for complaint. Of course, if the corporate agent makes fraudulent misrepresentations to induce the third party to enter into the contract, the agent is liable for his or her tortious behavior.⁹

III. UNAUTHORIZED CONTRACTS

Where a person who has no power to bind the corporation purports to contract on its behalf, that individual is personally liable to the other party under a theory of implied warranty of authority. Personal liability will also be found where the person contracted in excess of his or her authority.¹⁰ The person is liable even though he or she makes no express representation regarding the extent of his or her authority to bind the corporation. The warranty is implied from the act of purporting to act for the corporation.¹¹ Furthermore, the person is liable even if he or she acts in good faith and with an honest belief that his or her action is authorized.¹²

If the party with whom a purported agent deals knows or should know that the purported agent is not authorized to act, or if the purported agent disclaims any warranty of authority, the purported agent is not liable on the warranty of authority. For example, if a contract expressly requires the approval of another person or of the corporate board of directors, then the agent is not liable to the other party upon a warranty of authority.¹³

7. RESTATEMENT (SECOND) OF AGENCY § 320 (1958).

8. *Ace Dev. Co. v. Harrison*, 76 A.2d 566, 570-71 (Md. 1950) (finding that plaintiffs may sue the corporation for specific performance where the officers who signed the contracts acted solely for the corporation).

9. See *infra* part VII. A.

10. CAL. CIV. CODE § 2342 (West 1985); *Husky Indus. v. Craig Indus.*, 618 S.W.2d 458, 461 (Mo. Ct. App. 1981); RESTATEMENT (SECOND) OF AGENCY § 329 (1958).

11. *Husky*, 618 S.W.2d at 461; RESTATEMENT (SECOND) OF AGENCY § 329 cmt. a (1958).

12. *Husky*, 618 S.W.2d at 461; RESTATEMENT (SECOND) OF AGENCY § 329 cmt. b (1958).

13. See, e.g., *Yoakum v. Tarver*, 64 Cal. Rptr. 7, 10-12 (Cal. Ct. App. 1967) (finding that the

The third person may recover not only damages for the harm resulting to him or her from the purported agent's lack of authority, but also may recover the benefit that he or she would have received from the transaction if it had been authorized.¹⁴ The third person is not damaged, however, by the lack of authority where the third person would not have benefitted from the contract even if the purported agent had been authorized. Thus, the third person is not damaged by the lack of authority where the contract is unenforceable because of the Statute of Frauds, where the corporation is insolvent, or where performance under the contract would be excused because of supervening impossibility, commercial frustration, or illegality.¹⁵

A person who tortiously misrepresents that he or she has authority to bind a corporation is subject to tort liability to the other party to the transaction.¹⁶ The other party may recover for any loss caused by reliance upon the tortious misrepresentation. The purported agent is not liable if the other person knows that he or she is without authority to bind the corporation.¹⁷ "In practice, because of differing statutes of limitations or rules of damages, because of auxiliary remedies allowed for fraud, or because actions for fraud are not barred by bankruptcy, it may be advantageous to bring an action of tort."¹⁸

Generally, the liability of an unauthorized person is either upon a warranty of authority or for tortious misrepresentation, but not as a party to the contract. California, however, provides by statute that a person without authority who enters into a written contract in the principal's name without a good faith belief that he or she is authorized is responsible to the third person as a principal.¹⁹ Where its requirements are met, this statutory provision makes the agent a party to the contract. Similarly, under the Uniform Commercial Code a person without authority who signs a negotiable instrument in the name of another becomes liable on the instrument to any person who

defendant could not deliver title to corporate real estate without participation of another investor or officer); *Balzebre v. Pearson*, 273 So.2d 427, 428 (Fla. Dist. Ct. App. 1973) (concerning a letter of first refusal signed by corporate secretary as an individual where the plaintiff had knowledge that the title to real estate was held by the corporation). *See also* RESTATEMENT (SECOND) OF AGENCY § 329 cmt. g (1958).

14. *First Nat'l Bank of Chicago v. Jefferson Mortgage Co.*, 576 F.2d 479, 490 (3rd Cir. 1978) (citing RESTATEMENT (SECOND) OF AGENCY § 329 cmt. j (1958)).

15. RESTATEMENT (SECOND) OF AGENCY § 329 cmt. j (1958); *see also* *Gracie Square Realty Corp. v. Choice Realty Corp.*, 113 N.E.2d 416, 421 (N.Y. 1953) (finding the agreement unenforceable under the Statute of Frauds).

16. RESTATEMENT (SECOND) OF AGENCY § 330 (1958).

17. *Id.* at cmt. b.

18. *Id.* at cmt. c.

19. CAL. CIV. CODE § 2343 (West 1985).

in good faith and for value either takes or pays the instrument.²⁰ This liability is not for damages for breach of a warranty of authority, but instead is liability on the instrument itself.²¹ In sum, depending upon the circumstances, a person who without authority enters a contract purportedly on behalf of a corporation may be held liable under either the implied warranty of authority, for tortious misrepresentation, or as a party to the contract.

Ratification of an unauthorized transaction by the corporation terminates a purported agent's liability for breach of warranty of authority or for tortious misrepresentation.²² Ratification generally has the same effect as if the transaction had been originally authorized and, consequently, destroys any cause of action the third person had against the purported agent based upon the lack of power to bind the corporation.²³ If, however, the third person withdraws from the transaction by, for example, giving appropriate notice to either the corporation or the purported agent or by bringing suit against the agent for breach of the warranty of authority, the corporation cannot then ratify the transaction.²⁴

Finally, where it is unclear whether the corporate agent was authorized, the plaintiff may join the corporation and its agent in the same suit.²⁵ Joinder should avoid the possibility of inconsistent verdicts in separate actions against the corporation and its agent.

IV. FAILURE TO DISCLOSE AGENCY

A. *In General*

An authorized corporate officer or agent who contracts in his or her own name without fully disclosing his or her agency status is personally liable on the contract.²⁶ In order to avoid liability as a party to the contract, the agent must disclose both the fact of his or her agency and the identity of his or her corporate principal.²⁷ The agent is not

20. U.C.C. § 3-404(1) (1977).

21. *Id.* at cmt. 2. The signer is not liable to anyone who takes or pays the instrument knowing of the lack of authority. *Id.*

22. *Henry W. Savage, Inc. v. Friedberg*, 77 N.E.2d 213, 215-16 (Mass. 1948). The court added that when the defendant's principal ratified the agreement, "The plaintiff got what it had originally bargained for and what the defendant did caused it no harm." *Id.* See also RESTATEMENT (SECOND) OF AGENCY § 338 (1958).

23. RESTATEMENT (SECOND) OF AGENCY §§ 100, 338 cmt. a (1958).

24. *Id.* §§ 88 cmt. a, 338 cmt. a.

25. See FED. R. CIV. P. 22 (referring to permissive joinder of parties).

26. *Murphy v. Dell Corp.*, 440 A.2d 223 (Conn. 1981) (*per curiam*); RESTATEMENT (SECOND) OF AGENCY § 322 (1958).

27. *Jensen v. Alaska Valuation Serv. Inc.*, 688 P.2d 161, 163 (Alaska 1984).

relieved from liability on the contract by revealing that he or she is an agent while failing to reveal the identity of the corporate principal.²⁸ A person dealing with an agent is not required to ask whether the agent is acting for another.²⁹ To avoid liability the agent must disclose his or her agency status and the identity of the corporate principal before entering into the contract. Disclosure after the contract is formed does not relieve the agent of liability.³⁰ Where there are multiple deliveries on credit and each delivery is determined to be a separate contract, the extent of the agent's liability will depend upon the point at which the agent first disclosed the identity of his or her corporate principal. The agent will be personally liable on contracts before disclosure, but only the corporation will be liable on contracts after disclosure.³¹

The question of whether the agent fully disclosed his or her corporate principal prior to the formation of the contract is one of fact. Therefore, it is the function of the trial court to weigh the evidence and judge the credibility of witnesses on the issue.³² Unless the trial court's decision is clearly erroneous, it will be upheld on appeal.³³

A third person attempting to hold a corporate agent personally liable on a contract has the burden of proving that the agent is a party to the contract. Once this burden is satisfied, the agent has the burden of establishing that he or she contracted on behalf of a fully disclosed corporate principal.³⁴ To meet his or her burden of proof, the agent must establish that the other party knew, had reason to know, or was

28. *Western Seeds, Inc. v. Bartu*, 704 P.2d 974, 975 (Idaho Ct. App. 1985). The court stated that, "[U]nless otherwise agreed, a person purporting to make a contract with another for a partially disclosed principal is a party to the contract." *Id.* See also *RESTATEMENT (SECOND) OF AGENCY* § 321 (1958).

29. *Zolan, Bernstein, Dworken & Klein v. Milone*, 467 A.2d 938, 939 (Conn. App. Ct. 1983).

30. *American Ins. Co. v. Smith*, 472 A.2d 872, 875 (D.C. Cir. 1984) (remanding the case for resolution of fact questions of whether defendant was a corporate agent and, if so, whether timely disclosure of agency was made); *Como v. Rhines*, 645 P.2d 948, 953 (Mont. 1982) (holding that disclosure by agent during litigation did not relieve agent from liability).

31. *Rosenthal v. National Produce Co., Inc.*, 573 A.2d 365, 370-71 (D.C. 1990).

32. *Jensen v. Alaska Valuation Serv. Inc.*, 688 P.2d 161, 164 (Alaska 1984); *New England Whalers Hockey Club v. Nair*, 474 A.2d 810, 813 (Conn. App. Ct. 1984).

33. *Jensen*, 688 P.2d at 164; *Murphy v. Dell Corp.*, 440 A.2d 223, 224 (Conn. 1981) (per curiam). See also *FED R. CIV. P.* 52(a).

