CHAPTER NINE

OFFICER & DIRECTOR LIABILITY TO THIRD PARTIES

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Section 9.01 Liability, Generally

All too often, corporations are unable to pay their debts and their creditors seek a solvent party who they can hold liable for these debts. Likely candidates include the corporation's shareholders, directors, and officers.

For this reason, numerous theories have evolved for holding shareholders, directors and officers liable for corporate debts. In

analyzing these theories, a complicating factor is that often the same people serve in all three capacities. In imposing liability under these theories, some courts fail to clearly articulate whether the person liable was held liable in such person's capacity as a shareholder, as a director or as an officer.

A. Shareholders.

For the most part, liability is imposed on a shareholder only if a court decides the shareholder's conduct justifies disregarding the corporate form and imposing liability for corporate debts on the shareholder. The theory of corporate disregard is discussed in Chapter Ten of this book.

Generally, the theory of corporate disregard is applied to shareholders, not officers and directors as such, but there are a few exceptions discussed in Chapter Ten. *See, for example: Shades Ridge Holding Co., Inc. v. United States*, 888 F2d 725 (11th Cir 1989); *Glenn v. Wagner*, 313 NC 450, 329 SE2d 326 (1985). *But see: Castillo v. First City Bancorporation of Texas*, 43 F3d 953 (5th Cir 1994).

B. Officers.

In analyzing whether or not officers or other corporate agents are liable to a third party for acts undertaken during the scope of their duties, the principles of agency will generally apply.

Typically, an officer/agent is not liable to a third party for the breach of a contract signed by an authorized corporate agent; the corporate principal alone is liable. An officer's contract liability is discussed in Section 9.04 of this Chapter.

Typically, an officer/agent whose tortious conduct causes injury to a third party will be personally liable to the injured party. Typically, the corporation will be jointly and severally liable as well, as long as when the tort occurred, the agent was acting within the scope of the agency and the principal had sufficient control over the agent's activities. The tort liability of officers is discussed in Section 9.05 of this Chapter.

C. Directors.

Directors generally set policy; generally directors do not act as agents of the corporation in its dealings with third parties. Thus, principles of agency generally do not apply to directors and directors are generally not liable to third parties in either contract or tort (except when the director is also a party to the contract or when the director's own actions are tortious). A director's contract liability is discussed in Section 9.04 of this

Chapter and a director's tort liability is discussed in Section 9.05 of this Chapter.

Directors and officers of insolvent corporations may find themselves liable to third party creditors for decisions made near or after the time the corporation became insolvent. Director liability for improper distributions is discussed in Section 9.07 of this Chapter. Director and officer liability for preferences of themselves and other creditors are discussed in Section 9.08 of this Chapter.

Some state and federal statutes impose liability on directors and officers. Examples of such statutes are discussed in Section 9.10 of this Chapter.

Section 9.02 Acts Before Incorporation

Historically, a corporation could not begin doing business until after it had taken certain actions (*e.g.*, a certain amount of capital was paid in by subscribers; the articles of incorporation were filed; etc.). Officers and directors were once liable for corporate liabilities which arose before these actions were completed. *Roger v. Maib*, 6 Wash 2d 286, 107 P2d 335 (1940), *affirmed on rehearing*, 6 Wash 286, 111 P2d 593 (1941); *Florida Air Conditioners, Inc. v. Colonial Supply Co.*, 390 So2d 174 (Fla 5th DCA 1980), *appeal after remand*, 421 So2d 1106 (1982).

Today, a corporation may begin doing business once the articles of incorporation have been filed with the Secretary of State. Persons may be liable for their alleged "corporate" acts undertaken before incorporation if they act "knowing there was no corporation." RCW 23B.02.040; *Equipto Division Aurora Equipment Co. v. Yarmouth*, 134 Wash 2d 356, 950 P2d 451 (1997); *Jones v. Burlington Industries, Inc.*, 196 Ga App 834, 397 SE2d 174 (1990). Since a promoter usually has such knowledge, a promoter will usually be liable for their own pre-incorporation acts. *Harry Rich Corp v. Feinberg*, 518 So2d 377 (Fla 3d DCA 1987).

