

## CHAPTER SIX

### OFFICERS AND AGENTS

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## Section 6.01 Generally

Since a corporation is an artificial being, it must act through natural persons. *Opportunity Christian Church v. Washington Water Power Co.*, 136 Wash 2d 116, 238 P2d 641 (1925); *State v. Oregon City Elks Lodge No. 1189, BPO Elks*, 17 Or App 124, 520 P2d 900 (1974); *Guthridge v. Pen-Mod, Inc.*, 239 A2d 709 (Del Supr 1967); *State v. Gourley*, 209 Or 363, 305 P2d 396 (1956), *rehearing denied*, 209 Or 363, 306 P2d 1117 (1957). A corporation is managed by its board of directors. RCW 23B.08.010(2). But the board of directors does not implement policy. The job of implementing corporate policy belongs to corporate officers, employees and agents.

Being a creation of the law - an artificial person - it can only act by agents who are its limbs or instrumentalities to effect the purpose for which it was organized, and to act for it, their act being the act of the corporation, exactly as the act of an individual in his act. *Killingsworth v. Portland Trust Co.*, 18 Or 351, 355, 23 P 66, 68 (1890).

At a corporation's organizational meeting, bylaws are adopted and officers are appointed. RCW 23B.02.050(1)(a). As a general rule, a corporation's bylaws describe the title and duties of its officers. RCW 23B.08.400. Generally, much of an officers' express authority is spelled out in the corporation's bylaws.

### **A. Officers & agents distinguished - historical view.**

Historically, officers have been distinguished from mere corporate "agents."

There is a distinction between officers and agents of a corporation. An officer is elected by the directors or stockholders to the office created by the charter, while an agency is usually created by the officers and the agents are appointed by the same authority. The powers and duties are not necessarily the same. An officer of a corporation may be its agent, while an agent need not be an officer. The officers, as such, are the corporation, while the agent is a mere employee or servant of the corporation. *King v. Citizens Bank of DeKalb*, 88 Ga App 40, 45, 76 SE2d 86, 90 (1953).

Unlike mere agents, officers act and speak for the corporation in furthering its express objectives; officers are representatives of the corporation. *Halbert v. Berlinger*, 127 Cal App 2d 6, 273 P2d 274 (1954). One court has said:

There are various distinctions between corporate officers and employees. For example, an officer holds an office and performs duties created and prescribed by charter or by-law, and the officer is elected either by action of the stockholders or the board of directors at a salary or for compensation fixed by them or by the charter or by-laws.

On the other hand an employee usually occupies no office; he is generally employed not by action of the stockholders or directors but by the managing officer of the corporation, who also determines the

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compensation to be paid.

The officers of a corporation occupy a quasi-fiduciary relation to the stockholders and the corporation while employees do not. Employees are usually subordinate to and act under control of corporate officers, while the officers exercise the power of management under the policies or directives of the board of directors. *Flight Equipment & Engineering Corp. v. Shelton*, 103 So2d 615, 623 (Fla 1958).

Officers are "agents" of the corporation; most often, employees and other agents are "subagents."

In recent years, there has been a national trend toward de-emphasizing officers and toward blurring the distinction between officers and agents.

***B. Today, there is less distinction between officers & other agents.***

Historically, all corporations had a president and secretary and many corporations had other designated officers, such as a chairman of the board, a treasurer, and a vice president. Today, the Revised Model Business Corporation Act § 8.40 no longer requires the appointment of any particular officer, although the existence of at least one officer, with some designation, is contemplated.

Today, RCW 23B.08.400 provides for corporate officers, but it does not require the appointment of any particular officer. But, the existence of at least one officer, with some designation, is required. That one officer is delegated responsibility for preparing minutes of directors and shareholders' meetings and for authenticating corporate records. RCW 23B.08.400(3). Most corporations refer to this officer as the "secretary." Although no longer required, most corporations today still appoint an officer designated as the "president."

A corporation may appoint other officers, in addition to a president and secretary. RCW 23B.08.400. Such officers may either be designated in the corporation's bylaws or described in board resolutions. *Id.* If authorized by the bylaws or by the board of directors, a duly appointed officer may appoint another officer. RCW 23B.08.400(2).

Designating some agents as "officers" is useful to the corporation. Such a designation facilitates the delegation of authority and aids the corporation in carrying out its business. For instance, the bylaws generally set out a broad range of acts authorized to be carried out by a particular officer. Thus, the person designated "treasurer" each year may proceed to maintain corporate accounting records, pay expenses in the

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ordinary course of business, and do the other tasks authorized in the bylaws, rather than awaiting specific board authorization for the duties that he/she would normally perform.

Likewise, persons dealing with the corporation sometimes need to feel confident that the person with whom they are dealing has authority to bind the corporation. Implicit knowledge that a particular officer is generally granted broad authority, coupled with case law that the designation of a person as an "officer" may cloak that person with a degree of apparent authority, both facilitate corporate dealings with third parties.

### **C. Agency principles apply to officers.**

The principles of agency generally apply to officers. *Sons of Norway v. Boomer*, 10 Wash App 618, 519 P2d 28 (1974); *Deers, Inc. v. DeRuyter*, 9 Wash App 240, 511 P2d 1379 (1973); *Williams v. Queen Fisheries, Inc.*, 2 Wash App 691, 469 P2d 583 (1970); *Paynesville Farmers Union Oil Co. v. Ever Ready Oil Co., Inc.*, 379 NW2d 186, 188 (Minn App 1985); *Buxton v. Diversified Resources Corp.*, 634 F2d 1313 (10th Cir 1980)(interpreting Utah law); *Rae v. Heilig Theatre Co.*, 94 Or 408, 185 P 909 (1919).

### **D. Miscellaneous.**

While directors are "elected" by the shareholders, RCW 23B.08.030(2), officers are "appointed" by the directors, or by another officer. RCW 23B.08.400. While certain procedures must be followed in order to remove a director from office, RCW 23B.08.080, officers may be removed at any time, with or without cause. RCW 23B.08.430(2).

The standard of care that an officer owes to the corporation is substantially the same as the standard of care owed by a director. *Compare*: RCW 23B.08.300 and RCW 23B.08.420. *See*: Section 6.10 of this book.

## Section 6.02 Appointment

A corporation has the officers: (i) described in its bylaws; (ii) appointed by the board of directors in accordance with the bylaws; or (iii) appointed by another officer in accordance with the bylaws. RCW 23B.08.400(1); *Booker v. First Federal Savings and Loan Association*, 215 Ga 277, 110 SE2d 360, *cert denied*, 361 US 916 (1959). Thus, directors may vote to appoint a particular person as an officer, or, alternatively, the bylaws may designate a person as an officer. For instance, the board chairman could be designated "president," and any

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person holding the position of board chairman would automatically become president without further board action.

In keeping with the general trend toward de-emphasizing the importance of officers and toward treating officers the same as other corporate agents, the Revised Model Act provides that officers are "appointed" rather than "elected." RMBCA § 8.40(a). RCW 23B.08.400 adopts this terminology.

No officer is required to have any particular title. There does not need to be an officer with the title "president," nor one with the title "secretary." The same individual may simultaneously hold two or more offices. RCW 23B.08.400(4).

If authorized by the bylaws or by the board of directors, one officer can appoint another officer. RCW 23B.08.400(2). For instance, if authorized, the secretary can appoint an assistant secretary. Apparently, if authorized, the assistant treasurer can appoint the president.

The position of "Chairman of the Board" has no legally defined role. *Weeks v. Pratt*, 43 F2d 53 (5th Cir 1930). In some corporations, the "Chair" is a director chosen by the board of directors from among its members, all of whom were elected by the shareholders. In other corporations, the Chair is an executive officer appointed by the board of directors for an indeterminate period and is not a director at all. In the second instance, the Chair is not eligible to vote at director meetings. *Whitley v. Whitley Construction Co.*, 121 Ga App 696, 175 SE2d 128 (1970).

Unless the articles of incorporation or bylaws provide otherwise, a simple majority of the board of directors may appoint an officer. *Scott v. Anderson Newspapers, Inc.*, 477 NE2d 553, 565 (Ind App 1985).

### **Section 6.03 Term and Vacancies**

Officers are appointed by the board of directors and serve at the board's pleasure. Either the board of directors or another authorized officers may remove an officer and an officer may be removed with or without cause. RCW 23B.08.430(2). If the bylaws designate a method of appointment other than appointment by the board of directors (e.g., the board chairman is designated as president), such an officer would hold office only as long as he/she meets the requirements for the position.

Under the current Washington Act, there is no statutory qualification requirement for holding office. But, only a human being can be an officer, not another corporation or other artificial entity.

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Long ago, Washington required an officer to be appointed from among the shareholders. *Kneeland Investment Co. v. Berendes*, 81 Wash 372, 142 P 869 (1914). This is no longer true.

There is no requirement in Washington that an officer take an oath upon taking office.

#### **A. Term.**

Officers may serve indefinitely. There is no term of office prescribed by statute. Unless the bylaws provide otherwise, a person appointed as an officer stays an officer until death, resignation, or removal or until a successor is appointed and assumes office. *Doehler v. Lansdon*, 135 Or 687, 291 P 392, 298 P 200 (1931).

While there is no requirement that officers be appointed for any specified term, bylaws sometimes provide that the officers will hold office until the next annual meeting of the directors (generally designated to immediately follow the annual meeting of shareholders). In the event that such appointment does not occur, the old officers would likely continue in office, although the precise wording of the bylaws will necessarily affect the outcome of this issue. See: *Dowdle v. Central Brick Co.*, 206 Ind 242, 189 NE 145 (1934). Holdover officers are considered to be *de facto* officers, absent language in the bylaws dictating a contrary result. *Grothe v. Herschbach*, 153 Ind App 224, 286 NE2d 868 (1972); *Doehler v. Lansdon*, 135 Or 687, 291 P 392, 298 P 200 (1931). At least holdover officers may be considered *de facto* officers with respect to third parties who deal with them, believing them to be agents of the corporation. *Georgia Casualty and Surety Co. v. Seaboard Surety Co.*, 210 F Supp 644 (ND Ga 1962). This holdover doctrine does not apply to officers who are removed from office. *Jacksonville Terminal Co. v. Florida East Coast Railway Co.*, 363 F2d 216 (5th Cir 1966).