34. *Mahan v. First Nat'l Bank of Ariz.*, 677 P.2d 301, 304-05 (Ariz. Ct. App. 1984). The court explained that after the plaintiff makes a prima facie showing of a contract with the defendant, the burden shifts to the defendant to prove both the existence and timely disclosure of the agency relationship. *Id.*

given notification of the existence and identity of the corporate principal prior to contracting.³⁵ The agent does not meet his or her burden of proof by merely proving that a corporate principal exists.³⁶ In addition, proof that the agent used a trade name of the corporation in contracting with another party or that the agent paid by corporate check is generally insufficient, by itself, to establish full disclosure of the agency relationship.³⁷

Facts that tend to show that the other party had notice of the existence and identity of the corporate principal include: (1) the agent signed the contract in a representative capacity, such as "Acme, Corp., by John Doe, President,"³⁸ (2) the name of the principal is disclosed in the contract, even if the contract is in the name of the agent;³⁹ (3) corporate checks were used in dealings between the parties prior to the time of the transaction in question, particularly where the prior course of dealing was extensive and corporate checks were consistently used;⁴⁰ (4) the other party had knowledge of the existence of the corporation and the fact that the agent has a relationship with it, even if the position of the agent within the corporation is not known;⁴¹ (5) the business between the parties was transacted in corporate offices;⁴² and (6) the other party had knowledge that the subject matter of the transaction belonged to the corporation, particularly where the nature

35. *David v. Shippy*, 684 S.W.2d 586, 588 (Mo. Ct. App. 1985) (quoting RESTATEMENT (SECOND) OF AGENCY § 4 cmt. a (1958)).

36. *David*, 684 S.W.2d at 588 (finding that licenses issued to the corporation were not enough to discharge the agent's duty to disclose the principal).

37. *See, e.g., Conn. Limousine Serv. v. Powers*, 508 A.2d 836, 839 (Conn. App. Ct. 1986) (holding that payment by corporate check is not sufficient notice that tickets were purchased on behalf of the corporation); *New England Whalers Hockey Club v. Nair*, 474 A.2d 810, 814 (Conn. App. Ct. 1984) (using a corporate trade name is not sufficient to disclose a principal); *Hill & Co. v. O'Malley*, 817 P.2d 660 (Kan. Ct. App. 1991) (paying by corporate check); *Como v. Rhines*, 645 P.2d 948, 952 (Mont. 1982) (using a corporate trade name); *Biron v. Abare*, 522 A.2d 230, 231 (Vt. 1987) (using a corporate trade name).

38. *A.S. Abell Co. v. Skeen*, 288 A.2d 596, 598 (Md. 1972).

39. *Cf. Bidwell v. Jolly*, 716 P.2d 481, 483 (Colo. Ct. App. 1986) (finding that every document related to transaction bore the name of the corporation).

40. *See, e.g., id.*; *Potter v. Chaney*, 290 S.W.2d 44, 46 (Ky. 1956) (illustrating that checks given in payment over a period of nearly four years were sufficient to disclose corporate existence and identity).

41. *Vernon D. Cox & Co. v. Giles*, 406 A.2d 1107, 1109-10 (Pa. Super. Ct. 1979) (involving a plaintiff who was aware that the defendant was associated with the corporation, although unaware that the defendant was the chairman of the board); *A.S. Abell*, 288 A.2d at 598 (finding that plaintiff was aware that the defendant was at least an officer and maybe president of the corporation).

42. *See Potter*, 290 S.W.2d at 46 (involving party who came to corporate offices on numerous occasions to see about or to get checks).

of the transaction suggested that its purpose was to benefit the corporation.⁴³

Factors tending to show a lack of notice of the existence and identity of the corporate principal include: (1) the contract was signed by the agent without reference to the corporate name or the agent's representative capacity;⁴⁴ (2) documents such as quotes, invoices, delivery tickets, etc. are signed in the agent's name and/or mailed to the agent, particularly if sent to the agent's home address;⁴⁵ (3) testimony that the agent failed to advise the other party that he or she was acting on behalf of a corporation;⁴⁶ (4) evidence that the corporation was not a party to the negotiations or that the negotiations occurred at the agent's home;⁴⁷ and (5) testimony that the agent was asked to sign individually and/or a signature or contractual language indicating an intent to be bound individually, such as "John Doe, individually".⁴⁸

The issue of whether a corporate agent fully disclosed his or her corporate principal very often arises in situations where the third person agrees to extend credit on a continuing basis to a sole proprietorship which is subsequently incorporated. When the corporation becomes insolvent, the former proprietor attempts to avoid liability by claiming that the debt is that of the corporation. A significant number of cases have held that personal liability may be imposed upon the former proprietor where he or she did not adequately disclose to the other party that he or she had begun acting as a representative of the

43. See, e.g., *Vernon D. Cox*, 406 A.2d at 1110 (concerning a plaintiff who knew that the corporation owned the land to be appraised and that the purpose of the appraisal was to enable the corporation to refinance).

44. See, e.g., *Zella Wahnnon & Assoc. v. Bassman*, 398 N.E.2d 968, 971 (Ill. App. Ct. 1979); *Douglas v. O'Connell*, 429 A.2d 1310, 1311 (Vt. 1981) (signing "Timothy J. O'Connell Top of Square" did not "style [signor] as an agent").

45. See, e.g., *Delaware Valley Equip. Co. v. Granahan*, 409 F. Supp. 1011, 1014 (E.D. Pa. 1976) (involving an agent who signed a quotation and invoice personally, and they were mailed to his home address which was also the address of the corporation); *Mahan v. First Nat'l Bank*, 677 P.2d 301, 305 (Ariz. Ct. App. 1984) (concerning delivery tickets and billing statements that were made out in agent's name and the billing statements were sent to the agent).

46. See, e.g., *Delaware Valley Equip.*, 409 F. Supp. at 1014 (involving testimony by the other party to the contract that the agent never disclosed he was acting as agent for a corporation, and the agent did not testify that he had made such a disclosure).

47. *Brown v. Owen Litho Serv. Inc.*, 384 N.E.2d 1132, 1134 (Ind. Ct. App. 1979) (involving meetings which took place at the agent's house); *Ristvedt v. Nettum*, 311 N.W.2d 574, 577 (N.D. 1981) (finding that the corporation was not a party to the negotiations).

48. See, e.g., *Beck v. Haines Terminal and Highway Co., Inc.*, 843 P.2d 1229 (Alaska 1992) (involving language of a personal guarantee); *Ristvedt*, 311 N.W.2d at 577 (involving testimony that the agent was asked to sign individually). Cf. *Bank of N.M. v. Priestley*, 624 P.2d 511, 514-15 (N.M. 1981) (finding it "obvious" that two agents who signed "Joe W. Priestley, individually" and "Charles E. Nuckols, individually," with one signing in a representative capacity, were personally liable on the contract).

corporation.⁴⁹ These cases recognize that, “[a]s a matter of public policy and commercial reality, a trade creditor should not be burdened with the duty of continually monitoring its customers’ business organization.”⁵⁰

A corporate agent who is liable as a party to a contract has available any defense that arises out of the transaction as well as any defenses personal to the agent.⁵¹ Defenses arising out of the transaction include any defense that the corporation could have raised if it had been sued by the third person, including such defenses as fraud, misrepresentation, breach of condition, and nonperformance. Personal defenses of the agent would include infancy or a right of set-off resulting from a separate transaction.⁵²

B. *Election Rule vs. Satisfaction Rule*

A person who contracts with an agent for an undisclosed corporate principal may join both the agent and the corporate principal in a suit upon the contract if the person discovers the existence and identity of the corporate principal prior to bringing suit.⁵³ The Restatement (Second) of Agency provides that the plaintiff must elect whether to hold the principal or the agent liable if either the principal or the agent objects and demands an election.⁵⁴ Where neither the principal nor the agent demands an election, a number of cases hold that the right to demand an election is waived and judgment may be entered against both defendants.⁵⁵

The election requirement is arguably justified on the ground that a person who contracts with the agent of an undisclosed principal is given an advantage not contemplated at the time of the contract by

49. See, e.g., *Hill v. O'Malley*, 817 P.2d 660, 662-64 (Kan. Ct. App. 1991) (holding that payment by corporate check alone is insufficient notice of agency where defendant signed invoices without any corporate indication and all billings were mailed to defendant individually).

50. *Id.* at 664 (quoting *Taylor Oil Co. v. Giordano*, 509 A.2d 269, 273 (N.J. Super. Ct. App. Div. 1986)).

51. RESTATEMENT (SECOND) OF AGENCY § 334 (1958). Defenses personal to the corporation, however, are not available to the agent. *Id.* See also *O'Conner v. Hancock*, 604 A.2d 565, 566 (N.H. 1992) (mem.) (involving a counterclaim arising out of the same transaction).

52. See RESTATEMENT (SECOND) OF AGENCY § 334 cmt. a (1958).

53. *Id.* § 210A.

54. *Id.*

55. *Amortibanc Inv. Co., Inc. v. Rampart Associated Management, Inc.*, 627 P.2d 389, 393 (Kan. Ct. App. 1981); *Hoyt v. Horst*, 201 A.2d 118, 123-24 (N.H. 1964).

being permitted to sue the principal. Discharging the agent from liability where the person elects to hold the corporate principal liable merely places the parties in the same position as if the agent had disclosed the identity of the corporate principal.⁵⁶

The election requirement is heavily criticized⁵⁷ and a growing number of cases reject it.⁵⁸ These cases permit a party who contracts with the agent of an undisclosed principal to proceed to judgment against both the agent and the principal, although limiting the party to only one satisfaction.⁵⁹ These cases recognize that the agent should be liable because he or she contracted in his or her name and that the principal should be liable because the contract is made for the principal's benefit.⁶⁰ In addition, the satisfaction rule removes a potential trap for persons suing both the agent and the principal. Under the election rule, a summary or default judgment against one defendant discharges the liability of the other defendant. Such a discharge can "leave the creditor with but one possibly uncollectible judgment. . ."⁶¹

Under the Restatement (Second) Agency, the corporation is discharged from liability where the plaintiff recovers judgment against the agent for breach of contract after acquiring knowledge of the existence and identity of the corporate principal.⁶² The corporation is not discharged, however, where the judgment is recovered against the agent before the plaintiff acquires knowledge of the existence and identity of the corporate principal.⁶³

56. *Tabloid Lithographers, Inc. v. Israel*, 209 A.2d 364, 368 (N.J. Super. Ct. Law Div. 1965). *But cf. Grinder v. Bryans Road Bldg. and Supply Co.*, 432 A.2d 453, 461-63 (Md. 1981) (listing and criticizing justifications for the election requirement).