In order to be held personally liable to a third party for actions taken before incorporation, an officer/director must have "actual knowledge" the corporation had not yet been formed; constructive knowledge is not enough. *Equipto Division Aurora Equipment Co. v. Yarmouth*, 134 Wash 2d 356, 950 P2d 451 (1997); *Silvers v. R&F Capital Corp.*, 123 Or App 35, 858 P2d 895 (1993), *review denied*, 318 Or 351, 870 P2d 220 (1994); *Royal Development and Management Corp. v. Guardian 50/50 Fund V, Ltd.*, 583 So2d 403 (Fla 3d DCA 1991).

Section 9.03

Promoter liability for pre-incorporation acts is discussed in Section 2.06 of this book. A discussion of defective corporations and the *de facto* corporation defense, as well as the liability of officers and directors of defective corporations, appears in Sections 3.04 and 9.03 of this book.

Section 9.03 Defective Corporations

As discussed in Section 3.04 of this book, Washington no longer recognizes the *de facto* corporation defense in the case of a defective corporation. *Equipto Division Aurora Equipment Co. v. Yarmouth*, 134 Wash 2d 356, 950 P2d 451 (1997). Persons who purport to act for a corporation, knowing that no corporation exists, are jointly and severally liable. RCW 23B.02.040; *Equipto Division Aurora Equipment Co. v. Yarmouth*, 134 Wash 2d 356, 950 P2d 451 (1997).

A corporation may be administratively dissolved by the Secretary of State pursuant to RCW 23B.14.210 on a number of statutory grounds set forth in RCW 23B.14.200. Once a corporation is administratively dissolved, the corporation "continues its corporate existence but may not carry on any business except" winding up and liquidating its business and affairs. RCW 23B.14.210(3). *See:* Section 12.05 of this book.

If after administrative dissolution the corporation continues to conduct "ongoing" business, the persons conducting that business will be liable if they have "actual knowledge" of the dissolution. *Equipto Division Aurora Equipment Co. v. Yarmouth*, 134 Wash 2d 356, 950 P2d 451 (1997). If, however, a person conducting business in the name of corporation lacks actual knowledge, such a person will not be liable.

> All persons purporting to act as or on behalf of a corporation, knowing there was no incorporation under this title, are jointly and severally liable for liabilities created while so acting except for any liability to any person who also knew that there was no incorporation. RCW 23B.02.040.

Not only does a person become liable on a contract entered into after dissolution, such a person becomes a party to the contract and may enforce the contract in his/her individual capacity. *White v. Dvorak*, 78 Wash App 105, 896 P2d 85 (1995).

Under a similar statute, the directors of an involuntarily dissolved corporation have been held not to be personally liable on contracts entered into during the period in which the corporation was administratively dissolved.

> Although this provision suspends the right of delinquent corporations to transact business, it does not expressly invest corporate creditors with a right of action against individual officers. Absent clear evidence of legislative intent to create personal liability, such statutes have not been

> held to interrupt the existence of delinquent corporations so as to render its members liable as partners. Rather, they have been construed as affecting only the corporation's right to enforce contracts during the period of its delinquency. There is no indication that the legislature contemplated a harsher construction of ORS 57.779(3). In fact, that section specifically provides that claims against a delinquent corporation may be litigated by proceeding against the corporate directors as trustees of the corporation. A judgment thus obtained would be enforceable only against corporate assets, not against the directors personally, because the directors are sued only as trustees. Thus, it is clear that the legislature did not intend for delinquency to give rise to personal liability. (citations omitted) *Creditors Protection Association, Inc. v. Baksay*, 32 Or App 223, 226-7, 573 P2d 766, 768 (1978).

See also: Micciche v. Billings, 727 P2d 367 (Colo 1986); *Spector v. Hart*, 139 So2d 923 (Fla 2d DCA 1962); Section 12.05 herein.

Section 9.04 Contract Liability

A corporation is an artificial entity which can only act through its officers, employees, and other agents. *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). As such, a corporation itself is generally liable for the authorized acts of its agents. *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); *Allen v. Morgan Drive Away, Inc.*, 273 Or 614, 542 P2d 896 (1975); *State v. Gourley*, 209 Or 363, 305 P2d 396 (1956), *rehearing denied*, 209 Or 363, 306 P2d 1117 (1957). *See also:* Chapter Six of this book.

General principles of agency govern the relationship between a corporation and its officers, employees and other agents. *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); *Gilbert v. Sharkey*, 80 Or 323, 156 P 789, 157 P 146 (1916).