#### **B. Removal.**

The board of directors may remove an officer with or without cause. RCW 23B.08.430(2). This is consistent with earlier case law applying the business judgment rule to such decisions.

Which business judgment was correct is not for us to decide. The subsequent history of the company implies that defendants' position was not frivolous, but for all we know, the company might have been even more successful with plaintiff at its head. Happily, courts need not make business decisions. (citations omitted) *Kiess v. Eason*, 442 F2d 712, 720 n 14 (7th Cir 1971).

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If appointed by another officer, such person "may remove by another officer authorized to appoint officers or assistant officers." RCW 23B.08.430(2).

An officer's appointment does not in itself create a contract right. RCW 23B.08.440(1); *City Group, Inc. v. Ehlers*, 198 Ga App 709, 402 SE2d 787 (1991); *Morton v. E-Z Rake, Inc.*, 397 NE2d 609 (Ind App 1979). According to the Official Comments to the Revised Model Act § 8.44, removal would not prejudice the officer's right to lost wages, and resignation would not bar an action by the corporation against the officer for breach of contract. See: *Barber v. Southern Service Corp.*, 182 Ga 124, 185 SE 93 (1936).

Under an earlier statute, there were several Washington decisions which held that a corporation had the power to remove an officer at any time and, despite a contract specifying a longer time, to avoid paying the officer for the remainder of the contract term. *O'Donnell v. Sipprell, Inc.*, 163 Wash 369, 1 P2d 322 (1931); *Llewellyn v. Aberdeen Brewing Co.*, 65 Wash 319, 118 P 30 (1911).

Under the current Act, if the person who is appointed as an officer and the corporation together enter into a contract for a specified period, the removal of that person from office does not affect either party's contract rights vis-a-vis the other. RCW 23B.08.440(2). But officers may not avoid removal by entering into contracts which grant them office for a particular term. *Thielsen v. Blake, Moffitt & Towne*, 142 Or 59, 17 P2d 560 (1933).

**EXAMPLE:** If a baseball team appoint a person as its "manager" and enters into a three-year contract with him, the team can replace him with a new manager at any time. But the team will be required to pay the old manager for the full three-year term of his contract.

### **C. Resignation.**

Traditionally, most states have followed the view that an officer's resignation is effective upon delivery of the resignation to the board of directors. *Anderson v. K.G. Moore, Inc.*, 6 Mass App 386, 376 NE2d 1238 (1978), *cert denied*, 439 US 1116 (1979); *Bell v. Texas Employers' Ins. Ass'n.*, 43 SW2d 290 (Tex Civ App 1931). A few states held that an officer's resignation became effective only upon acceptance by the board. *Young v. James*, 34 Del Ch 287, 103 A2d 299 (1954); *Barde v. Portland News Publishing Co.*, 145 Or 376, 26 P2d 787, 28 P2d 216 (1934).

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Under the present Act, Washington essentially adopts the majority view. The Act provides that the resignation is effective when notice is "delivered" to the board of directors, unless a later time is specified. RCW 23B.08.430(1).

RCW 23B.08.430(1) does not require any particular method for delivery, nor does it describe when delivery is deemed to occur. But RCW 23B.01.410(5) does describe when a notice (presumably including notice of resignation) is deemed "effective" when delivered using certain methods of deliver, These include: (i) if authorized by the articles of incorporation or bylaws, when notice dispatched by telegraph, teletype or facsimile; (ii) when notice is received; (iii) fives days after notice is mailed; or (iv) the date shown on the return receipt for the notice.

### **Section 6.04 Duties**

The Washington Act provides that officers shall have the duties described in the bylaws.

Each officer has the authority and shall perform the duties set forth in the bylaws or, to the extent consistent with the bylaws, the duties prescribed by the board of directors or by an officer authorized by the board of directors to prescribe the duties of other officers. RCW 23B.08.410.

The Washington Act does not specify that a corporation have any specific officer. It does require that either the bylaws or the board of directors "delegate to one of the officers responsibility for preparing minutes of the directors' and shareholders' meetings and for authenticating records of the corporation." RCW 23B.08.400(3). Although the Act is silent on the title of this person, most corporations call this person the "secretary."

Traditionally, statutes have not required many specific duties for officers, leaving specific duties to be set out in the corporation's bylaws or in board resolutions. Provisions related to officers in the 1933 Act are a good illustration:

- I. The board of directors shall elect a president, a secretary and a treasurer, and may elect one or more vice-presidents. No one of said officers, except the president, need be a director, but a vice-president who is not a director cannot succeed to or fill the office of president. Any two of the offices of vice-president, secretary and treasurer may be combined in one person.
- II. Such officers and agents as may be necessary for the business of the corporation may be appointed by the board of directors or in the manner provided in the by-laws.
- III. All officers and agents shall respectively have such authority and perform such duties in the management of the property and affairs of the



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corporation, subject to the control of the board of directors, as may be prescribed in the by-laws, or, in the absence of controlling provisions in the by-laws, as may be determined by the board of directors. 1933 Washington Session Laws, Ch 185, Sec 32, pp 795-6.

Absent authority granted them by a statute, the bylaws, or a resolution of the board of directors, officers have little inherent power. For instance, one case held that the president has no power to call a meeting of the shareholders, unless the bylaws or a board resolution bestows such power on the president. *State Bank of Wilbur v. Wilbur Mission Church*, 44 Wash 2d 80, 265 P2d 821 (1954). In another decision, the court said:

The president of a corporation has no power, by virtue of his office, to sell or otherwise dispose of the corporate franchises, or of its real or personal property, when this is not in the regular course of the company's business; nor can he appoint an agent to make such sale; and it has been held that he has not such power even though he is authorized to act as superintendent or general manager in the conduct of the corporation's ordinary and routine business. The president, however, may sell or otherwise dispose of the corporate property where such power is conferred on him by the directors or other governing body, or by a recognized usage of the corporation; or where the transaction is in the ordinary course of business; or where the president has such entire management of the corporate business as clothes him with apparent authority to act for it in all respects; or where he owns substantially all of the stock and the corporation is in reality a mere agency to carry out his will. *Betz v. Tacoma Drug Co.*, 15 Wash 2d 471, 479-80, 131 P2d 183, 186 (1942).

In another decision, the court stated:

aside from duties as presiding officer at meetings, a corporate president has no more authority, by virtue of that office, than any other director. Additional authority, if any, must be conferred by the charter, bylaws, director resolution, or implied from express powers granted, custom and usage, or the nature of the company's business. In particular, the president has no power to mortgage or pledge corporate property, or to borrow money and pledge corporate credit, unless expressly authorized, or unless such authority may be implied from a course of conduct or from powers expressly given. (citations omitted) *Pierce v. Astoria Fish Factors, Inc.*, 31 Wash App 214, 217-8, 640 P2d 40, 43 (1982).

Today, bylaws frequently contain language granting broad authority to the officers. Likewise, courts today are more likely to interpret these powers broadly and to find that an officer's power is implied, inherent or apparent. See: Section 6.07 of this book.

### **Section 6.05 Authority, Generally**

Although management of a corporation's affairs is vested in its board of directors, authority to implement board decisions is usually delegated to a corporation's officers and its other agents. In fact, since it is not a natural person, a corporation can only act through its officers, employees and other agents. *Opportunity Christian Church v.*

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*Washington Water Power Co.*, 136 Wash 2d 116, 238 P2d 641 (1925); *State v. Oregon City Elks Lodge No. 1189, BPO Elks*, 17 Or App 124, 520 P2d 900 (1974); *Guthridge v. Pen-Mod, Inc.*, 239 A2d 709 (Del Supr 1967).

Officers, employees and other agents only possess such authority to act for the corporation as is expressly conferred on them or which may be implied from the authority expressly conferred on them.

The board of directors is the governing body of a corporation, and as such is vested with the management of its ordinary corporate affairs, such as the corporation itself is authorized to perform under the rights and powers delegated by its charter. The officers appointed by the directors are clothed with only such powers and authority as are expressly conferred upon them by the charter or the by-laws, or as may be implied by usage and acquiescence. *Ware v. Rankin*, 97 Ga App 837, 839-40, 104 SE2d 555, 559 (1958).

Officers are agents for their corporate principals. General principles of agency apply to the relationship of officers (and other corporate agents) to their corporate principal. *Sons of Norway v. Boomer*, 10 Wash App 618, 519 P2d 28 (1974); *Deers, Inc. v. DeRuyter*, 9 Wash App 240, 511 P2d 1379 (1973); *Williams v. Queen Fisheries, Inc.*, 2 Wash App 691, 469 P2d 583 (1970); *Buxton v. Diversified Resources Corp.*, 634 F2d 1313 (10th Cir 1980) (interpreting Utah law); *Rae v. Heilig Theatre Co.*, 94 Or 408, 185 P 909 (1919). *But see: Jacksonville American Pub. Co. v. Jacksonville Paper Co.*, 143 Fla 835, 197 So 672 (1940) ("A corporation cannot be compared in all matters to a principal acting through his agent or partner acting through his co-partner, because a corporation is a fictional being, a creation of law, with neither will, purpose nor animation.")

Under general principles of agency, an officer or other agent: (i) may be granted specific authority to undertake a specific task; or (ii) may be granted authority which may be inferred by the nature of the specific authority granted, by business customs, or by past practices of the corporation.

Even if an officer's act is not authorized, the corporation may ratify that act and become bound by it.

Even when an officer has no actual authority, the corporation may be bound by the officer's act if the officer had apparent authority.

If a third party asserts that an officer had authority to act for the corporation, generally the burden of proof is on the person asserting authority. *Waukon Auto Supply v. Farmers & Merchants Savings Bank*,

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440 NW2d 844, 847 (Iowa 1989); *B & D Investment v. Petticord*, 48 Or App 345, 617 P2d 276, *review denied*, 290 Or 302 (1980).