57. *See Grinder*, 432 A.2d at 461-63 (discussing views of commentators and concluding that they "appear to be nearly unanimous in their support of the minority, ie., satisfaction rule.")

58. *See, e.g., id.* at 464; *Engelstad v. Cargill, Inc.* 336 N.W.2d 284, 286 (Minn. 1983); *Crown Controls, Inc. v. Smiley*, 756 P.2d 717, 721 (Wash. 1988).

59. *Grinder*, 432 A.2d at 464; *Engelstad*, 336 N.W.2d at 286.

60. *See Beymer v. Bonsall*, 79 Pa. 298, 300 (1875); Maurice H. Merrill, *Election Between Agent and Undisclosed Principal: Shall We Follow the Restatement*, 12 NEB. L. BULL. 100, 122 (1933).

61. *See, e.g., Grinder*, 432 A.2d at 464 (rejecting summary judgment entered against corporation and the election rule); *cf. Tabloid Lithographers, Inc. v. Israel*, 209 A.2d 364 (N.J. Super. Ct. Law Div. 1965) (treating default judgment entered against corporation as election to discharge agent).

62. RESTATEMENT (SECOND) OF AGENCY § 210(1) (1958). *See also Wynne v. Adcock Pipe and Supply*, 761 S.W.2d 67, 70 (Tex. Ct. App. 1988).

63. RESTATEMENT (SECOND) OF AGENCY § 210(2) (1958).

C. *Use of Extrinsic Evidence to Show Agency*

Where a written contract is integrated⁶⁴ and is unambiguous as to whether the agent is or is not a party to the contract, extrinsic evidence is not admissible to show a contrary intent. For example, if the contract is signed "Acme, Inc., by John Doe, President", extrinsic evidence is not admissible to show that the agent is a party to the contract.⁶⁵ Conversely, if the contract describes the agent as a party or includes a promise by the agent and is signed "Jane Doe, individually" or "Jane Doe, acting for myself alone," extrinsic evidence is not admissible to show that the agent is not a party to the contract.⁶⁶ Or, where an integrated contract contains no reference to a corporation, extrinsic evidence is not admissible to show that a corporate officer or agent who appears to be a party to the contract is not intended to be a party.⁶⁷

Where an integrated contract reveals the fact of agency but is ambiguous regarding whether the parties intended to make the agent a party, extrinsic evidence dealing with the intention of the parties is admissible. For example, if the contract includes the name of the corporation and is signed by the agent or is signed "John Doe, agent", extrinsic evidence is admissible to show whether the parties intended the agent to be a party to the contract.⁶⁸

D. *Disclosing Agency in a Written Contract*

As discussed above, a corporate agent must disclose both the fact of his or her agency and the identity of the corporate principal in order to avoid personal liability on contracts made on behalf of the corporation.⁶⁹ While in some circumstances it is important that the

64. An agreement is integrated where it constitutes a final and exclusive written expression of agreement on one or more terms. RESTATEMENT (SECOND) OF CONTRACTS § 209(1) (1981).

65. See RESTATEMENT (SECOND) OF AGENCY § 323(1) illus. 2 (1958).

66. *Id.* § 323(1), ill. 1.

67. *World Ins. Co. v. Smith*, 329 N.E.2d 518, 520-22 (Ill. Ct. App. 1975). The court found that the trial court improperly admitted parol evidence that purported agent signed in a representative capacity. The contract described Alex Smith as a party and was signed "Alex Smith." *Id.* See also RESTATEMENT (SECOND) OF AGENCY § 323(3) (1958); U.C.C. § 3-403(2)(a) (1991).

68. *Charles Selon & Assoc. v. Estate of Aisenberg*, 431 N.E.2d 1214, 1216 (Ill. App. Ct. 1981). Where a document contained the name of the corporation and was signed by the agent, but did not contain reference to an agency relationship, the ambiguity justified admission of extrinsic evidence to determine the capacity in which the parties intended the agent to sign. *Id.* See also *Elkay Mfg. Co. v. Chasco Supply Co.*, 281 A.2d 765, 766-67 (Pa. Super. Ct. 1971) (finding that document entitled "personal guaranty" where signatures were followed by corporate titles was ambiguous and therefore a question of fact for the jury).

69. See *infra* part IV.A.

corporate principal remain undisclosed, where disclosure is not an issue a corporate agent can insure that he or she is not personally liable on an authorized written contract by following some simple rules.

First, the contract should describe the corporation and not the agent as the party to the contract. Second, promises in the contract should be phrased as promises of the corporation and not of the agent. Third, the contract should use the name of the corporation as it is set out in its articles of incorporation and not merely a trade name of the corporation. Regardless of the degree of similarity between the two names, if a corporation uses its trade name, a court may decide that the identity of the corporate principal was not adequately disclosed. Fourth, the contract should use the entire name of the corporation including "Incorporated", "Corporation", "Inc.", "Corp.", etc. Without a reference to such a word or abbreviation, the name does not by itself give notice that the business is being carried on as a corporation as opposed to a sole proprietorship or a partnership.⁷⁰

Fifth, the agent should execute the contract in a manner that indicates that the corporation is the party and that the agent is signing in a representative capacity. Styling the signature "Acme, Inc., by Jane Doe, President" or "Acme, Inc., by Jane Doe, Agent" is the most effective manner of doing this.⁷¹ Finally, the agent should not sign the contract both in a representative capacity and in an individual capacity unless he or she intends to be personally bound. An agent for a disclosed corporate principal may agree to be a party to a contract he or she makes on behalf of the corporation.⁷² If the contract is signed: Acme, Inc., by John Doe, President
John Doe.

then, the individual signature is superfluous to the execution of the contract in a representative capacity, and is likely to be viewed as evidence of an intention to bind the agent personally.⁷³

70. See, e.g., *David v. Shippy*, 684 S.W.2d 586, 587 (Mo. Ct. App. 1985) (finding that although the corporate name was "Captain W. T. Walkers, Inc.," contract referred to "Captain W. T. Walkers"); *African Bio-Botanica, Inc. v. Leiner*, 624 A.2d 1003, 1004 (N.J. Super. Ct. App. Div. 1993) (concerning checks and letterhead which carried the name "Ecco Bella," but corporate name was "Ecco Bella Incorporated").

71. Cf. U.C.C. § 3-403 cmt. 3 (referring to negotiable instruments, "Peter Pringle by Arthur Adams, Agent" is the "unambiguous way to make the representation clear").

72. See RESTATEMENT (SECOND) OF AGENCY § 320 cmt. e (1958). "Ordinarily, if the agent is a co-promisor, he is in effect a surety, and the principal is primarily liable." *Id.* See also *Bank of New Mex. v. Priestley*, 624 P.2d 511, 514-15 (N.M. 1981) (holding agent who signed contract and promissory note once in his representative capacity as corporate president and a second time in the form "Joe W. Priestley, individually" was bound by both contract and note).

73. Cf. *Tesoro Petroleum Corp. v. Schmidt*, 316 N.W.2d 290, 292-93 (Neb. 1982) (dealing with signatures on a promissory note).

V. *ULTRA VIRES* CONTRACTS

Absent special circumstances, a corporate agent who enters into an *ultra vires* contract⁷⁴ on behalf of a corporation is not liable to the other party to the contract for the corporation's failure to perform.⁷⁵ While a corporate agent usually impliedly warrants his or her authority to bind the corporation,⁷⁶ the agent generally does not warrant that the corporation has capacity to make a particular contract.⁷⁷

If a corporate agent has reason to know that an act is *ultra vires* and that the other person is ignorant of that fact, he or she might be liable to the other party for the corporation's failure to perform.⁷⁸ For example, a comment to the Restatement (Second) of Agency suggests that an agent who contracts on behalf of a foreign corporation whose powers are not ordinarily known to the other party, but which should be known to the agent, may have a duty to disclose the corporation's lack of full contractual capacity.⁷⁹ However, because of the common practice of using broad purposes clauses⁸⁰ and because of the broad statutory powers conferred by modern corporation statutes,⁸¹ the actions of corporate agents will only rarely be outside the powers of the corporation and, hence, *ultra vires*. In addition, modern corporation statutes restrict the use of the *ultra vires* doctrine. Generally, a corporation itself may not raise the issue of *ultra vires* as a grounds for challenging the validity of a corporate action. Consequently, a third person is unlikely to suffer damages as a result of entering an *ultra vires* contract with a corporate agent.⁸²

74. An *ultra vires* contract is one not within the express or implied powers of a corporation. See FLETCHER CYC. CORP. § 3399 (Per. Ed. 1989).

75. *Kitchell Corp. v. Hermansen*, 446 P.2d 934, 936-37 (Ariz. Ct. App. 1968); RESTATEMENT (SECOND) OF AGENCY § 332 (1958).

76. See *supra* part III.

77. *Jenkins v. City of Henderson*, 199 S.E. 37, 39 (N.C. 1938) (dealing with municipal corporation); RESTATEMENT (SECOND) OF AGENCY § 332 cmt. a (1958).

78. RESTATEMENT (SECOND) OF AGENCY § 332 cmt. b (1958).

79. *Id.*

80. See, e.g., DEL. CODE ANN. tit. 8, § 102(a)(3) (1991) (permitting the certificate of incorporation to state that "the purpose of the corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware"). The Revised Model Business Corporation Act does not even require a purpose clause in the articles of incorporation. § 2.02 (1984). Under the Revised Model Act, "a corporation formed without reference to a purpose clause will automatically have the purpose of engaging in any lawful business." MODEL BUSINESS CORP. ACT ANN. § 2.02 cmt. (3rd ed. 1993).