Generally, officers, employees and other agents are not liable on authorized contracts which they sign on behalf of the corporation, as long as they disclose their representative capacity. *State v. Hanson*, 59 Wash App 651, 800 P2d 1124 (1990); *Hopkins v. Anderson*, 7 Wash App 762,

502 P2d 473 (1972); *Pacific Power & Light Co. v. Norris*, 194 Wash 91, 77 P2d 379 (1938); *Wilson v. Mears*, 105 Wash 296, 117 P 815 (1918); *Weeks v. Kerr*, 486 NE2d 10 (Ind App 1985).

> An officer of a corporation who acts within the scope of his authority, discloses his representative capacity to the other party and makes a contract in the corporation's name is not liable for its breach. *Kahn v. Weldin*, 60 Or App 365, 377, 653 P2d 1268, 1275 (1983).

In another decision, the court stated:

> Arlasky and Chapman are not individually liable merely because of their status as officers of the corporate defendant. The individual liability of a corporate officer purporting to act for a corporation is no different than that of any other agent. When an agent contracts for goods or services on behalf of a disclosed principal he is not personally liable and a party suing both agent and principal assumes the burden of proving joint liability. (citations omitted) *Laff v. Chapman Performance Products, Inc.*, 63 Ill App 3d 297, 379 NE2d 773, 784 (1978).

See also: RESTATEMENT OF AGENCY (SECOND) §§ 320 & 328.

A. Directors not usually liable on corporate contracts.

Directors are usually corporate decision-makers, not corporate agents. But when directors serve as agents, their conduct is judged by the same principles of agency as are other corporate agents. Thus generally, directors are not liable to third parties for contracts which they sign on behalf of the corporation.

> a director is not personally liable for his corporation's breaches unless he assumed personal liability, acted in bad faith or committed a tort in connection with the performance of the contract. This is true even where the director, while acting in his official capacity, took actions that resulted in the breach. In so immunizing corporate directors from personal liability the law has proceeded on the theory that in so acting they are but the agents of the corporation and that the breach is that of the corporation, and hence it alone is answerable therefore. (citations & internal quotation marks deleted) *Reedeker v. Salisbury*, 952 P2d 577, 582 (Utah App 1998).

There are exceptions to the general rule:

> This principle of agency leads inevitably to the conclusion that directors are not liable on contracts made by them on the company's behalf, if their directorship is disclosed to the contractor. To be sure, if the contract is beyond the scope of their authority, or *ultra vires* of the corporation, or for some other reason not binding on the company, they may, like other agents, be liable on an implied warranty of authority. *Pelton v. Gold Hill Canal Co.*, 72 Or 353, 358, 142 P 769, 770 (1914).

Some cases have held directors and officers to be personally liable for corporate acts which are *ultra vires* acts. *Lurie v. Arizona Fertilizer & Chemical Co.*, 101 Ariz 482, 421 P2d 330 (1966); *Pelton v. Gold Hill Canal Co.*, 72 Or 353, 142 P 769 (1914). Other cases take a contrary

view. *Ketcham v. Mississippi Outdoor Displays, Inc.*, 33 So2d 300 (1948).

Corporate officers, employees, and other agents are not agents of the corporation's directors. *Hoff v. Peninsula Drainage District No. 2*, 172 Or 630, 143 P2d 471 (1943). Therefore, directors are not personally liable on contracts signed by officers and other corporate agents. *Pelton v. Gold Hill Canal Co.*, 72 Or 353, 142 P 769 (1914).

B. Agent for undisclosed principal is personally liable.

An agent for an undisclosed principal is personally liable on a contract signed by the agent. *Maxwell's Electric, Inc. v. Hegeman-Harris Company of Canada, Ltd.*, 18 Wash App 358, 567 P2d 1149 (1977); *White & Bollard, Inc. v. Goodenow*, 58 Wash 2d 180, 361 P2d 571 (1961); *Vinye v. American Automobile Co.*, 165 Wash 161, 4 P2d 851 (1931); RESTATEMENT OF AGENCY (SECOND) §§ 320 & 322. Officers and other agents are liable to third parties when they fail to disclose their representational capacity when entering into the contract. *Schwab v. Getty*, 145 Wash 66, 258 P 1035 (1947); *Hirsovescu v. Shangri-La Corp.*, 113 Or App 145, 831 P2d 73 (1992); *State ex rel Nilsen v. Lee*, 251 Or 284, 444 P2d 548 (1968).

> the rule to be applied is that an agent who acts for an undisclosed principal will be personally bound by the obligations of the contract *as principal* if the name of the principal is not disclosed. (emphasis in original) *Matsko v. Dally*, 49 Wash 2d 370, 374, 301 P2d 1074, 1077 (1956).