But there are exceptions. For instance, RCW 62A.3-402 creates the presumption that an agent's signature on a negotiable instrument is authorized if the name of the corporation is followed by the name and office of person signing. *Major Products Co., Inc. v. Northwest Harvest Products, Inc.*, 96 Wash App 405, 979 P2d 905 (1999); *Bowers v. Winitzki*, 83 Or App 169, 730 P2d 1253 (1986). Likewise, if an officer uses the corporate seal in executing a document, this use creates a rebuttable presumption that the officer had authority to sign on behalf of the corporation. *Hamilton v. Hamilton Mammoth Mines*, 110 Or 546, 223 P 926 (1924).

### Section 6.06 Express Authority

A corporation can act only through its officers, employees and other agents. When a corporate agent acts within the scope of his/her authority, the agent's act is the act of the corporation itself. "A corporation can act only through its agents, and when its agents act within the scope of their authority, their actions are the actions of the corporation itself." *Mauch v. Kissling*, 56 Wash App 312, 316, 783 P2d 601, 604 (1989).

Corporations act exclusively by agents. The officers, principal, and subordinate are but agents, created and granted all their powers by the board of directors. In respect to being commissioned to act for the principal, the agent of the corporation, of whatever station or rank, is governed by the same general rules and principles of the law as the agent of an individual. (citations omitted) *Cushman v. Cloverland Coal & Mining Co.*, 170 Ind 402, 84 NE 759, 760 (1908).

"Actual authority may be express or implied." *Deers, Inc. v. DeRuyter*, 9 Wash App 240, 242, 511 P2d 1379, 1380 (1973). "Express authority . . . is that authority which the principal confers upon the agent in express terms." *Wiggins v. Barrett & Associates, Inc.*, 295 Or 679, 686, 669 P2d 1132, 1138 (1983).

There are a number of ways that a corporation can expressly authorize an officer or other agent to undertake a particular task, or a broad range of tasks.

Authorization may be granted through a corporation's bylaws or through a resolution adopted by the corporation's board of directors. *State Bank of Wilbur v. Wilbur Mission Church*, 44 Wash 2d 80, 265 P2d 821 (1954); *Peek v. Skelley Lumber Co.*, 59 Or 374, 117 P 413 (1911). Authority also may be established by a course of dealing or usage in which the directors or shareholders have acquiesced. *Real Estate Loan*

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*Fund Oreg. Ltd. v. Hevner*, 76 Or App 349, 709 P2d 727 (1985); *Howland v. Iron Fireman Manufacturing Co.*, 188 Or 230, 213 P2d 177, 215 P2d 380 (1950). Authority can also be determined by what is "ordinary" in reference to the nature of the business and the manner in which other businesses conduct their affairs. *Management Technologies, Inc. v. Morris*, 961 F Supp 640, 647 (SDNY 1997).

While it is usually preferred to have the board's authorizations reflected formally in a corporate resolution "that method is not the exclusive one for establishing the existence either of authority or of inherent agency power" to make loans and pledge corporate assets therefor. Thus, for example, a director's or officer's authority to act for the corporation also can be established by a course of dealings or usage in which the directors or stockholders have acquiesced. Normally, the question of whether authority to act exists by reason of usage or course of business dealings is a question of fact to be resolved by the factfinder. We find no reason to depart from this principle in this case. (citations omitted) *Rossville Bank v. Southeast Federal Savings Bank*, 192 Ga App 384, 386, 385 SE2d 9, 11 (1989).

Both testimony of eye-witnesses and circumstantial evidence are admissible on the issue of whether or not the board of directors authorized an officer or other agent to act on behalf of the corporation. *United States v. Everett Monte Cristo Hotel, Inc.*, 524 F2d 127 (9th Cir 1975).

proof of the authority of an officer to act for the corporation "need not be made in the form of a resolution of the board of directors, duly entered upon the records of the corporation conferring the authority upon the president, but that the act of the directors may be shown by an oral vote, and may be otherwise proved by parol, and often equally well by circumstantial evidence."

In short, the excerpts from the by-laws and records of the directors' meeting confer upon the president the power to do an act of the kind in question. (citations omitted) *Markham v. Loveland*, 69 Or 451, 454, 138 P 483, 484 (1914).

The language in the bylaws and in a resolution must be read carefully. For instance, one court held that a board resolution which authorized the president and secretary to sign in the name of the corporation as surety to a certain bond in a specified sum did not authorize these officers to execute a bond providing for liquidated damages. *Roberts v. Washington Water-Power Co.*, 19 Wash 392, 53 P 664 (1898). Another court held that a resolution stating that the president may sign all "authorized" notes did not give him the power to sign a specific note never approved by the board of directors. *Phillips v. Colfax Company, Inc.*, 195 Or 285, 243 P2d 276, 245 P2d 898 (1952).

## Section 6.07 Implied, Inherent, & Apparent Authority

"Actual authority may be express or implied." *Deers, Inc. v.*

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*DeRuyter*, 9 Wash App 240, 242, 511 P2d 1379, 1380 (1973). Thus even if a corporate agent lacks express authority, the agent may bind the corporation if the agent has implied or inherent authority.

**NOTE:** Implied authority and inherent authority are closely related concepts. Many courts use these two terms interchangeably.

If a corporation causes a third party to reasonable believe its agent has authority, the agent may bind the corporation even though the agents lacks authority. This principle is known as "apparent authority."

Implied/inherent authority arises out of a agent's actual authority; apparent authority arises out of the principal's words or deeds which cause a third party to believe the agent has authority, even though the agent lacks authority.

Apparent authority is to be distinguished from implied authority. Implied authority is such as the principal actually intends his agent to have, although that intention is to be discerned only from the nature of the task or from the acts and conduct of the principal from with the grant of power may be inferred even though not expressed. If implied authority exists there is no need to consider whether the principal has held out the agent as having certain authority. The principal will be bound to a third person by the act of the agent within his implied authority even if the third person was unaware at the time of the act that the agent's authority was only implied.

On the other hand, a principal may be held bound to a third person for an act of the agent completely outside the agent's implied (express) authority if the principal has clothed the agent with apparent authority to act for the principal in that particular. In other words, the principal permits the agent to appear to have the authority to bind the principal. *Wiggins v. Barrett & Associates, Inc.*, 295 Or 679, 687, 669 P2d 1132, 1139 (1983).

Language in a resolution can negate the implied authority of an agent. *Deers, Inc. v. DeRuyter*, 9 Wash App 240, 511 P2d 1379 (1973).

An agent is personally liable to a third party when the agent misrepresents that the agent has authority, when the agent does not. *Deers, Inc. v. DeRuyter*, 9 Wash App 240, 511 P2d 1379 (1973).

An agent representing authority which exceeds his actual authority is personally responsible and liable to the party to whom he makes such an unauthorized representation if the other party justifiably relies upon the representation. *GeIndale Realty, Inc. v. Johnson*, 6 Wash App 752, 755, 495 P2d 1375, 1377 (1972).

Whether or not an agent is acting within the scope of his/her authority is usually a question of fact, one for a jury to decide. *Mauch v. Kissling*, 56 Wash App 312, 783 P2d 601 (1989); *Murray v. Corson Corp.*, 55 Wash 2d 733, 350 P2d 468 (1960); *Koepping v. Tri-County Metropolitan Transportation District of Oregon*, 120 F3d 998, 1004 (9th Cir

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1997).

### A. *Implied/inherent authority.*

"Actual authority may be express or implied. . . . Implied authority is actual authority, circumstantially proven, which the principal is deemed to have actually intended the agent to possess." (citations and internal quotations omitted) *Deers, Inc. v. DeRuyter*, 9 Wash App 240, 242, 511 P2d 1379, 1380 (1973).

Likewise, "a power given to an agent to perform a particular service carries with it the authority to do whatever is usual and necessary to carry into effect the principal power." *Larson v. Bear*, 38 Wash 2d 485, 490, 230 P2d 610, 613 (1951). An agent's express authority carries with it the implied authority "to do such other things as are reasonably necessary for carrying out the given task." *Wiggins v. Barrett & Associates, Inc.*, 295 Or 679, 686, 669 P2d 1132, 1138 (1983).

It is elementary that express authority given an agent to do certain things carries with it the implied authority to do all other things reasonably incident to and necessary for carrying out the objectives of the agency. *Beeson v. Hegstad*, 199 Or 325, 330, 261 P2d 381, 383 (1953).

**NOTE:** The concepts of "implied" authority and "inherent" authority are closely linked. Courts often use the two terms interchangeably.

A corporation is liable for acts of its agents, even acts not expressly authorized, if the agent's authority can be implied from the authority expressly conferred.

The authority of an attorney to act as agent for a corporation may be express or implied. Express authority may be provided in the charter, the by-laws of the corporation, in a resolution of the board of directors not inconsistent with the by-laws, or other written authority such as a memorandum or letter. Implied authority depends on the actual relationship of the corporation and the agent, and not what others may believe about that relationship. Implied authority of an agent binds a corporation only if the agent is performing an act that is appropriate in the ordinary course of a corporation's business; it includes incidental authority necessary, usual, and proper to effectuate the main authority expressly conferred. Implied authority may also arise from a course of conduct showing that the corporation has repeatedly ratified acts of the same kind. (citations omitted) *Indiana Department of Public Welfare v. Chair Lance Service, Inc.*, 523 NE2d 1373, 1377 (Ind 1988).

A agent's authority is also implied where the corporation knows that an agent habitually transacts certain kinds of business for corporation.

Since corporations can only act through their officers and agents, they have power to appoint agents with full authority to act for the corporation, and as a general rule all acts within the powers of a corporation may be performed by agents of its own selection. Express authority by resolution directing officers and agents to represent the corporation in the execution of contracts is not indispensable to the exercise of that

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power. Their authority may be implied from their conduct and the acquiescence of the corporation. A person who knows that the agent of a corporation habitually transacts certain kinds of business for such corporation under circumstances which necessarily show knowledge on the part of those charged with the conduct of the corporate business has the right to assume that such agent is acting within the scope of his authority. (citations omitted) *Sherman, Clay & Co. v. Buffum & Pendleton*, 91 Or 352, 358, 179 P 241, 243 (1919).