81. See DEL. CODE ANN. tit. 8, § 122 (1991); REVISED MODEL BUSINESS CORP. ACT. § 3.02 (1984).

82. See REVISED MODEL BUSINESS CORP. ACT § 3.04 (1984); DEL. CODE ANN. tit. 8, § 124 (1991).

VI. TORTIOUS ACTS

A. *In General*

A corporate agent who commits a tort is personally liable to third persons who are injured as a result. For example, a corporate agent is liable when his or her negligence creates an unreasonable risk of harm to others,⁸³ for participation in a tortious conversion,⁸⁴ for trespass,⁸⁵ for misrepresentation,⁸⁶ for common law unfair competition,⁸⁷ and for other types of tortious conduct. The agent is not relieved of liability by the fact that his or her agency is disclosed, that the act is done on behalf of the corporation, or that the corporation is also liable.⁸⁸

A corporate agent generally is subject to liability only where he or she participates in a tort. This participation requirement is met by: (1) a tortious act personally committed by the agent;⁸⁹ (2) the tortious conduct of another which is directed by the agent, who intends either a tortious act or consequence;⁹⁰ (3) a failure to exercise reasonable care in controlling another under the agent's control;⁹¹ (4) a failure to exercise reasonable care in hiring, supervising, or cooperating with other agents;⁹² (5) a failure to take reasonable precautions to protect others from risks associated with chattels or real property subject to

83. *Loeffler v. McShane*, 539 A.2d 876, 879 (Pa. Super Ct. 1988), *aff'g* 49 Pa. D.&C.3d 120 (Pa. Super. Ct. 1987) (finding against principal corporate officer and part owner of corporation for negligent disbursement of funds from mortgage refinancing); RESTATEMENT (SECOND) OF AGENCY § 350 (1958).

84. *Shonberger v. Oswell*, 530 A.2d 112, 114 (Pa. Super. Ct. 1987) (determining that trial court erred in entering judgment in favor of corporate officer in conversion action); RESTATEMENT (SECOND) OF AGENCY § 349 (1958).

85. *Curlee v. Donaldson*, 233 S.W.2d 746, 754 (Mo. Ct. App. 1950) (affirming trial court judgment against general manager of corporation who ordered crews to cut timber from plaintiff's tract); RESTATEMENT (SECOND) OF AGENCY § 348A (1958).

86. *Galie v. RAM Assoc. Management Serv., Inc.*, 757 P.2d 176, 177 (Colo. Ct. App. 1988) (holding that trial court erred in dismissing misrepresentation claim against corporate agents); RESTATEMENT (SECOND) OF AGENCY § 348 (1958).

87. *A & M Records, Inc. v. M. V. C. Distrib. Corp.*, 574 F.2d 312 (6th Cir. 1978) (concluding that district court erred in failing to hold corporate agent liable for record piracy).

88. *Galie*, 757 P.2d at 177; *Wilson v. S. Cent. Miss. Farmers, Inc.*, 494 So.2d 358, 361 (Miss. 1986); *Shonberger*, 530 A.2d at 114; RESTATEMENT (SECOND) OF AGENCY § 343 (1958).

89. *See St. James Constr. Co. v. Morlock*, 597 A.2d 1042, 1046 (Md. Ct. Spec. App. 1991) (involving a decision of a corporate president to use wood in constructing support for wall), *cert. denied* 601 A.2d 1100 (Md. 1992); *Amabile v. Auto Kleen Car Wash*, 376 A.2d 247, 252 (Pa. Super. Ct. 1977) (negligence of engineer in designing car wash); RESTATEMENT (SECOND) OF AGENCY § 350 (1958).

90. *See* RESTATEMENT (SECOND) OF AGENCY § 344 (1958).

91. *See Curlee v. Donaldson*, 233 S.W.2d 746, 752-54 (Mo. Ct. App. 1950) (finding failure of general manager to use reasonable care to prevent crews under his control from trespassing); RESTATEMENT (SECOND) OF AGENCY § 351 (1958).

92. RESTATEMENT (SECOND) OF AGENCY § 358(1) (1958).

the agent's control;⁹³ or (6) a failure to exercise reasonable care to protect the person or property of another whom the agent has a duty to protect, where the other relies upon the protection of the corporate principal or the agent.⁹⁴ Absent a co-employee immunity provision in the applicable workers' compensation statute, a corporate agent is liable to co-employees to the same extent as to third persons.⁹⁵

Some authority suggests that a corporate officer may be liable in tort where he or she decides what course of action the corporation will take. For example, in one case a jury found that a corporate chief executive officer who decides that the corporation will not vacate premises may be personally liable for damages.⁹⁶

A corporate agent who does not participate in a tort is not liable, however, simply because of his or her agency status.⁹⁷ In addition, absent special circumstances a corporate agent is not liable to a third person for a breach of a duty the agent owes to the corporation.⁹⁸ A mere breach of the agent's contract with the corporation or fiduciary duties to the corporation does not give rise to tort liability to a third person. The agent is only liable when he or she harms another by tortious conduct which constitutes the breach of an independent legal obligation to that person. "In some cases, the harm is caused by the

93. See *J. C. Penney Co. v. Barrientez*, 411 P.2d 841, 849 (Okla. 1965) (holding that the manager of a store had a duty of care towards invitees of the store); RESTATEMENT (SECOND) OF AGENCY § 355 (1958).

94. See *Craven v. Oggero*, 213 N.W.2d 678, 682 (Iowa 1973) The holding was superceded by statute as stated in *Thompson v. Bohlken*, 312 N.W.2d 501, 504 (Iowa 1981) (finding that trial court improperly directed verdict on behalf of safety director and job superintendent arising out of death of employee at work site).

95. RESTATEMENT (SECOND) OF AGENCY § 359 (1958). Many states have enacted co-employee immunity provisions. See, e.g., CAL. LAB. CODE § 3601(a) (1989) (stating that workers' compensation is the exclusive remedy of an injured employee except where injury caused by "unprovoked physical act of aggression" or by intoxication of other employee); DEL. CODE ANN. tit. 19, § 2363(a) (1985); N.Y. WORK. COMP. LAW §§ 29(1), (6) (McKinney 1993). There weight of authority is that co-employee immunity provisions are inapplicable to intentional torts, although there is some authority to the contrary. See 2A ARTHUR LARSON, LAW OF WORKMEN'S COMPENSATION § 72.21 (1993). Co-employee immunity provisions are inapplicable where the co-employee is acting outside of the course of employment at the time he or she commits the tort. *Id.* § 73.23.

96. *Metromedia Co. v. WCBM Maryland, Inc.*, 610 A.2d 791, 794-95 (Md. 1992) (finding that the trial court erred in directing judgment for the officer). Cf. also *Camacho v. 1440 Rhode Island Ave. Corp.*, 620 A.2d 242, 247-48 (D.C. Cir. 1993) (involving a tort action by an evicted tenant where the court held that the trial court erred in applying incorrect standards to corporate chief executive officer who was primarily responsible for setting policies of the corporation and making sure the policies were carried out).

97. See, e.g., *Barker v. Crown Drug Co.*, 284 S.W.2d 559, 561 (Mo. 1955) (holding that the trial court did not err in directing a verdict in favor of a store manager who was not present at the store when a bottle fell onto plaintiff's foot and who was merely relieving the regular manager during the latter's vacation).

98. RESTATEMENT (SECOND) OF AGENCY § 352 (1958).

fact that an agent does an act which causes the injury. . . In other cases the harm is caused, not merely because the agent failed in his duty to the principal, but because he improperly failed to perform acts, upon the performance of which the injured person or the principal relied.”⁹⁹

In civil cases, it is generally held that a purely intracorporate conspiracy cannot exist.¹⁰⁰ The acts of corporate agents are usually viewed as being acts of the corporation.¹⁰¹ Since it is legally impossible for a person to conspire with herself,¹⁰² the acts of the corporate agents are generally held to be legally insufficient to establish a conspiracy¹⁰³ regardless of the number of agents who are involved. However, a conspiracy may be found where one of the corporate agents acts in his or her individual capacity.¹⁰⁴

B. *Interference With A Contract or Prospective Contract*

A party to a disadvantageous contract is generally able to abandon the contract and only incur liability for breach of contract. A corporation, however, can only act through and upon the advice of its agents. A corporation would be at a comparative disadvantage if it could only abandon disadvantageous contracts at the risk of personal liability of its agents for tortious interference with the contract.¹⁰⁵

A corporate agent is not liable on a theory of tortious interference with contract for the corporation's breach of contract where the agent acts in good faith on behalf of the corporation within the scope of the agent's official capacity.¹⁰⁶ This privilege protects actions taken

99. *Id.* § 352 cmt. a.

100. *Rutherford v. Presbyterian Univ. Hosp.*, 612 A.2d 500, 508-09 (Pa. Super. Ct. 1992) (holding that the trial court properly dismissed a conspiracy claim).

101. *Mehl v. Navistar Int'l Corp.*, 670 F. Supp. 239, 241 (N.D. Ill. 1987).

102. *Selman v. American Sports Underwriters, Inc.*, 697 F. Supp. 225, 238 (W.D. Va. 1988); *Cedar Hills Properties Corp. v. Eastern Fed. Corp.*, 575 So.2d 673, 676 (Fla. Dist. Ct. App. 1991) *review denied*, 589 So.2d 290 (Fla. 1991). “Conspiracy requires the combination of two or more persons.” *Id.*

103. *Selman*, 697 F. Supp. at 225; *Cedar Hills*, 575 So.2d at 676. *But see* *Lawler Mobile Homes, Inc. v. Tarver*, 492 So.2d 297, 306 (Ala. 1986) (holding that a corporation can conspire with two or more of its agents).

104. *Fojtik v. First Nat'l Bank*, 752 S.W.2d 669, 673 (Tex. Ct. App. 1988) (holding that trial court erred in directing verdict for defendants on conspiracy claim), writ denied, 775 S.W.2d 633 (Tex. 1989); *Pittman v. Larson Distrib. Co.*, 724 P.2d 1379, 1390 (Colo. Ct. App. 1986) (holding issue of civil conspiracy should have been submitted to the jury).