There are numerous cases in which there is an ambiguity over whether the officer disclosed both the identity of the principal and that the officer was entering into the contract on behalf of the principal.

Where the contract is in writing, the court is to look to the four corners of the contract to ascertain the intention of the parties. *Norton v. McIntosh*, 1 Wash App 334, 461 P2d 348 (1969)(court found that officers intended only to acknowledge that their signature was voluntary, not to become liable on the contract).

One Washington case indicates that the agent has a duty to reveal the true name of the agent's principal, not just the principal's assumed name. *Crown Controls, Inc. v. Smiley*, 47 Wash App 832, 737 P2d 709 (1987), *affirmed*, 110 Wash 2d 695, 756 P2d 717 (1988). But whether an agent has disclosed the identity of the agent's principal is usually a question of fact. *Crown Controls, Inc. v. Smiley*, 47 Wash App 832, 737 P2d 709 (1987), *affirmed*, 110 Wash 2d 695, 756 P2d 717 (1988); *Matsko v. Dally*, 49 Wash 2d 370, 301 P2d 1074 (1956).

One commentator has noted that courts tend to disfavor contract constructions which make an officer personally liable, unless that intent clearly appears present. 3A FLETCHER CYC CORP § 1130 (Perm Ed 1994).

C. Agent for partially-disclosed principal is personally liable.

An officer or other agent is liable if the principal's identity is only partially disclosed.

> In general, an officer of a corporation is not liable to its creditors for corporate debts. Principles of agency law apply when third parties attempt to hold officers or agents personally liable on corporate contracts. When an agent acts for a partially disclosed principal or on his own for an undisclosed principal, the agent is a party to the agreement and is liable on the contract. (citations omitted) *Paynesville Farmers Union Oil Co. v. Ever Ready Oil Co., Inc.*, 379 NW2d 186, 188 (Minn App 1985).

Many cases involve the form of the officer's or agent's signature. *See, for example: Brady v. Frigidaire Sales Corp.*, 180 Wash 472, 40 P2d 166 (1935); *Schwab v. Getty*, 145 Wash 66, 258 P2d 1035 (1927). These cases point out the advisability of adding a title to the officer's signature and of indicating the name of the corporation.

For instance, an officer was held not to be personally liable when he signed a contract as "Arthur S. Overbay, Jr., President, Typoservice Corporation." *Winkler v. V.G. Reed & Sons, Inc.*, 619 NE2d 597 (Ind App 1993). A president was held not to be personally liable under an employment contract between the corporation and the employee which the president signed on behalf of his corporation by signing "By: /s/ James L. Coxwell, Sr., `Employer.'" *Coxwell Tractor & Equipment Sales, Inc. v. Burgess*, 192 Ga App 663, 385 SE2d 753 (1989).

When an officer signs without specifically noting on the document that he/she is signing in an agency capacity for a disclosed principal, the officer runs the risk of being held personally liable on the contract since he/she will bear the burden of proof both that he/she signed in a representative capacity and that other party to the contract knew the agent was signing on behalf of the corporation. *Button Gwinnett Landfill, Inc. v. Sinnock*, 193 Ga App 244, 387 SE2d 439 (1989)(agent successful in meeting burden of proof because the check that he signed bore corporation's name, address, and telephone number and other evidence established that check was delivered as part of transaction between corporation and the plaintiff).

In *Sneed v. Santiam River Timber Co.*, 122 Or 652, 260 P 237 (1927), the corporate name was mentioned in the document and one of the two signing officers remembered to add his title. The court did not impose liability upon the more forgetful officer.

NOTE: These cases illustrate that when signing a contract, it is important that an officer include the name of the corporation in the contract and add the officer's title after his/her signature. The following form is recommended:

ABC, INC.

by:_____
John Doe, President

On the other hand, even if an officer fails to mention the principal's name and the officer's agency capacity, the officer will not be liable if the other party otherwise knows of such facts and knows that the officer intended to bind only the corporation. *Coxwell Tractor & Equipment Sales, Inc. v. Burgess*, 192 Ga App 663, 385 SE2d 753 (1989).

RCW 62A.3-402 governs when a corporate agent's signature appears on commercial paper.