See also: *Hessler, Inc. v. Farrell*, 226 A2d 708 (Del 1967).

### **B. Implied/inherent authority of general manager & other agents.**

Officers and other agents only have such authority as is expressly granted to them by the corporation, and such other authority as can be implied from the authority expressly granted.

Courts have frequently held that the person designated as the corporation's "general manager" has the implied authority to undertake a broad range of activities on behalf of the corporate principal.

As "general manager" without any limitations or restrictions as to his express authority, he had implied authority to do anything that the corporation could lawfully do in the general scope of its business. *Kitzmilller v. Pacific Coast & Norway Packing Co.*, 90 Wash 357, 362, 156 P 17, 19 (1916).

The modern trend has been for the courts to find that a corporation's chief executive officer - regardless of title - is cloaked with implied authority.

In general, the chief executive officer of a corporation - an individual functioning as the general manager of the business and often, but by no means always, holding the title "president" - is presumed authorized to make any contract and, by analogy, to take any other action which the board of directors could authorize or ratify, provided the contract or action is one in the ordinary course of the company's business. *Management Technologies, Inc. v. Morris*, 961 F Supp 640, 647 (SDNY 1997).

Recently, the Ninth Circuit held a general manager has the inherent authority to enter into employment contracts on behalf of the corporation.

Appointment of an employee to a management position is conduct that suggests that the agent has the authority to make management decisions, including the creation of employment contracts. In the absence of evidence to the contrary, a general manager has the power to enter into employment contracts. (citations omitted) *Koepping v. Tri-County Metropolitan Transportation District of Oregon*, 120 F3d 998, 1004 (9th Cir 1997)(interpreting Oregon law).

The terms "officer" and "general manager" are not synonymous. A person can be one and not be the other.

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The president, vice president, secretary or treasurer may in effect be the general manager of the whole business or a specific part of it without regard to whether he is expressly designated as manager or whether his managerial work is recognized as a separate office or employment. In such case, his powers are not measured by the powers of a president, vice president, secretary or treasurer, but by the powers of a general manager of all or a part of the business. It is not necessary, in order that one may have the powers of a general manager, that he be denominated as such or that such an office or position exists; but it is sufficient that the corporation permits him to conduct and manage the business without objection. So it is not necessary that any resolution should be passed appointing a general manager in order to bind the corporation by the act of an officer, who is in fact permitted or authorized to manage the business. (citations omitted) *Lane v. National Insurance Agency*, 148 Or 589, 598, 37 P2d 365, 368 (1934).

Courts have held that the inherent authority of a general manager is broader than that of a president.

The office of general manager is of broader import than that of president, and implies authority in one invested with it to do such acts as are necessary in the usual and ordinary course of the business carried on by the corporation. (citations omitted) *Wainwright v. P. H. & F. M. Roots Co.*, 176 Ind 682, 97 NE 8, 9-10 (1912).

Traditionally, courts have held that the president has little inherent authority.

aside from duties as presiding officer at meetings, a corporate president has no more authority, by virtue of that office, than any other director. Additional authority, if any, must be conferred by the charter, bylaws, director resolution, or implied from express powers granted, custom and usage, or the nature of the company's business. In particular, the president has no power to mortgage or pledge corporate property, or to borrow money and pledge corporate credit, unless expressly authorized, or unless such authority may be implied from a course of conduct or from powers expressly given. (citations omitted) *Pierce v. Astoria Fish Factors, Inc.*, 31 Wash App 214, 217-8, 640 P2d 40, 43 (1982).

Yet courts are increasingly willing to find that the president has some degree of inherent authority to act in connection with the corporation's day-to-day ordinary affairs.

The rule so often stated that the president has very little or no authority merely by virtue of his office, that he has no powers other than those delegated him by the board of directors or otherwise expressly conferred upon him, that he has no more authority than any other director, etc., as already set forth above, is gradually being supplanted by the more reasonable view that he has certain more or less limited power, merely by virtue of his office, or at least there is a presumption that such authority exists, in case of the ordinary routine business of the corporation. *Jacksonville American Pub. Co. v. Jacksonville Paper Co.*, 143 Fla 835, 197 So 672, 678 (1940).

Even where courts have been disinclined to infer that a corporation's president had inherent authority to act as general manager



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of the corporation's business, a course of conduct may lead a court to conclude that the officer has been delegated the authority of general manager as well. *Cooper v. G.E. Construction Co.*, 116 Ga App 690, 158 SE2d 305, 308 (1967); *Lane v. National Insurance Agency*, 148 Or 589, 37 P2d 365 (1934).

There are numerous cases which question whether the title conferred on an officer carries with it the inherent authority to undertake certain actions.

The secretary of a corporation, merely as such, is a ministerial officer, without authority to transact the business of the corporation upon his volition and judgment. Similarly, a treasurer has no authority to bind a corporation in dealings with third persons unless expressly or impliedly authorized to do so. (citations omitted) *Ideal Foods, Inc. v. Action Leasing Corp.*, 413 So2d 416, 417 (Fla 5th DCA 1982).

In another decision, the court stated:

As a usual thing the secretary of a corporation is a mere ministerial officer whose authority does not extend to the transaction of the ordinary affairs of the corporation upon his independent volition and judgment. But one who is secretary may also have far more extensive functions than those ordinarily incident to his office. He may be clothed with the authority of a general manager, and his open and public exercise of the functions of such position is notice that he has such authority. (citations & internal quotation marks omitted) *Van Denburgh v. Tungsten Reef Mines Co.*, 20 Cal App 2d 463, 67 P2d 360, 361 (1937).

On the other hand, both the title bestowed and the customary authority of similarly-titled agents in the business community are important.

Fentron did not title Foster as its general manager, but instead titled him a "manager of manufacturing services". There is no evidence in the record that one titled "manager of manufacturing services" is customarily or generally understood in the business community to have the authority to sell, and we are unwilling to assume that the title is so understood. Therefore, the fact that Fentron employed and titled Foster as it did is not, by itself, sufficient to support a finding of apparent authority. *Smith v. Hansen, Hansen & Johnson*, 63 Wash App 355, 367, 818 P2d 1127, 1134 (1991), *review denied*, 118 Wash 2d 1023, 827 P2d 1392 (1992).

Generally, whether or not an employee was acting within the scope of his/her authority will be a question of fact for the jury to decide. *Mauch v. Kissling*, 56 Wash App 312, 783 P2d 601 (1989); *Murray v. Corson Corp.*, 55 Wash 2d 733, 350 P2d 468 (1960); *Koepping v. Tri-County Metropolitan Transportation District of Oregon*, 120 F3d 998, 1004 (9th Cir 1997).

### **C. Apparent authority.**

An agent has "apparent authority" to bind a corporate principal

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when the corporate principal does something by word or deed to cause a third party to reasonably believe that the agent has authority to act, even though the agent lacks such authority.

In cases when it appears that a corporation has vested an officer or officers with apparent authority to transact certain business affairs, the corporation will be estopped to deny the authority of its chosen representatives and to repudiate their acts.

In *Ballantine, Private Corporations* (1927) 347, § 110, the rule is stated as follows:

A corporation is subject to the same extent as a natural person to the general principle that one who holds out another, or allows him to appear as having authority to act, as his agent with respect to his business generally, or with respect to a particular matter, is estopped, as against persons dealing with him in good faith, to deny that his apparent authority is real. If a corporation, therefore, or its directors, either intentionally or negligently, clothe a particular officer or agent with an apparent authority to act for it in a particular business or transaction, and persons deal with him in good faith, it will be bound to the same extent precisely as if such apparent authority were real. In such a case, the corporation cannot set up secret instructions or rules limiting the apparent authority of its agent.

*Superior Portland Cement, Inc. v. Pacific Coast Cement Co.*, 33 Wash 2d 169, 213, 205 P2d 597, 620-1 (1949).

Another court has said:

Apparent authority is a rule of agency law by which a principal may become liable for the acts of an agent even if those acts are outside the scope of the agent's actual authority. The principal will be liable if, by words or conduct, it has led third parties reasonably to believe that the agent has authority or if the principal consents to the and if the third party actually believes that the agent is authorized to act as the agent acts. *Filter v. City of Vernonia*, 64 Or App 559, 563, 669 P2d 350, 352 (1983).

An officer or agent may be deemed to have apparent authority even where such authority is neither expressly given or implied.

The rule is that the principal is bound by the act of his agent when he has placed the agent in such position that persons of ordinary prudence, reasonably conversant with business usages and customs, are thereby led to believe and assume that the agent is possessed of certain authority, and to deal with him in reliance upon such assumption.

The rule stated is particularly applicable to corporations which, of necessity, act only through officers and agents and by which the great bulk of the transactions of the commercial world is carried on. (citations omitted) *Mohr v. Sun Life Assur. Co. of Canada*, 198 Wash 602, 89 P2d 504, 505 (1939).

Apparent authority is closely related to, but not quite the same as, the doctrine of estoppel. *Debentures Incorporated v. Zech*, 192 Wash 339, 73 P2d 1314 (1937).

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Apparent authority is grounded in estoppel. Its three primary elements are: (1) representation by the principal, (2) reliance upon that representation by a third person, and (3) a change of position by the third person in reliance upon such representation. (citations omitted) *Ideal Foods, Inc. v. Action Leasing Corp.*, 413 So2d 416, 418 (Fla 5th DCA 1982).

Although there are some differences between apparent authority and estoppel, for most applications, "[t]here is really no practical difference between application of one doctrine or another to hold a principal liable for the promise of the agent." *Wiggins v. Barrett & Associates, Inc.*, 295 Or 679, 689, 669 P2d 1132, 1140 (1983). See also: *Hill's, Inc. v. William B. Kessler, Inc.*, 41 Wash 2d 42, 246 P2d 1099 (1952); *Superior Portland Cement, Inc. v. Pacific Coast Cement Co.*, 33 Wash 2d 169, 205 P2d 597 (1949); *Debentures Incorporated v. Zech*, 192 Wash 339, 73 P2d 1314 (1937). One difference between the two theories may be that if an agent has apparent authority to sign a contract on behalf of the principal, both the principal and the third party may sue to enforce the contract; under the doctrine of estoppel, only the third party may enforce the contract. *Wiggins v. Barrett & Associates, Inc.*, 295 Or 679, 689, n 3, 669 P2d 1132, 1140 (1983).