105. *Wampler v. Palmerton*, 439 P.2d 601, 606 (Or. 1968).

106. *Sorrells v. Garfinckel's* 565 A.2d 285, 290-91 (D.C. Cir. 1989) (holding that under the facts of the case, privilege vitiated by malice); *Cronk v. Intermountain Rural Elec. Ass'n*, 765 P.2d 619, 623-24 (Colo. Ct. App. 1988) (holding that a director or officer is not liable if he is acting within the scope of his official duties) *cert. denied*; *Ostrander v. Farm Bureau Mut. Ins. Co.*, 851 P.2d 946, 950 (Idaho 1993); *Davenport v. Eppely*, 744 P.2d 1110, 1114 (Wyo. 1987); RESTATEMENT (SECOND) OF TORTS § 770 and cmt. b (1972).

by the agent within the scope of his or her duties where the agent intends to protect a corporate interest.¹⁰⁷ For example, a corporate employee who recommends in his or her official capacity the discharge of another employee is generally not liable for tortiously inducing a breach of contract if the co-employee is discharged.¹⁰⁸ The privilege also extends to claims of tortious interference with prospective contracts where the cause of action is recognized.¹⁰⁹

On the other hand, a corporate agent is liable for tortious interference with a contract where for personal or improper motives he or she induces the corporation to breach its contract.¹¹⁰ If the corporate agent's sole motive is to harass or to retaliate against another, the agent's actions in inducing a breach of contract are tortious.¹¹¹ Additionally, a corporate agent is liable for tortious interference with contract where he or she employs wrongful means in inducing the corporation to breach a contract.¹¹² For example, fraudulent misrepresentations or threats of illegal conduct to induce the corporation to breach a contract or to interfere with a prospective contract would generally be considered wrongful.¹¹³

Most corporate officers and employees have some personal interest in the welfare of the corporation. Corporate officers and employees can benefit from a corporation's improved financial position as a result of its breach of a disadvantageous contract. If an agent acts with an intent to benefit the corporation, he or she is not liable simply because the breach of contract also benefits him or her personally.¹¹⁴

Since the issue of abuse of privilege is a question of fact, the plaintiff will often be able to avoid summary judgment on the issue.¹¹⁵ For example, where there is testimony that the defendant wanted to get the plaintiff fired because the defendant didn't like to work with

107. See RESTATEMENT (SECOND) OF TORTS § 770 cmt. b (1977).

108. See *Davenport*, 744 P.2d at 1114.

109. See RESTATEMENT (SECOND) OF TORTS § 770 and cmt. a (1977). See also *Turner v. Halliburton Co.*, 722 P.2d 1106, 1115-17 (Kan. 1986) (involving communications to a prospective employer).

110. See RESTATEMENT (SECOND) OF TORTS §§ 767 cmt. d, 770 cmt. e (1977).

111. *Zappa v. Seiver*, 706 P.2d 440, 442 (Colo. Ct. App. 1985) (holding that a fact issue existed as to whether defendant's action "was motivated by improper personal reasons or by a desire to serve the corporate interests."); *Sorrels v. Garfinckel's*, 565 A.2d 285, 291 (D.C. Cir. 1989) (holding that the jury was properly instructed that the privilege is destroyed by malice).

112. RESTATEMENT (SECOND) OF TORTS § 770 and cmt. d (1977).

113. See *id.* § 767 cmt. c.

114. *Wampler v. Palmerton*, 439 P.2d 601, 606-07 (Or. 1968).

115. See *Nickens v. Labor Agency of Metro. Wash.*, 600 A.2d 813, 820 (D.C. Cir. 1991) (holding that whether a corporate agent acted with malice or for an improper purpose is a question of fact; "summary judgment on the issue is rarely appropriate").

him, a court may find that a genuine issue of material fact exists regarding whether the defendant acted solely out of improper motives.¹¹⁶ Further, the fact finder is permitted to infer from the existence of an improper motive that it was the defendant's only motive.¹¹⁷

C. Defamation

In some circumstances a corporate agent may be liable for defamation. A defamatory communication is actionable only if it is published to a third party.¹¹⁸ In some jurisdictions a defamatory intra-corporate communication among officers or agents of a corporation concerning the business of the corporation is not considered publication to a third person.¹¹⁹ Under this view an intra-corporate communication merely involves the corporation talking to itself; there is no publication to a third person.¹²⁰ The better view is that an intra-corporate communication is publication to a third person, recognizing that the communication is subject to a qualified privilege.¹²¹ This view recognizes that "damage to one's reputation within a corporate community may be just as devastating as that effected by defamation spread to the outside."¹²²

A defamatory communication is not actionable if it is privileged.¹²³ In jurisdictions in which an intra-corporate statement constitutes publication to a third person, the statement is conditionally privileged where it is made to a party with a legitimate interest in the subject matter,¹²⁴ or to a party with a common interest in the subject

116. *Giordano v. Aerolift, Inc.*, 818 P.2d 950, 953 (Or. Ct. App. 1991).

117. *Id.*

118. See RESTATEMENT (SECOND) OF TORTS §§ 558(b), 577 (1977).

119. See, e.g., *Dixon v. Economy Co.*, 477 So.2d 353, 354 (Ala. 1985) (holding that communication among managerial personnel about the corporation's business is not a publication); *Commercial Union Ins. Co. v. Melikyan*, 424 So.2d 1114, 1115 (La. Ct. App. 1982) (holding that a memo to the home office stating that an employee was "not trustworthy" was not a publication); *Jones v. Golden Spike Corp.*, 623 P.2d 970, 971 (Nev. 1981) (holding that a statement to a group of employees is not a publication).

120. See *Luttrell v. United Tel. Sys.*, 683 P.2d 1292, 1293 (Kan. Ct. App. 1984) (discussing the different views regarding intra-corporate communications), *aff'd*, 695 P.2d 1279 (Kan. 1985).

121. See, e.g., *Brewer v. American Nat'l Ins. Co.*, 636 F.2d 150, 153-54 (6th Cir. 1980) (interpreting Kentucky law); *Jones v. Britt Airways, Inc.*, 622 F. Supp. 389, 391-92 (N.D. Ill. 1985); *Luttrell*, 683 P.2d at 1294; *Frankson v. Design Space Int'l*, 394 N.W.2d 140, 143-44 (Minn. 1986); RESTATEMENT (SECOND) OF TORTS § 577 cmt. i (1977).

122. *Luttrell*, 683 P.2d at 1294.

123. RESTATEMENT (SECOND) OF TORTS § 558(b) (1977). A number of privileges are recognized as defenses to a defamation action. While some are absolute privileges, others are conditional or qualified privileges. See generally *id.* §§ 583-612. D. Jan Duffy, *Defamation and Employer Privilege*, 9 EMP. REL. L.J. 444 (1984).

124. RESTATEMENT (SECOND) OF TORTS § 595 (1977).

matter.¹²⁵ Thus, communications between managerial personnel acting within the scope of their duties regarding the reasons for dismissal of an employee are generally held to be subject to a qualified privilege.¹²⁶ A number of cases extend this privilege to a communication of the reason for the dismissal to co-employees of the dismissed worker.¹²⁷ Similarly, communications regarding employee conduct or performance, or communications in the course of an investigation of employee conduct, generally are subject to a qualified privilege.¹²⁸

A communication by a corporate agent to a person outside of the corporation is subject to a qualified privilege where the person has a legitimate interest in the subject matter¹²⁹ or where the communication is to a party who may act in the public interest.¹³⁰ Thus, a communication by an agent of a corporation to a prospective employer regarding the performance or the reason for the termination of a former employee is subject to a qualified privilege.¹³¹ Additionally, a

125. *Id.* § 596.

126. *See, e.g.,* Lawson v. Howmet Aluminum Corp., 449 N.E.2d 1172, 1175 (Ind. Ct. App. 1983) (holding that a plant supervisor, plant manager and immediate supervisor had a common interest in the reason for plaintiff's termination); Frankson v. Design Space Int'l, 394 N.W.2d 140 (Minn. 1986) (discussing the distribution of a termination letter to two officers involved in the decision-making process); DiBiasio v. Brown & Sharpe Mfg. Co., 525 A.2d 489, 491 (R.I. 1987) (discussing supervisory personnel present at a meeting where an employee was terminated).

127. *See, e.g.,* Patane v. Broadmoor Hotel, Inc., 708 P.2d 473, 475 (Colo. Ct. App. 1985) (holding that the trial court erred in limiting the privilege to communications among managerial personnel); Gordon v. Allstate Ins. Co., 71 A.D. 2d 850 (N.Y. App. Div. 1979) (mem.) (holding that other insurance agents had a common interest in the subject of reasons for terminating the plaintiff).

128. *See, e.g.,* Jones v. Britt Airways, Inc., 622 F. Supp. 389, 392 (N.D. Ill. 1985) (discussing communications among several levels of employees during investigation of improper issuance of tickets); Turner v. Halliburton Co., 722 P.2d 1106, 1114 (Kan. 1986) (discussing investigation of possible theft of company tools by employee); Luttrell v. United Tel. Sys., 683 P.2d 1292, 1293-94 (Kan. Ct. App. 1984) (discussing statement by managerial personnel that employee was illegally taping telephone conversations), *aff'd*, 695 P.2d 1279 (1985); Zuniga v. Sears, Roebuck & Co., 671 P.2d 662, 665 (N.M. Ct. App. 1983) (discussing statements of store security personnel to manager that employee had attempted to steal a television set), *cert. denied*, 671 P.2d 1150 (N.M. 1983).

129. Smith v. Greyhound Lines, Inc., 614 F. Supp. 558, 562 (W.D. Pa. 1984) (holding that statements made in meetings between the company, the employees, and the union are subject to a qualified privilege; all had a legitimate interest in the subject of money shortage and employee's discharge), *aff'd*, 800 F.2d 1139 (3rd Cir. 1986); RESTATEMENT (SECOND) OF TORTS § 596 (1977).

130. RESTATEMENT (SECOND) OF TORTS § 598 (1977).

131. *See, e.g.,* Riggs v. Cain, 406 So.2d 1202, 1203 (Fla. Dist. Ct. App. 1981); Haldeman v. Total Petroleum, Inc., 376 N.W.2d 98, 103 (Iowa 1985); Turner, 722 P.2d at 1114 (Kan. 1986). *Cf.* Shannon v. Taylor AMC/Jeep, Inc., 425 N.W.2d 165, 167-68 (Mich. App. 1988). A qualified privilege is not applicable to communications to customers regarding the reason for termination of a parts manager because the customers' interest is only curiosity. *Id.*

communication by a corporate agent to law enforcement officials regarding a possible crime is subject to a qualified privilege.¹³²

A communication subject to a qualified privilege is actionable where the privilege is abused.¹³³ A privilege may be abused in a number of ways including: (1) publication of a statement with knowledge that it is false or in reckless disregard of its truth or falsity,¹³⁴ (2) publication of a statement solely as an act of spite or ill will,¹³⁵ (3) publication of a communication that includes a statement going beyond what is necessary to protect the interest giving rise to the privilege,¹³⁶ or (4) excessive publication of a statement "to persons not within the 'circle' of those people who have a legitimate and direct interest in the subject matter of the communication."¹³⁷

The question of whether a statement is subject to a qualified privilege is a question of law for the court.¹³⁸ Where a corporate agent relies upon the defense of privilege, he or she bears the burden of proof as to the existence of the privilege.¹³⁹ Where the court decides that a defamatory communication is subject to a qualified privilege, the question of whether the qualified privilege was abused is a question of fact for the jury.¹⁴⁰ The plaintiff bears the burden of proving abuse of the privilege.¹⁴¹

Because the issue of abuse of privilege is a question of fact, the

132. *Turner*, 722 P.2d at 1115 (discussing communications initiated by the police during an investigation).

133. RESTATEMENT (SECOND) OF TORTS § 599 (1977).

134. *Jones v. Britt Airways, Inc.*, 622 F. Supp. 389, 393 (N.D. Ill. 1985) (holding there was sufficient evidence in the record to present a fact issue on the reckless disregard of the truth); *Riggs v. Cain*, 406 So.2d 1202, 1203 (Fla. Dist. Ct. App. 1981). While communication of information regarding a former employee to a prospective employer is subject to a qualified privilege, the privilege does not protect a deliberate lie. *Id.* See also RESTATEMENT (SECOND) OF TORTS § 600 (1977).

135. See *DiBiasio v. Brown & Sharpe Mfg. Co.*, 525 A.2d 489, 492 (R.I. 1987) (holding that evidence existed from which the jury could find malice); RESTATEMENT (SECOND) OF TORTS § 603 cmt. a (1977).

136. See *Garziano v. E.I. Du Pont De Nemours & Co.*, 818 F.2d 380, 391-92 (5th Cir. 1987) (holding that the scope of statements did not exceed what was necessary); RESTATEMENT (SECOND) OF TORTS § 604 (1977).

137. See *Garziano*, 818 F.2d at 392, 395 (holding that a jury question existed as to whether a qualified privilege was abused by excessive publication); RESTATEMENT (SECOND) OF TORTS § 604 (1977).

138. *Lawson v. Howmet Aluminum Corp.*, 449 N.E.2d 1172, 1175 (Ind. Ct. App. 1983); *DiBiasio*, 525 A.2d at 491; RESTATEMENT (SECOND) OF TORTS § 619(1) (1977).

139. RESTATEMENT (SECOND) OF TORTS § 613 cmt. g (1977).

140. *Frankson v. Design Space Int'l*, 394 N.W.2d 140, 144 (Minn. 1986); RESTATEMENT (SECOND) OF TORTS § 619(2) (1977).

141. *Garziano*, 818 F.2d at 388; *Frankson*, 394 N.W.2d at 144 (holding that the plaintiff has the burden of proving malice); RESTATEMENT (SECOND) OF TORTS § 613(h) (1977).

plaintiff will often be able to avoid summary judgment on the issue.¹⁴² If the alleged defamatory statement is purportedly based upon personal knowledge, the plaintiff can often create a fact issue by denying the facts and alleging that the agent knew the statement was false.¹⁴³ Alternatively, the plaintiff can allege facts suggesting that the agent was not acting for the benefit of the corporation, but rather out of ill will towards the plaintiff. In many cases, a trial is necessary in order to defeat a claim of abuse of privilege.

D. *Joint and Several Nature of Agent's Liability*

The liability of a corporate servant for a tort committed within the scope of his or her employment is joint and several with the liability of the corporate master under the doctrine of respondeat superior. The injured party may sue either the servant or the corporation, or may join them both in one action and obtain judgment against both.¹⁴⁴ If the corporation and the servant are joined in the same action, judgment in favor of one and against the other on the merits or judgments for differing amounts of compensatory damages are improper in most jurisdictions.¹⁴⁵

If the injured party obtains a judgment against either the servant or the corporation, he or she may still bring an action against the one not joined in the first action unless the judgment has been satisfied.¹⁴⁶ Absent special circumstances, however, the first judgment is conclusive against the injured party in the second action on the amount of compensatory damages.¹⁴⁷ Where the injured person sues only the servant in the first action and judgment is for the servant, the person's claim against the corporation under the theory of respondeat superior

142. See *Lutz v. Royal Ins. Co. of Am.*, 586 A.2d 278, 287 (N.J. Sup. Ct. 1991). "[T]he general rule is that one's intent, or state of mind, is a factual question which should not be decided on summary judgment." *Id.*

143. See, e.g., *Lawson v. Boeing Co.*, 792 P.2d 545, 549-50 (Wash. Ct. App. 1990) (holding that the plaintiff's denial of accusations that he sexually harassed other employees created a fact question regarding whether complaining employees abused the privilege by lying).

144. See RESTATEMENT (SECOND) OF AGENCY § 217 B(1) (1958) (joinder of principal and agent); RESTATEMENT (SECOND) OF TORTS § 882 cmt. b (1979). See also FED. R. CIV. P. 20 (permissive joinder of parties).

145. RESTATEMENT (SECOND) OF AGENCY § 217 B(2) (1958); RESTATEMENT (SECOND) OF TORTS § 882 cmt. d (1979) (noting that the amount of damages against each party must be the same); *id.* § 883 cmt. b (discussing inconsistent verdicts on the issue of liability); see also *Missouri, Kan. and Tex. R.R. Co. v. Stanley*, 372 P.2d 852, 855 (Okla. 1962) (reversing judgment against the employer because the jury verdict was only against the railroad and the only theory of employer liability was respondeat superior).

146. *Goines v. Pennsylvania R.R. Co.*, 6 A.2d 531, 533 (N.Y. App. Div. 1958).

147. *Id.* (discussing prior judgment against servants in the amount of one dollar each).

is extinguished.¹⁴⁸ Similarly, if the injured person sues only the corporation in the first action, a judgment in favor of the corporation on a respondeat superior claim extinguishes the person's claim against the servant where the corporation concedes that the servant was acting within the scope of employment at the time of the injury.¹⁴⁹

A judgment against the servant or the corporation in the first action generally is not preclusive against the other on the issues of liability and damages in a subsequent action since neither is ordinarily representative of the other in the initial lawsuit.¹⁵⁰ In the rare cases where the servant, as indemnitor,¹⁵¹ assumes control of the action brought against the corporation or is given the opportunity by the corporation to defend the action, a judgment against the corporate master may bind the servant in a subsequent suit by the corporation against the servant for indemnity.¹⁵² Absent special circumstances,¹⁵³ a servant would then be bound by the determination of issues in the first action as though he or she were a party.¹⁵⁴ For example, the servant would be bound by determinations that he or she was negligent, that the negligence occurred within the scope of his or her employment, and that such negligence caused an injury to the plaintiff.

E. *Principal's Right to Indemnity*

A corporation that is required to pay damages solely under the doctrine of respondeat superior for the tort of its servant is entitled to indemnification from the servant.¹⁵⁵ The innocent master's right to indemnity from the servant allows the entire cost of the accident to be shifted to the servant, who is the lower-cost accident avoider. Under modern rules of procedure, a corporation may make the servant a party to an action in which the corporation is sued under the doctrine of respondeat superior for the tortious act of the servant.¹⁵⁶

148. RESTATEMENT (SECOND) OF JUDGMENTS § 51(1) (1982).

149. *Davis v. Perryman*, 286 S.W.2d 844, 845 (Ark. 1956); RESTATEMENT (SECOND) OF JUDGMENTS § 51(1) (1982). Cf. *Caldwell v. Kelly*, 302 S.W.2d 815, 816-17 (Tenn. 1957) (holding that the trial court did not err in dismissing the suit against the servant even though the servant did not appeal the order granting plaintiff a new trial).

150. See RESTATEMENT (SECOND) OF JUDGMENTS § 51 cmt. b (1982).

151. See *infra* part VI.E.

152. RESTATEMENT (SECOND) OF JUDGMENTS §§ 1, 57 (1982).

153. *Id.* § 57(2).

154. *Id.* § 39.

155. See RESTATEMENT (SECOND) OF AGENCY § 401 cmt. d (1958); RESTATEMENT (SECOND) OF TORTS § 886B(2)(a) cmt. e (1979). See also *Fireman's Fund Am. Ins. Co. v. Turner*, 488 P.2d 429 (Or. 1971) (reversing trial court decision that permitting recovery would be against public policy in an action by insurer of a master against a servant for indemnity).