Apparent authority is premised on the conduct or acquiescence of the corporate principal in misleading an innocent third party. The principal must act, or fail to act, in such a way as to cause the third party to believe the principal has authorized the agent to act. The agent's own unauthorized, extrajudicial declarations concerning the extent of his/her authority are insufficient to prove agency, although an agent's testimony at trial on this topic is competent.

Corporate liability based on the apparent authority of its agents is premised upon the principal's knowledge or acquiescence in the conduct of its agents which has led third parties to rely upon their actions. It is a well-established rule that the apparent or ostensible authority of an agent can be inferred only from acts and conduct of the principal. The authority of an agent is not "apparent" merely because it looks so to the person with whom he deals. (citations omitted) *Kiniski v. Archway Motel, Inc.*, 21 Wash App 555, 563, 586 P2d 503, 508 (1978).

"Manifestations to the third party can be made by the principal in person or through anyone else, including the agent, who has the principal's actual authority to make them - e.g., an advertisement in the newspaper, provided it is placed by the principal or an agent with actual authority." *Smith v. Hansen, Hansen & Johnson*, 63 Wash App 355, 364, 818 P2d 1127, 1133 (1991), *review denied*, 118 Wash 2d 1023, 827 P2d 1392 (1992).

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In order for a corporate principal to be liable, the principal must communicate, directly or indirectly, with the third party in a manner sufficient to instill a reasonable belief of the agent's authority, based upon objective manifestations of the principal. *Smith v. Hansen, Hansen & Johnson*, 63 Wash App 355, 818 P2d 1127 (1991), *review denied*, 118 Wash 2d 1023, 827 P2d 1392 (1992); *Pepkowski v. Life of Indiana Insurance Co.*, 535 NE2d 1164 (Ind 1989). Such a belief is not "reasonable" if the third party had such "knowledge of facts as would reasonably require him to inquire as to the authority" of the agent. *Deers, Inc. v. DeRuyter*, 9 Wash App 240, 245, 511 P2d 1379, 1382 (1973); *Bank of Oregon v. Hiway Products, Inc.*, 41 Or App 223, 598 P2d 318 (1979).

Apparent or ostensible authority can be inferred only from the acts and conduct of the asserted principal. Facts and circumstances are sufficient to establish apparent authority only when a person exercising ordinary prudence, acting in good faith and conversant with business practices and customs, would be misled thereby, and such person has given due regard to such other circumstances as would cause a person of ordinary prudence to make further inquiry. *J & J Food Centers, Inc. v. Selig*, 76 Wash 2d 304, 309, 456 P2d 691, 694 (1969).

In order to prevail on a theory of apparent authority, the third party must have a good faith belief that the agent had authority to bind the principal. *Koepping v. Tri-County Metropolitan Transportation District of Oregon*, 120 F3d 998, 1004 (9th Cir 1997); *Edart Truck Rental Corp. v. B. Swirsky & Company, Inc.*, 23 Conn App 137, 579 A2d 133 (1990); *Gables Racing Assoc., Inc. v. Persky*, 148 Fla 627, 6 So2d 257 (1942).

The subjective belief of the third party is not enough; an objective test of apparent authority is required. *Bill McCurley Chevrolet, Inc. v. Rutz*, 61 Wash App 53, 808 P2d 1167, *review denied*, 117 Wash 2d 1015, 816 P2d 1223 (1991); *Fair Price Moving Co., Inc. v. Sixto Pacleb*, 42 Wash App 813, 714 P2d 321 (1986).

Either oral communications or physical acts by the principal may be form the basis for the third party to believe the agent has apparent authority.

Unlike express and implied authority, apparent authority is created by the outward appearance a corporation has given the agent authority to act. To determine whether an agent acted with apparent authority, we ask whether the third person reasonably believed, because of some manifestation from the agent's principal, the agent possessed the authority to act. For the third person to reasonably believe the agent possessed the authority, the principal need not communicate with the third person directly. Placing the agent in a position to perform acts or to make representations is sufficient to clothe the agent with apparent

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authority. (citations omitted) *Blair Laboratories, Inc. v. Clobes*, 599 NE2d 233, 236 (Ind App 1992).

The agent's testimony in court is admissible to prove the extent of the agent's authority. *Hartford v. Faw*, 166 Wash 335, 7 P2d 4 (1932).

While it is true that agency cannot be proved by the testimony of third parties as to the declarations of the agent made to them, the situation here is not that. Here the agent is testifying directly as to his authority, and we have heretofore held that such testimony is as admissible coming from the agent on the stand, as the contrary evidence would be from the principal as a witness. (citations omitted) *Beeler v. Pacific Fruit & Produce Co.*, 133 Wash 116, 118, 233 P 4, 4-5 (1925).

Evidence of business custom may be used to prove apparent authority. *Smith v. Hansen, Hansen & Johnson*, 63 Wash App 355, 818 P2d 1127 (1991), *review denied*, 118 Wash 2d 1023, 827 P2d 1392 (1992).

If a corporation appoints a person as its agent, a third party may assume, absent information to the contrary, that the agency is a general one, not subject to special restrictions. *Real Estate Loan Fund Oregon Ltd. v. Hevner*, 76 Or App 349, 709 P2d 727 (1985).

Apparent authority may give rise either to contract liability. *Schoonover v. Carpet World, Inc.*, 91 Wash 2d 173, 588 P2d 729 (1978); *Real Estate Loan Fund Oregon Ltd. v. Hevner*, 76 Or App 349, 709 P2d 727 (1985). It may also give rise to tort liability. *Mauch v. Kissling*, 56 Wash App 312, 783 P2d 601 (1989); *Thayer v. Oregon Federation of Square Dance Clubs*, 258 Or 302, 482 P2d 717 (1971); *but see: Torres v. Salty Sea Days, Inc.*, 36 Wash App 668, 676 P2d 512, *review denied*, 101 Wash 2d 1008 (1984).

Whether an agent had apparent authority is an issue usually left for determination by the trier of fact. *Smith v. Hansen, Hansen & Johnson*, 63 Wash App 355, 818 P2d 1127 (1991), *review denied*, 118 Wash 2d 1023, 827 P2d 1392 (1992); *Mauch v. Kissling*, 56 Wash App 312, 783 P2d 601 (1989); *Debentures Incorporated v. Zech*, 192 Wash 339, 73 P2d 1314 (1937); *Koepping v. Tri-County Metropolitan Transportation District of Oregon*, 120 F3d 998, 1004 (9th Cir 1997). But "when the facts are not disputed and susceptible of only one interpretation, the relationship becomes a question of law." *Bill McCurley Chevrolet, Inc. v. Rutz*, 61 Wash App 53, 57, 808 P2d 1167, 1170, *review denied*, 117 Wash 2d 1015, 816 P2d 1223 (1991).

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Even when it does not authorize an officer's act before performance, a corporation may later ratify the agent's act and become bound thereby. *Howe v. Washington Land Yacht Harbor, Inc.*, 77 Wash 2d 73, 459 P2d 798 (1969); *Betz v. Tacoma Drug Co.*, 15 Wash 2d 471, 131 P2d 183 (1942). General principles of agency apply. *Riss v. Angel*, 131 Wash 2d 612, 934 P2d 669 (1997); *Luria v. Bank of Coral Gables*, 106 Fla 175, 142 So 901, *rehearing denied*, 106 Fla 175, 143 So 598 (1932); *Seymour Improvements Co. v. Viking Sprinkler Co.*, 87 Ind App 179, 161 NE 389 (1928); RESTATEMENT OF AGENCY (SECOND) §§ 82-104.

[R]atification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him. To be charged by ratification with the unauthorized act of an agent, the principal must act with full knowledge of the facts, accept the benefits of the acts, or without inquiry assume an obligation imposed. *Riss v. Angel*, 131 Wash 2d 612, 636, 934 P2d 669, 683 (1997).

There are four elements to ratification.

Ratification requires (1) the existence of a principal; (2) an act done by a purported agent; (3) knowledge of the material facts by the principal; and (4) an intent by the principal to ratify the act. *Robertson v. Jessup*, 96 Or App 349, 352, 773 P2d 385, 387, *review denied*, 308 Or 331, 780 P2d 222 (1989).

Ratification may be either express or implied. *Id.* The doctrine of estoppel may also apply. *Spokane Concrete Products, Inc. v. U. S. Bank of Washington*, 126 Wash 2d 269, 892 P2d 98 (1995); *Kneeland v. Shroyer*, 214 Or 67, 328 P2d 753 (1958).

Ratification is usually a question of fact. *Smith v. Dalton*, 58 Wash App 876, 795 P2d 706 (1990).

#### **A. Express ratification.**

A corporation's board of directors may expressly ratify an unauthorized act after the fact. "[T]he law is clear regarding the fact that the actions of a corporate officer acting without authority may be ratified by the Board of Directors after the fact." *In re Valles Mechanical Industries, Inc.*, 20 BR 355, 356 (ND Ga 1982).

To expressly ratify an unauthorized act, the board of directors must have full knowledge of the facts relevant to the act ratified. *Riss v. Angel*, 131 Wash 2d 612, 636, 934 P2d 669, 683 (1997); *Poweroil Manufacturing Co. v. Carstensen*, 69 Wash 2d 673, 678, 419 P2d 793, 796 (1966);

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*American Timber & Trading Co. v. Niedermeyer*, 276 Or 1135, 558 P2d 1211 (1977). "Ratification means that one affirms that which he had a right to repudiate." *Poweroil Manufacturing Co. v. Carstensen*, 69 Wash 2d 673, 678, 419 P2d 793, 796 (1966).

Generally, a corporation is charged with the knowledge of its officers and other agents. *Equico Lessors, Inc. v. Tow*, 34 Wash App 333, 661 P2d 597 (1983); *Phillips v. Colfax Co., Inc.*, 195 Or 285, 243 P2d 276, rehearing denied, 195 Or 285, 245 P2d 898 (1952). But there are exceptions.

The law imputes to the principal, and charges him with, all notice or knowledge relating to the subject-matter of the agency with the agent acquires or obtains while acting as such agent and within the scope of his authority, or, according to the weight of authority, which he may previously have acquired, and which he then had in mind, or which he had acquired so recently as to reasonably warrant the assumption that he still retained it. Provided, however, that such notice or knowledge will not be imputed: (1) Where it is such as it is the agent's duty not to disclose; (2) Where the agent's relations to the subject-matter are so adverse as to practically destroy the relation of agency; and, (3) Where the person claiming the benefit of notice, or those whom he represents, colluded with the agent to cheat or defraud the principal. (citations omitted) *American Fidelity & Casualty Co. v. Backstrom*, 47 Wash 2d 77, 82, 287 P2d 124, 127 (1955).

Thus, a corporation may not be charged with the knowledge of an officer whose acts were unauthorized or outside the scope of the agency. *Roderick Timber Co. v. Willapa Harbor Cedar Products, Inc.*, 29 Wash App 311, 627 P2d 1352 (1981); *Bank of Oregon v. Hiway Products, Inc.*, 41 Or App 223, 598 P2d 318 (1979). Likewise, "[k]nowledge acquired by corporate officers while acting for themselves and not for the corporation cannot be imputed to the corporation." *C. & H. Contractors, Inc. v. McKee*, 177 So2d 851, 854 (Fla App 1965).

### **B. Implied ratification.**

A corporation may ratify an agent's act without doing so expressly. Ratification may be implied from the corporation's conduct. "By retaining and using the benefit obtained, the corporation ratifies the contract." *Spokane Concrete Products, Inc. v. U. S. Bank of Washington*, 126 Wash 2d 269, 278, 892 P2d 98, 103 (1995).

An implied ratification can arise if the corporate principal, with full knowledge of the material facts (1) receives, accepts, and retains benefits from the contract, (2) remains silent, acquiesces, and fails to repudiate or disaffirm the contract, or (3) otherwise exhibits conduct demonstrating an adoption and recognition of the contract as binding. The basic inquiry to determine whether an implied ratification has occurred is whether the facts demonstrate an intent to affirm, to approve, and to act in furtherance of the contract. (citations omitted) *Barnes v.*

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*Treece*, 15 Wash App 437, 443-4, 549 P2d 1152, 1157 (1976).

See also: *Smith v. Hansen, Hansen & Johnson*, 63 Wash App 355, 818 P2d 1127 (1991), *review denied*, 118 Wash 2d 1023, 827 P2d 1392 (1992).

In another decision, the court stated:

The rule in this state upon this subject is that, if a principal, when fully notified thereof, neglects promptly to disavow an act or contract of his agent in excess of his authority, such silence will usually be interpreted as an implied ratification, and particularly so if the failure speedily to repudiate such contract or agreement might impose upon the other party loss or injury. *Kneeland v. Shroyer*, 214 Or 67, 93, 328 P2d 753, 765 (1958).

Implied ratification may take many forms. It can occur where a corporation retains the benefits of an unauthorized act. *Pierce v. Astoria Fish Factors, Inc.*, 31 Wash App 214, 640 P2d 40 (1982); *National Bank of Commerce of Seattle v. Thomsen*, 80 Wash 2d 406, 495 P2d 332 (1972); *Bank of Oregon v. Hiway Products, Inc.*, 41 Or App 223, 598 P2d 318 (1979). It can occur where a corporation acquiesces in an unauthorized act. *Rudeen v. Lilly*, 196 F2d 300 (9th Cir 1952). It can also occur where some other conduct by a corporation demonstrates affirmance. *Stroud v. Beck*, 49 Wash App 279, 742 P2d 735 (1987)(principal assumed obligation and accepted tax benefits).

Like express ratification, implied ratification requires a corporation to have full knowledge of the facts surrounding the agent's unauthorized act.

For a principal to be charged with the unauthorized act of its agent by ratification, it must act with full knowledge of the facts or accept benefits of the act or intentionally assume the obligation imposed without inquiry. *Swiss Baco Skyline Logging, Inc. v. Haliewicz*, 18 Wash App 21, 32, 567 P2d 1141, 1148 (1977).

In another decision, the court stated:

Whenever a principal accepts the benefits of his agent's unauthorized acts *with knowledge of all the material facts*, he ratified the same. Silent acquiescence *with full knowledge of the material facts* may amount to a ratification if continued for an unreasonable length of time. *Alldrin v. Lucas*, 260 Or 373, 382, 490 P2d 141, 145 (1971)(quoting from *Cranston v. West Coast Life Ins. Co.*, 72 Or 116, 130, 142 P 762 (1914)).

For instance, if a corporate officer borrows money for the corporation without proper authority, and the corporation accepts the funds, it may not later disavow the unauthorized act while retaining the funds. *Pierce v. Astoria Fish Factors, Inc.*, 31 Wash App 214, 640 P2d 40 (1982).



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If a corporation ratifies part of a transaction, for instance by accepting the benefits, it is generally deemed to have ratified all of the transaction. *Tobias v. Towle*, 179 Wash 101, 35 P2d 1114, *adhered to*, 179 Wash 101, 41 P2d 1119 (1934); *Leschen & Sons Rope Co. v. Case Shingle & Lumber Co.*, 152 Wash 37, 276 P 892 (1929); *Phillips v. Colfax Company, Inc.*, 195 Or 285, 243 P2d 276, 245 P2d 898 (1952). *But see: Pacific Rolling Mill v. Dayton, Sheridan & Grande Ronde Railway Co.*, 5 F 852 (D Or 1881)(when directors ratified a contract without knowing of an attorney fee provision, contract was deemed ratified except for attorney fee provision).

Implied ratification and equitable estoppel are related, but distinguishable, principles. *Kneeland v. Shroyer*, 214 Or 67, 328 P2d 753 (1958).

Ratification, moreover, differs from estoppel, though they are often very closely associated. Estoppel requires that the party alleging it shall have done something or omitted to do something, in reliance upon the other party's conduct, by which he will now be prejudiced if the facts are shown to be different from those upon which he relied. Ratification requires no such change of condition or prejudice: if the principal ratifies, the other party may simply avail himself of it. As soon as ratification takes place, the act stands as an authorized one, and not merely as one whose effect the principal may be estopped to deny. If there be ratification, there is no occasion to resort to estoppel. There may, however, be cases in which one may be estopped to deny that he has ratified.

The difference in effect may be striking: ratification is retroactive, estoppel operates upon that done after the act and in reliance upon it; ratification makes the whole act good from the beginning, while estoppel may only extend to so much as can be shown to be affected by the estopping conduct. *Woodworth v. School District No. 2*, 92 Wash 456, 463, 159 P 757, 760 (1916)(quoting 1 Mechem, Agency (2d ed) § 349).

Like ratification, estoppel bars the corporation from asserting a defense if the corporation has accepted the benefits of the act in question.

So long as a contractual agreement is not contrary to public policy or the terms of a statute, a corporation that has received directly or indirectly the benefits of a contract, including a contract of guaranty, generally is estopped from asserting the defense of ultra vires. *Spokane Concrete Products, Inc. v. U. S. Bank of Washington*, 126 Wash 2d 269, 277, 892 P2d 98, 103 (1995).

Although the mere passage of time does not usually establish ratification, failure to repudiate the after full knowledge of the facts can infer an election to ratify. *Rayonier, Inc. v. Polson*, 400 F2d 909, 915 (9th Cir 1968). Even if much time has elapsed, however, the act is not deemed ratified if the board of directors quickly acts to disavow the unauthorized act once discovery has occurred. *Farmers' Market v. Austin*,

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118 Wash 103, 203 P 42 (1921); *Hansen v. Oregon Humane Society*, 142 Or 59, 17 P2d 560 (1933).

### **C. Ratification by acquiescence.**

"Ratification can be inferred from the principal's silence if the circumstances are such that, according to the ordinary experience and habits of men, one would naturally be expected to speak if he did not consent." (citation & internal quotation marks omitted) *Smith v. Hansen, Hansen & Johnson*, 63 Wash App 355, 369, 818 P2d 1127, 1135 (1991), *review denied*, 118 Wash 2d 1023, 827 P2d 1392 (1992). Such ratification is known as "ratification by acquiescence."

The rule is elementary that when an agent, in contracting for his principal, exceeds his authority, the principal, upon being fully informed of the facts, must, within a reasonable time, disavow or disaffirm the act of his agent, especially in cases where his silence might operate to the prejudice of innocent parties, or he will be held to have ratified and affirmed such unauthorized act, and such ratification will be equivalent to a precedent authority.

This rule is as applicable to corporations as individuals. (citations omitted) *Reid v. Alaska Packing Co.*, 47 Or 215, 220, 83 P 139, 141 (1905).

*See also: Farmers' Market v. Austin*, 118 Wash 103, 203 P 42 (1921); *Glaser v. Slate Construction Co.*, 196 Or 625, 251 P2d 441 (1952).

Although the mere passage of time does not usually establish ratification, failure to repudiate the after full knowledge of the facts can infer an election to ratify. *Rayonier, Inc. v. Polson*, 400 F2d 909, 915 (9th Cir 1968). Even if much time has elapsed, however, the act is not deemed ratified if the board of directors quickly acts to disavow the unauthorized act once discovery has occurred. *Farmers' Market v. Austin*, 118 Wash 103, 203 P 42 (1921).

### **D. Ratification by shareholders.**

In most cases, an agent's act is ratified by an act of the board of directors. But an unauthorized act may also be ratified by the shareholders. This most often occurs when the unauthorized act involves self-dealing by an officer who is also a director. Shareholder ratification can occur only after the shareholders gain full knowledge of the facts.