156. See, e.g., FED. R. CIV. P. 14.

Sometimes a corporate master makes an insolvent servant a third party defendant in an attempt to give the jury the false impression that the servant will actually be called upon to pay the judgment or to coerce the servant into testifying favorably to the corporation.¹⁵⁷ In this situation a court may order a separate trial of the third party claim in order to avoid any prejudice to the plaintiff.¹⁵⁸

An interesting question arises when a corporation is injured as a result of the actions of two servants. Where the corporation sues one of the servants, some cases hold that the negligence of the other servant is imputed to the corporation and deny recovery.¹⁵⁹ The better view is that the negligence of the other servant is not imputed to the corporation.¹⁶⁰ The purpose for imputing the negligence of a servant to the corporation, when the corporation is sued by a third person, is not served by imputing the negligence of a servant to the corporation when the corporation sues another negligent servant.¹⁶¹ The corporation "should not be remediless against two negligent agents."¹⁶²

Where the corporation is held liable because of negligence in hiring, retaining, or instructing the agent or on a theory of negligent entrustment,¹⁶³ the corporation does not have a right to indemnity as an innocent party who is only vicariously liable. In jurisdictions that follow the active/passive (or primary/secondary) negligence distinction, however, the corporation may have a right of indemnity against the servant as the active or primary tortfeasor.¹⁶⁴

157. See *List v. Roto-Broil Corp. of Am.*, 40 F.R.D. 31 (M.D. Pa. 1966); *Goodhart v. United States Lines Co.*, 26 F.R.D. 163, 164 (S.D. N.Y. 1960). "[T]aking judicial notice of the fact that the operator of a hi-lo will not be financially able to indemnify defendant to any substantial extent" and refusing to help defendant "threaten the hi-lo operator with the necessity of going through bankruptcy unless he testifies favorably to defendant." *Id.*

158. FED. R. Civ. P. 42(b). See also *Lankford v. Ryder Truck Sys., Inc.*, 41 F.R.D. 430, 432 (D.S.C. 1967) (dictum) (denying motion to dismiss a third party complaint); *Smith v. Moore-McCormack Lines, Inc.*, 31 F.R.D. 239, 241 (S.D.N.Y. 1962) (dictum).

159. See, e.g., *Capitola v. Minneapolis, St. Paul & Sault Ste. Marie R.R. Co.*, 103 N.W.2d 867, 869 (Minn. 1960).

160. See *Oxford Shipping Co. v. New Hampshire Trading Corp.*, 697 F.2d 1, 6-7 (1st Cir. 1982); *Brown v. Poritzky*, 283 N.E.2d 751, 754 (N.Y. 1972); *South Carolina Ins. Co. v. James C. Greene & Co.*, 348 S.E.2d 617, 625-26 (S.C. Ct. App. 1986).

161. *South Carolina Ins. Co.*, 348 S.E.2d at 625-26 (S.C. Ct. App. 1986). "The purpose of imputed liability is to provide an effective remedy for the person injured by the servant's negligence. . . . Its purpose is not to let a negligent party evade responsibility for his wrongdoing." *Id.*

162. *Brown*, 283 N.E.2d at 754 (N.Y. 1972).

163. See RESTATEMENT (SECOND) OF AGENCY § 213 (1958).

164. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 51, at 343 (5th ed. 1984). In jurisdictions that have abolished complete indemnity based upon the active/passive negligence distinction in favor of a comparative negligence approach, the corporate master may be entitled to comparative partial indemnity. *Id.* See generally *Schneider Nat'l, Inc.*

VII. CRIMINAL ACTS

A. *In General*

A corporate agent is criminally liable for conduct that he or she performs or causes to be performed in the name of the corporation to the same extent as if the conduct was in his or her own name or on his or her own behalf.¹⁶⁵ Thus, when a corporate agent commits a crime on behalf of the corporation, he or she is not shielded from prosecution by the existence of the corporation.¹⁶⁶

A corporate agent may be convicted not only for acts that he or she personally commits,¹⁶⁷ but also for criminal conduct authorized or directed by the agent. A corporate employee who directs other employees to make false entries in records or to submit false claims in violation of the law is subject to criminal liability.¹⁶⁸ Further, a corporate officer who sets corporate policies and practices which he or she understands are in violation of the law is subject to criminal liability despite the fact the policy is dictated through phone calls and occasional visits to the corporate premises rather than through day-to-day supervision of corporate activities.¹⁶⁹

In addition, a corporate agent who assists another in the commission of a crime is criminally liable.¹⁷⁰ Generally mere presence at the scene of a crime or knowledge that a crime is being committed is insufficient to establish criminal liability.¹⁷¹ "To be liable. . . one must associate himself with the venture, participate in it as something he wishes to bring about, and through his action seek to make it succeed."¹⁷² Finally, a developing area involves the potential liability of corporate officers or managers for homicide where they are aware of

v. Holland Hitch Co., 843 P.2d 561, 576-79 (Wyo. 1992) (holding that equitable indemnity is to be allocated on the basis of the comparative degree of fault).

165. See MODEL PENAL CODE § 2.07(6)(a) (1985); N.Y. PENAL CODE § 20.25 (McKinney 1987).

166. State v. Picheco, 203 A.2d 242, 244 (Conn. Cir. Ct. 1964); State v. Hill, 333 S.E.2d 789, 790 (S.C. Ct. App. 1985).

167. See, e.g., United States v. Bach, 151 F.2d 177, 179 (7th Cir. 1945) (holding that the defendant knowingly and intentionally sold whiskey at a price in excess of lawful maximum price).

168. See United States v. Precision Medical Laboratories, Inc., 593 F.2d 434 (2nd Cir. 1978) (discussing false claims); Meredith v. United States, 238 F.2d 535 (4th Cir. 1956) (discussing false entries).

169. United States v. Cattle King Packing Co., 793 F.2d 232, 239-41 (10th Cir. 1986) (finding that a defendant in Nebraska was not insulated from liability for transactions carried out in Colorado pursuant to his instructions).

170. See 18 U.S.C.A. § 2 (West 1969); MODEL PENAL CODE § 2.06 (1985).

171. Commonwealth v. Henderson, 378 A.2d 393, 398 (Pa. 1977).

172. KATHLEEN F. BRICKEY, CORPORATE CRIMINAL LIABILITY § 5:09 at 116 (1984).

serious hazards to the safety of employees or customers and fail to take corrective action.¹⁷³

B. *The Responsible Corporate Officer Doctrine*

Under limited circumstances a corporate officer may be held liable without any awareness of wrongdoing or any personal participation in the act that is criminal. Congress and state legislatures have adopted a number of statutes that are aimed at protecting the public from dangers that members of the public are unable to protect themselves against. For example, the Food, Drug and Cosmetic Act¹⁷⁴ was adopted to protect the public against impure and adulterated food and drugs. Under that Act, the Supreme Court upheld the conviction of a company president and general manager in *United States v. Dotterweich*.¹⁷⁵ The company shipped misbranded and adulterated drugs in interstate commerce. The Court found the president and manager stood in a "responsible relation to a public danger."¹⁷⁶ The Court therefore placed a duty on persons standing in a responsible relation to the transaction to inform themselves of the existence of the conditions imposed for the protection of the public.¹⁷⁷

In the subsequent case of *United States v. Park*,¹⁷⁸ involving a corporate chief executive officer convicted on violations of the Act, the Supreme Court defined responsible relation in terms of the "power to prevent the act complained of."¹⁷⁹ Thus, a corporate agent stands in a responsible relation to a transaction if he or she has the power to prevent the criminal act. The Court, however, made clear that persons in a responsible relation have not only the duty to seek out and remedy violations when they occur, but also "a duty to implement measures

173. See generally Peter T. Edelman, Comment, *Corporate Criminal Liability for Homicide: The Need to Punish Both the Corporate Entity and its Officer*, 92 DICK. L. REV. 193 (1987); Sharon R. Weinfield, *Recent Development, Criminal Liability of Corporate Managers for Deaths of their Employees*: "People v. Warner-Lambert Co.," 46 ALB. L. REV. 655 (1982). The California Corporate Criminal Liability Act of 1989 imposes criminal liability on both corporations and corporate managers for certain failures to report concealed dangers to the appropriate state agency or to warn employees of these dangers. CAL. PEN. CODE § 387 (West 1993 Supp.). In Illinois, two former managers of a defunct corporation recently pleaded guilty to involuntary manslaughter in order to avoid retrial for murder in the death of an employee from exposure to cyanide. EDWARD FELSENTHAL, WALL ST. J., Sept. 9, 1993, B2, Col. 6, (S.W. ed). The managers had been convicted of murder in a 1985 trial, but the convictions were overturned on appeal. *People v. O'Neil*, 550 N.E.2d 1090 (Ill. App. Ct.), cert. denied, 553 N.E.2d 400 (Ill. 1990).

174. 21 U.S.C. §§ 301-392 (1938)

175. 320 U.S. 277 (1943).

176. *Id.* at 281.

177. *Id.* at 285.

178. 421 U.S. 658 (1975).

179. *Id.* at 671.

that will insure that violations will not occur."¹⁸⁰ The Court stated the Act did not require the corporate agent to do anything objectively impossible. Therefore, the agent is not liable if he or she is powerless to prevent or correct the violation.¹⁸¹

The conviction of Park was upheld even though he testified that he had relied upon his subordinates to remedy the problem.¹⁸² Thus, the case makes clear that delegation of authority to subordinates does not provide an iron-clad defense to criminal liability for a public welfare offense. In *Park*, the corporation involved had 36,000 employees, 874 retail outlets, and 16 warehouses.¹⁸³ While the case leaves open the possibility that the defense of objective impossibility may be based upon the impossibility of supervising a large operation without delegation to subordinates,¹⁸⁴ delegation is not a defense where the corporate officer is on notice, for example because of prior violations, that the system of delegation is not working to prevent or correct violations of the public welfare statute.¹⁸⁵

The offenses in *Dotterweich* and *Park* were strict liability offenses. An important question is whether the responsible corporate officer doctrine may be used to meet the knowledge requirement of a crime. In other words, may a jury infer that a person holding a responsible corporate position had knowledge that a statutory requirement had not been met? Case law conflicts on this issue.¹⁸⁶

In sum, the rationale applied in the *Dotterweich* and *Park* cases has potential application to a large number of federal and state criminal statutes dealing with public welfare offenses.¹⁸⁷

180. *Id.* at 672.