The most decisive answer to plaintiff's contention which seems to have been overlooked by all counsel is the rule to the effect that the stockholders of a corporation can always acquiesce or ratify any action of the Board of Trustees provided they have full knowledge concerning it. *Robinson v. Linfield College*, 42 F Supp 147, 156 (ED Wa 1941), *affirmed*, 136 F2d 805 (9th Cir), *cert denied*, 320 US 795 (1943).

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Usually, shareholders ratify an unauthorized act by adopting a resolution expressly ratifying the act. *Robinson v. Linfield College*, 42 F Supp 147, 156 (ED Wa 1941), *affirmed*, 136 F2d 805 (9th Cir), *cert denied*, 320 US 795 (1943). But shareholder ratification may also be implied by other shareholder actions or inactions. *The Egeria*, 294 F 791 (9th Cir 1924); *West Side Irr. Co. v. United States*, 246 F 212 (9th Cir 1917).

### **E. Relation back.**

As a general rule, ratification relates back to the original transaction. *Riss v. Angel*, 131 Wash 2d 612, 934 P2d 669 (1997); *Woodworth v. School District No. 2*, 92 Wash 456, 463, 159 P 757, 760 (1916); *High v. Davis*, 283 Or 315, 584 P2d 725 (1978).

Ratification is the affirmance by a person of a prior unauthorized act, whereby the act is given effect as if originally authorized by him. (citations omitted) *Rayonier, Inc. v. Polson*, 400 F2d 909, 915 (9th Cir 1968).

There are exceptions. Ratification will not relate back if the rights of an intervening party are affected. *General S.S. Corp. v. Astoria Overseas Corp.*, 294 F 861 (9th Cir 1924). Even if much time has elapsed, an act is not deemed ratified if the board of directors acts quickly to disavow the unauthorized act once discovery has occurred. *Farmers' Market v. Austin*, 118 Wash 103, 203 P 42 (1921).

## Section 6.09 Absence of Authority

### **A. Generally.**

Absent authority granted by a statute, the bylaws, or a board resolution, officers have little inherent power to control or manage the business or property of the corporation. *Ideal Foods, Inc. v. Action Leasing Corp.*, 413 So2d 416 (Fla 5th DCA 1982); *Harding v. Oregon-Idaho Co.*, 57 Or 34, 110 P 412 (1910).

In most states, the courts held that corporate officers had little inherent authority.

It is elementary law that the president and secretary of a corporation, as such, have no power to bind the corporation by the execution of promissory notes or other contracts, but such authority "must be derived from some bylaw of the corporation, or some special order, or must be implied by some acquiescence or ratification on the part of the corporation, whose powers, under our law, are exercised by the directors." (citations omitted) *Crawford v. Albany Ice Co.*, 36 Or 535, 537, 60 P 14, 15 (1900).

It is less clear whether this rule applied under early Washington law. Some early cases held that a note executed by an officer, without

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express authority, was not enforceable against the corporation. Yet such cases generally included some other factor affecting the outcome, such as, the officer and not the corporation received the proceeds, *Hoffman v. M. Gottstein Inv. Co.*, 101 Wash 428, 172 P 573 (1918), the corporation received no benefit, *A.F. Anderson Estate, Inc. v. Puget Sound Savings & Loan Ass'n.*, 171 Wash 378, 18 P2d 5 (1933), or the transaction lacked consideration. *Mansfield State Bank v. Leslie Hardware Co.*, 126 Wash 562, 219 P 15 (1923).

For the most part, early Washington cases tended to find that an officer had authority to execute contracts and notes on behalf of the corporation.

Many authorities hold that there is no presumption that the manager of a corporation has any authority to execute and deliver promissory notes on behalf of his corporation, and that the burden to show such authority is on the plaintiff. At an early date, however, this court took an advanced view of this question and held that, where the manager of a corporation had executed a contract on its behalf, the presumption is that he has power and authority so to do. *Parr v. Pacific Storage Warehouse, Inc.*, 124 Wash 26, 27, 213 P 677, 678 (1923).

In many of the Washington cases where the court found that an officer had authority to execute a note and/or mortgage without board resolution, the corporation received and accepted the funds. *Puget Sound Pulp & Timber Co. v. Clear Lake Cedar Corp.*, 15 Wash 2d 707, 132 P2d 363 (1942); *Tacoma Hotel v. Morrison & Co.*, 193 Wash 134, 74 P2d 1003 (1938)(officers used corporate seal and corporation received proceeds).

As also discussed in Section 6.07 above, most courts have held that a corporation's general manager possesses broad authority to act on behalf of the corporation.

When a corporation names some person as its manager, and as such allows him in a large measure to control all its business transactions, it must be held responsible for the acts of such manager in the name of the company until it has been affirmatively shown by it that as a matter of fact such acts were unauthorized. This is, perhaps, an extension of the general rule, but, in our opinion, such extension is necessary to prevent great hardships being cast upon those who deal with corporations. The very use of the word "manager" as applied to the officer conveys the idea to the ordinary mind that to one thus named has been committed the management of the affairs of the company. And to hold that one dealing with a person so held out must, before the company can be held liable for his acts, show affirmatively that it had authorized them, would often result in great hardship. *Carrigan v. The Port Crescent Imp. Co.*, 6 Wash 590, 591, 34 P 148, 148 (1893).

On the other hand, both the title bestowed and the customary

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authority of similarly-titled agents in the business community are important.

Fentron did not title Foster as its general manager, but instead titled him a "manager of manufacturing services". There is no evidence in the record that one titled "manager of manufacturing services" is customarily or generally understood in the business community to have the authority to sell, and we are unwilling to assume that the title is so understood. Therefore, the fact that Fentron employed and titled Foster as it did is not, by itself, sufficient to support a finding of apparent authority. *Smith v. Hansen, Hansen & Johnson*, 63 Wash App 355, 367, 818 P2d 1127, 1134 (1991), *review denied*, 118 Wash 2d 1023, 827 P2d 1392 (1992).

Generally, rules for determining the inherent, implied and apparent authority of an agent will govern.

### **B. Discretionary authority.**

In some older cases, courts held that a board of directors could only delegate ministerial, not discretionary, duties to corporate officers. *Patterson v. Portland Smelting Works*, 35 Or 96, 56 P 407 (1899). The more modern view is that the board of directors may delegate substantial discretion to officers and other agents, but may not delegate those duties which lay at the heart of their management of the corporation, such as their duty to use their own best judgment on management matters. *Morgan v. State Farm Mutual Automobile Insurance Co.*, 402 A2d 1211 (Del Supr 1979).

Under general principles of agency, agents may delegate ministerial duties to subagents but, absent authority, may not delegate discretionary authority. *Clark v. Shea*, 130 Or 195, 279 P 539 (1929). In modern times, courts have less rigorously applied this rule to corporate agents.

As a general rule an agent can delegate to someone else the ministerial tasks which his principal has assigned to him, but not those which require the exercise of judgment or discretion. The rule is less strictly applied when the principal is a corporation. But, nevertheless, a corporate officer normally "has no authority to delegate special powers conferred on him, and which involve the exercise of judgment or discretion, unless he is expressly authorized to do so, or unless the circumstances are such that the authority is necessarily implied." (citations omitted) *Evanston Bank v. Conticommodity Services, Inc.*, 623 F Supp 1014, 1031 (ND Ill 1985).

*See also: Miller v. United Pacific Casualty Insurance Co.*, 187 Wash 629, 60 P2d 714 (1936); *Russell & Co. v. Stevenson*, 34 Wash 166, 75 P 627 (1904); *Citizens' Nat. Bank of Fernandia v. Florida Tie & Lumber Co.*, 81 Fla 889, 89 So 139 (1921); FLECTHER CYC CORP § 503 (Perm Ed).

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### **Section 6.10 Standard of Care**

The same standard of care applies to officers with discretionary authority as applies to directors. Like RCW 23B.08.300 (which sets out the standard of care for directors), RCW 23B.08.420 requires an officer with discretionary authority to discharge his/her duties:

- (a) In good faith;
- (b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
- (c) In a manner the officer reasonably believes to be in the best interests of the corporation. RCW 23B.08.420.

In discharging their duties, officers, like directors, may reasonably rely on information prepared by other officers, employees, professionals, and experts. Unlike directors, officers may not reasonably rely on board committees. *Compare:* RCW 23B.08.300(2) and RCW 23B.08.420(2). *See:* Section 5.12 of this book.

### **Section 6.11 Officers as Fiduciaries**

Much of the case law related to an officer's duty to the corporation and its shareholders involves a person who is both an officer and a director. Partially as a consequence, courts have generally imposed the same duty of good faith, loyalty, and trust on both officers and directors. *Sherman v. Baker*, 2 Wash App 845, 472 P2d 589 (1970); *Kane v. Klos*, 50 Wash 2d 778, 314 P2d 672 (1957); *Wool Growers Service Corp. v. Ragan*, 18 Wash 2d 655, 140 P2d 512, 527, *rehearing denied*, 18 Wash 2d 655, 141 P2d 875 (1943); *Williams v. Pilgrim Turkey Packers, Inc.*, 264 Or 36, 503 P2d 710 (1972). *See also:* 3 FLETCHER CYC CORP §§ 989-1009 (Perm Ed 1994).

Yet even when a person is an officer only, and not a director, that person will generally owe a fiduciary duty to the corporation. *Sherman v. Baker*, 2 Wash App 845, 472 P2d 589 (1970); *Jamison v. Coldwell*, 25 Or 199, 35 P 245 (1894).

Generally, the same rules regarding conflicts of interest and usurpation of corporate opportunities apply to officers as applies to directors. *See, generally:* Sections 5.16 and 5.17 of this book. General principles of agency also apply to officers, including the fiduciary duties owed by an agent to the agent's principal.

### **Section 6.12 Compensation**

Today, officer compensation is set by the board of directors. In reviewing a decision by the board of directors to pay officers, courts will

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apply the business judgment rule and will not overturn the informed judgment of the board of directors unless it is grossly unjust to the corporation and its shareholders.

Where an officer is also a director, however, the usual rules regarding conflicts of interest apply. On a vote setting compensation for an officer/director, that officer/director should abstain. But even if the officer/director does not abstain, the test will be one of fairness to the corporation.

### **A. Early view.**

At the turn of the last century, courts looked with disfavor at officer compensation. While courts would generally enforce a contract for compensation, absent an express agreement, most courts held that an officer was not entitled to compensation merely for being an officer. *Denman v. Richardson*, 292 F 19, 22-3 (9th Cir 1923); *Home Mixture Guano Co. v. Tillman*, 125 Ga 172, 53 SE 1019 (1906).

It is a well settled rule that officers of a corporation are not entitled to recover, draw or retain compensation for their service unless authorized by the board of directors or the stockholders. *Flight Equipment & Engineering Corp. v. Shelton*, 103 So2d 615 (Fla 1958).

Gradually, courts began to draw a distinction between an officer's services as an "officer" and that person's services which went beyond those of an officer. Since most courts had held the inherent duties of the president to be quite narrow, *Luse v. Isthmus Transit Railway Co.*, 6 Or 125 (1876), courts had a basis from which they could hold that a person, who just happens to be an officer, had the right to compensation on a quantum meruit theory for services which were outside his/her duties as an officer. *Baines v. Coos Bay Navigation Co.*, 41 Or 135, 68 P 397 (1902).

[T]his court has recognized and applied the rule that an officer of a corporation cannot recover compensation for the performance of the duties incident to his office, unless authorized by the board of directors or by the by-laws of the company, yet, if the services performed lie outside or apart from those imposed upon him by virtue of his office and rendered at the request or with the acquiescence of the corporation, recovery could be had upon a

quantum meruit. (citations omitted) *Barrenstecher v. The Hof Brau*, 67 Or 194, 197, 135 P 518, 518 (1913).

But even under this view, without an express authorization of the compensation, an officer could still only recover for duties outside his/her official duties as an officer. *Kenner v. Whitelock*, 152 Ind 635, 53 NE 232 (1899).

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By the overwhelming weight of authority, the doctrine that the directors and other managing officers of a corporation are not entitled to compensation, in the absence of express provision or agreement therefor, does not apply to unusual or extraordinary services, -- that is, services which do not properly pertain to their office, and are rendered by them outside of their regular duties. If such services are rendered by a director or other officer at the request of the corporation or the board of directors, with the understanding that they are to be paid for, the law will imply a promise, in the absence of any special agreement, to pay what they are reasonably worth. *Blom v. Blom Codfish Co.*, 71 Wash 41, 49, 127 P 596, 599 (1912).

In another decision, the court stated:

Two general principles emerge from authoritative decisions upon the subject, to wit: (1) That an officer of a corporation cannot recover for services rendered in the course and scope of his official duties unless there has been an express contract authorizing compensation prior to the rendition of the services. (2) That an officer of a corporation may recover under certain circumstances the reasonable value of necessary services rendered entirely outside of the line and scope of his duties as such officer. *North Carolina Agricultural Credit Corp. v. Boushall*, 193 NC 605, 137 SE 721, 723 (1927).

Express authorization of an officer's compensation usually took the form of board resolution, or a provision in the bylaws, or both. *Wonderful Group Mining Co. v. Rand*, 111 Wash 557, 191 P 631 (1920).

Historically, a board resolution which granted retroactive compensation for past services was generally held to be void. *Hurt v. Cotton States Fertilizer Co.*, 159 F2d 52, 58 (5th Cir), *cert denied*, 331 US 828 (1947); *Wood v. Lost Lake Manufacturing Co.*, 23 Or 20, 23 P 848 (1890); *Doe v. Northwest Coal & Transportation Co.*, 78 F 62 (D Or 1896). "The salaries fixed are not too large, but the resolutions fixing them can, as a matter of course, have operation only in the future." *Crichton v. Webb Press Co.*, 113 La 167, 36 So 926, 932 (1904). See also: *Retroactive Compensation to Director - Officers*, 25 IND L J 212 (1950).

### **B. Modern view.**

By the 1930's, courts had generally accepted the concept of officer compensation. For example, in *Rugger v. Mt. Hood Electric Co.*, 143 Or 193, 20 P2d 412, 21 P2d 1100 (1933), the court set aside a board resolution granting the officers compensation for past services not, as in older cases, because such compensation was prohibited but, rather, as a result of a technical defect in the board of director vote. The court held, however, that officers still had a valid claim for compensation for the reasonable value of their services.

In *American Timber & Trading Co. v. Niedermeyer*, 276 Or 1135, 558 P2d 1211 (1977), a corporation's bylaws provided that officers'



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salaries were to be set by the board of directors. Instead, the president set his own salary without board action. Nevertheless, the court prevented the corporation from recovering the president's salary, finding that the salary was reasonable and that the board of directors had acquiesced with full knowledge that the payments were being made.

In modern times, even retroactive votes to compensate officers have been upheld. *Western Properties, Inc. v. Barksdale*, 65 Wash 2d 612, 399 P2d 16 (1965); *Zupick v. Goizueta*, 698 A2d 384 (Del Ch 1997). For instance, in *Blish v. Thompson Automatic Arms Corp.*, 64 A2d 581 (Del 1948), the Delaware Supreme Court held that the directors may retroactively increase an officer's salary if the amount awarded is not unreasonable in light of the services rendered.

Today, courts generally will apply the business judgment rule to officer compensation and decline to substitute their judgment for the judgment of the corporation's board of directors. *Lowry v. Lowry*, 590 NE2d 612 (Ind App 1992); *Royal Crown Companies, Inc. v. McMahon*, 183 Ga App 543, 359 SE2d 379 (1987)(approving a "golden parachute" for an executive officer).

Yet, sometimes a court will intervene when it concludes the compensation is excessive.

Although appellant was estopped from questioning the validity of the voting of salaries, no estoppel arose as to the excessive amounts voted and paid, the general rule being that directors may not vote excessive salaries to officers of the corporation; and courts of equity have the power to inquire into the reasonableness of the salaries voted to its officers by the directors of a corporation, considering the nature and extent of the services, and, if found to be excessive, they may grant adequate relief. *Von Herberg v. Von Herberg*, 6 Wash 2d 100, 117, 106 P2d 737, 744 (1940).

More recently, another court has said:

Because of this great deference, courts do not invalidate executive compensation systems under the business judgment rule unless they constitute corporate waste. Corporate waste exists when the payment is afforded without "adequate" consideration. Under the business judgment rule, adequacy of consideration is left to the sound discretion of the directors, and courts do not invalidate compensation plans so long as the compensation the executive receives bears a reasonable relationship to the services rendered. A compensation plan passes this "reasonable relationship" test if the payment insures that the benefit provided by the services rendered will inure to the corporation.

Necessarily, the reasonable relationship analysis requires a court to conduct three inquiries. First, the court must determine whether the corporation benefited from the services rendered. If the corporation received no benefits in exchange, the payments insured nothing, and the compensation system is corporate waste. Second, a court should

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examine whether the compensation was so unreasonably disproportionate to the benefits created by the exchange that a reasonable person would think the corporation did not receive a *quid pro quo*. If no *quid pro quo* resulted, no true benefit could inure to the corporation, for the payments would constitute corporate gifts, and, therefore, would offset any benefit received in exchange. Finally, a court must conclude that the services rendered triggered the payments. If some other event triggers payment, the payment cannot reasonably assure anything. (footnotes & citations omitted) *International Insurance Co. v. Johns*, 874 F2d 1447, 1461-2 (11th Cir 1989).

It is safe to say that the law now recognizes that officers normally have a right to compensation for their services to the corporation. But such compensation should still be approved by the corporation's board of directors. *Nordin v. Kaldenbaugh*, 7 Ariz App 9, 435 P2d 740 (1968). Particularly when setting the salary of an officer who is also a director, the director's fiduciary duties apply and the board of directors must act in good faith. *Id.*; *Corbin v. Corbin*, 429 F Supp 276, 281 (MD Ga 1977).

The board of directors may delegate to certain officers the authority to set the compensation of inferior officers or agents. *Cox v. First Nat. Bank of Brea*, 10 Cal App 2d 302, 52 P2d 524 (1935).

**NOTE:** With the possible exception of persons who hold corporate office without performing any significant services, an officer can expect to have his/her claims for reasonable compensation upheld by the court. Caution may dictate including language in a board resolution granting compensation for past services (e.g., a bonus) that the compensation is aimed at encouraging future performance by that employee, or other similarly situated employees. Yet, courts will almost certainly uphold such board action even absent such language.

Grossly excessive compensation may still be subject to challenge. But in challenging compensation as excessive, the challenging shareholder will have the burden of proving that the compensation is "unjust, oppressive, or fraudulent," *Krukemeier v. Krukemeier Mach. & Tool*, 551 NE2d 885, 888 (Ind App 1990), that it is "unreasonable or unfair." *Cole Real Estate Corp. v. Peoples Bank and Trust Co.*, 160 Ind App 88, 310 NE2d 275, 279 (1974), or that it is clearly excessive and wasteful as against the minority." *Coleman v. Plantation Golf Club, Inc.*, 212 So 2d 806, 808 (Fla App 1968).

### **C. Compensation if officer breaches fiduciary duty.**

An officer may not be entitled to reasonable compensation if the officer has breached his/her fiduciary duty to the corporation. In such

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cases, courts have the power to require the return of the compensation paid during the period of the breach.

The remedy of restoration of compensation is an equitable principle and its applicability is dependent upon the individual facts of each case. The general rule, however, is that a corporate officer who engages in activities which constitute either a breach of his duty of loyalty or a wilful [sic] breach of his contract of employment is not entitled to any compensation for services rendered during that period of time even though part of those services may have been properly performed. (citations omitted) *American Timber & Trading Co. v. Niedermeyer*, 276 Or 1135, 1155, 558 P2d 1211, 1223 (1977).

The decision of whether or not to order such restitution ultimately rests within the discretion of the trial court. *Williams v. Queen Fisheries, Inc.*, 2 Wash App 691, 469 P2d 583 (1970). One court has said that compensation should be denied "only when the breach [of trust] has been serious." *Strickland v. Arnold Thomas Seed*, 277 Or 165, 182, 560 P2d 597, 606 (1977).