181. *Id.* at 673. For discussions of the impossibility defense, see Kathleen F. Brickey, *Criminal Liability of Corporate Officers for Strict Liability Offenses - Another View*, 35 VAND. L. REV. 1337, 1367-74 (1982); Stephen C. Jones, *Individual Liability Under the Federal Food, Drug, and Cosmetic Act: The Defenses Find a Defendant*, 39 FOOD DRUG COSM. L.J. 385, 398-400 (1984).

182. *Park*, 421 U.S. at 664-65

183. *Id.* at 660.

184. *Id.* at 677 n.19.

185. *See id.* at 678.

186. *Compare* United States v. Johnson & Towers, Inc., 741 F.2d 662, 669-70 (3rd Cir. 1984) (holding that knowledge may be inferred from a responsible corporate position), *cert. denied sub nom.*, 469 U.S. 1208 (1985), *with* United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35, 51-55 (1st Cir. 1991) (finding that a mere showing of official responsibility is insufficient; however, knowledge may be inferred from circumstantial evidence or willful blindness). *See generally* Joseph G. Block & Nancy A. Voisin, *The Responsible Corporate Officer Doctrine - Can You go to Jail for What You "Don't" Know?*, 22 ENVTL. L. 1347 (1992); Ronald M. Broudy, Note, *RCRA and the Responsible Corporate Officer Doctrine: Getting Tough on Corporate Offenders by Sidestepping the Mens Rea Requirement*, 80 KY. L.J. 1055 (1991-92).

187. *See, e.g.*, State v. Kailua Auto Wreckers, Inc., 615 P.2d 730, 739-740 (Haw. 1980) (affirming conviction of corporate officers for violations of prohibition on open burning); People v. Byrne, 494 N.Y.S.2d 257, 258 (N.Y. Sup. Ct. 1985). In *Byrne*, a complaint was reinstated against

C. *Intracorporate Conspiracy*

Conspiracy to commit a criminal offense is generally punishable as a criminal offense.¹⁸⁸ Two important questions regarding intracorporate conspiracies are: (1) whether a corporation as a legal entity can conspire with a single corporate agent and (2) whether two or more agents of the same corporation can conspire together.¹⁸⁹

A criminal conspiracy requires a plurality of actors. This plurality requirement is not met where a corporation and only one of its agents is involved.¹⁹⁰ Since a corporation can only act through its agents, a contrary rule transforms every criminal act of a corporate agent acting on behalf of the corporation into a criminal conspiracy¹⁹¹ and would, as one opinion states, "over-extend the fiction of corporate personality."¹⁹²

A closer question is whether the plurality of actors requirement is met solely by two or more agents of the same corporation acting on behalf of the corporate business. A number of cases hold that the plurality requirement may be met solely by the actions of the agents of a single corporation.¹⁹³ A strong argument can be made that a conspiracy among agents of a single corporation may present the very dangers that conspiracy laws are aimed at preventing, namely "mutual support, encouragement and an education in criminal methods" as well as "a focal point for further crimes."¹⁹⁴

an officer and fifty percent shareholder of corporation which owned a bar where a minor was served. The officer was not present, did not have notice of, nor participation in the service of the minor. *Id.* See generally Lynn Bledsoe, Note, *Criminal Liability for Public Welfare Offenses: Gambler's Choice*, 10 MEM. ST. U. L. REV. 612 (1980).

188. 18 U.S.C.A. § 371 (West 1966); OKLA. STAT. tit. 21, § 421 (1991).

189. See generally Sarah N. Welling, *Intracorporate Plurality in Criminal Conspiracy Law*, 33 HASTINGS L.J. 1155 (1982).

190. *Union Pac. Coal Co. v. United States*, 173 F. 737, 745 (8th Cir. 1909) (discussing an alleged conspiracy to restrain trade); *United States v. Carroll*, 144 F. Supp. 939 (S.D.N.Y. 1956) (finding a conspiracy to violate gold laws). *But cf.* *State v. Parker*, 158 A. 797, 801 (Conn. 1932) (dictum) (explaining that in determining whether there is a conspiracy, the corporation may be counted).

191. Welling, *supra* note 189, at 1161.

192. *United States v. Carroll*, 144 F. Supp. 939, 941 (S.D.N.Y. 1956).

193. See, e.g., *United States v. Hartley*, 678 F.2d 961, 968-72 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); *United States v. Consol. Coal Co.*, 424 F. Supp. 577, 579-81 (S.D. Ohio 1976).

194. Welling, *supra* note 189, at 1199 (discussing the idea that an intracorporate conspiracy is more harmful to society than individual action and that the actions of multiple agents of a single corporation should meet the plurality requirement). See also Kathleen F. Brickey, *Conspiracy, Group Danger and the Corporate Defendant*, 52 U. CIN. L.REV. 431, 439-40 (1983); John T. Priske, Comment, *The Intracorporate Conspiracy Doctrine*, 16 U. BALT. L. REV. 538, 550-51 (1987).

Multiple agents of the same corporation meet the plurality requirement where one of the agents is acting on his or her own behalf.¹⁹⁵ "The personally motivated employee is viewed no differently than someone outside of the corporation because the employee is acting without concern as to whether his actions benefit the corporation."¹⁹⁶ In addition, a corporate agent can conspire with agents of a subsidiary corporation since each corporation is a separate legal entity.¹⁹⁷ Finally, a corporate agent can conspire with actors who are outside of the corporation.¹⁹⁸

VIII. STATUTORY LIABILITIES

A corporate agent may be liable under any of a multitude of state or federal statutes imposing either a statutory penalty or civil liability for various acts. These provisions include, for example, provisions in the applicable state corporation statute¹⁹⁹ and controlling person liability under federal and state securities laws.²⁰⁰ Consider the following three significant provisions: (1) the provisions in the Internal Revenue Code making a person required to collect and withhold internal revenue tax from another person and to pay over the tax to the United States a trustee of the funds²⁰¹ and imposing a one hundred percent penalty for willful failure to collect or to pay over such tax;²⁰² (2) liability for response costs under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA);²⁰³ and (3)

195. See *United States v. Spiezio*, 523 F. Supp. 264, 271 n.5 (E.D. Pa. 1981); cf. *Hughes v. Technology Licensing Consultants, Inc.* 815 F. Supp. 847, 851 (W.D. Pa. 1992) (dictum) (civil RICO case).

196. *Prisbe*, *supra* note 194, at 544.

197. *But cf. Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984) (holding that, in civil action for damages, "the coordinated activity of a parent [corporation] and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act").

198. *Cf. Hughes*, 815 F. Supp. at 852 n.2 (discussing alleged conspiracy between defendants associated with two corporations in a civil RICO case); *United States v. Kemmel*, 160 F. Supp. 718, 721 (M.D. Pa. 1958) (holding that the conspiracy of a corporation and others was properly charged).

199. For example, sixteen jurisdictions impose a penalty on a corporate officer or agent who refuses to permit a qualified shareholder to inspect corporate books and records. See MODEL BUSINESS CORP. ACT. ANN. § 16.04 annot. (1993).

200. See Securities Act of 1933, § 15, 15 U.S.C.A. § 770 (West 1981); Securities Exchange Act of 1934, § 20, 15 U.S.C. § 78t (West 1981); OKLA. STAT. tit. 71, § 408(b) (Supp. 1992).

201. I.R.C. § 7501(a) (West Supp. 1993). See also OKLA. STAT. tit. 68, § 253 (1991) (dealing with liability of principal corporate officers for tax assessments against corporation).

202. I.R.C. § 6672 (1993). Any corporate officer or employee with the power to direct the payment of the taxes is a responsible person within the meaning of these provisions. See *Feist v. United States*, 607 F.2d 954, 960 (Ct. Cl. 1979).

203. See *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 743-44

provisions which impose liability on corporate officers for debts of a corporation incurred after the revocation of the corporate charter.²⁰⁴ A discussion of the full scope of these and other potential statutory liabilities is beyond the scope of this article.

IX. CONCLUSION

Generally an agent for a corporation is not personally liable to a third person where he or she makes an authorized contract on behalf of a fully disclosed corporate principal. In addition, he or she is generally not liable to a third person for making an *ultra vires* contract on behalf of the corporation.

A purported corporate agent is liable to a third person where he or she makes an unauthorized contract on behalf of a corporation or where he or she fails to fully disclose the identity of the corporate principal on whose behalf the agent is acting. In addition, a corporate agent is personally liable for any tortious or criminal acts that he or she commits on behalf of the corporation. Finally, corporate officers and agents are subject to various potential penalties and civil liabilities under federal and state statutes.

In some situations the fact that a corporate agent is acting on behalf of the corporation may operate to protect the agent from personal tort or criminal liability. These situations include: (1) where the agent, acting in good faith on behalf of the corporation within the scope of his or her official capacity, interferes with a contract or prospective contract; (2) where the agent, acting in his or her official capacity, makes a defamatory communication that is subject to a qualified privilege; and (3) some cases in which the agent is charged with conspiracy.

(8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987). See also Harold J. Cronk & Pat Huddleston, II, *Corporate Officer Liability for Hazardous Waste Disposal: What are the Consequences?*, 38 *MERCER L. REV.* 677 (1987); David E. Preston, Comment, *Dissolving the Corporate Veil: Corporate Officer Liability for Response Costs Under the Comprehensive Environmental Response Compensation and Liability Act*, 17 *U. TOL. L. REV.* 923 (1986).

204. See *OKLA. STAT.* tit. 68, § 1212(c) (Okla. 1991) (discussing the liability of an officer or director for debts incurred with his or her "knowledge, approval and consent" after suspension of charter by the Tax Commission); *Nichols-Homeshield, Inc. v. Mid-American Constr. Supply*, 643 P.2d 309, 310-11 (Okla. 1982). In comparison, the Delaware statutes expressly provide that upon reinstatement of the charter, the corporation is exclusively liable on all contracts and acts done on its behalf during the period of the forfeiture of its charter. See *DEL. CODE ANN.* tit. 8, § 312(e) (1991). See also *Frederic G. Krapf & Son, Inc. v. Gorson*, 243 A.2d 713, 715 (Del. 1968) (holding that reinstatement absolved officers from personal liability on contract).