D. Corporation also liable.

Even though a corporate agent is personally liable when his/her agency capacity is not disclosed, if the officer's act was authorized, the corporation is also liable. *Maxwell's Electric, Inc. v. Hegeman-Harris Company of Canada, Ltd.*, 18 Wash App 358, 567 P2d 1149 (1977); *Pennsylvania Casualty Co. v. Washington Portland Cement Co.*, 63 Wash 689, 116 P 284 (1911); *Hugener v. Greider's Wooden Shoe, Inc.*, 108 Ill App 2d 98, 246 NE2d 323 (1969). General agency law applies.

Under general agency law, an undisclosed principal is liable on contracts entered into by an agent acting within the scope of the agent's authority. RESTATEMENT OF AGENCY (SECOND) § 186.

Under the common law, a third party must elect between suing the agent or suing the undisclosed principal. *Empire Petroleum, Inc. v. D.F. & Associates, Inc.*, 538 F Supp 615, 620 (ED Mo 1982); *Maxwell's Electric, Inc. v. Hegeman-Harris Company of Canada, Ltd.*, 18 Wash App 358, 362, 567 P2d 1149, 1152 (1977); *Matsko v. Dally*, 49 Wash 2d 370, 301 P2d 1074 (1956); *Chapman v. Ross*, 152 Wash 262, 277 P 854 (1929); *McDonald v. New World Life Insurance Co.*, 76 Wash 488, 136 P 702 (1913). This rule no long applies in Washington.

> In conclusion, we hold that the liability of an agent and his previously undisclosed principal is no longer alternative, but is joint and several. Accordingly, a creditor may recover judgments against both the principal and the agent, may attempt to collect its judgment against either party, and, to the extent that the judgment remains unsatisfied, may subsequently pursue collection from the other party. *Crown Controls, Inc. v. Smiley*, 110 Wash 2d 695, 706, 756 P2d 717, 722 (1988).

In Washington today, the third party can sue and can obtain a judgment against both the agent and the principal.

***E. Agent liable for unauthorized acts*.**

A corporate agent is personally liable on a contract which the agent signs for the corporation, but which act exceeds the agent's actual authority. *Deers, Inc. v. DeRuyter*, 9 Wash App 240, 511 P2d 1379 (1973).

> An agent representing authority which exceeds has 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. *Gelndale Realty, Inc. v. Johnson*, 6 Wash App 752, 755, 495 P2d 1375, 1377 (1972).

"Some one must be bound by the contract, and, if he does not bind some other, he binds himself." *Rowley v. Hager*, 63 Or 246, 249, 127 P 36, 37 (1912).

> An unauthorized agent purporting to enter into a contract for a principal is personally liable to the other contracting party. *Vulcan Corp. v. Cobden Machine Works*, 336 Ill App 394, 84 NE2d 173, 176 (1949)(quoting 3 CJS, Agency, § 208).

Generally, a corporation is not liable when its purported agent's act is unauthorized. *Farmers' Market v. Austin*, 118 Wash 103, 203 P 42 (1921); *Florida Capital Corp. v. Robert J. Bissett Construction, Inc.*, 167 So2d 595 (Fla 2d DCA 1964). But the corporation will be liable if its agent had apparent authority or if the corporation later ratifies the contract. *See:* Sections 6.07 and 6.08 of this book.

***F. Agent liable for acts on behalf of disclosed, but nonexistent, principal*.**

An agent for a disclosed principal is personally liable if the principal does not exist. *Kelley v. RS & H of North Carolina, Inc.*, 197 Ga App 236, 398 SE2d 213 (1990); *C. & H. Contractors, Inc. v. McKee*, 177 So2d 851 (Fla 2d DCA 1965). An agent (*e.g.*, "promoter") of a corporation yet-to-be-formed is personally liable for contracts signed by the agent on behalf of the yet-to-be-formed corporate principal. *American Seamount Corp. v. Science and Engineering Associates, Inc.*, 61 Wash App 793, 812 P2d 505 (1991); *Goodman v. Darden, Doman & Stafford Associates*, 100

Wash 2d 476, 670 P2d 648 (1983); *Royal Development and Management Corp. v. Guardian 50/50 Fund V, Ltd.*, 583 So2d 403 (Fla 3d DCA 1991).

Likewise, a person is personally liable if the person signs a contract as president of a corporation which simply does not exist. *James G. Smith & Associates, Inc. v. Everett*, 1 Ohio App 3d 118, 439 NE2d 932 (1981); *Gilbert v. Sharkey*, 80 Or 323, 157 P 789, 157 P 146 (1916). *See:* Section 2.06 of this book.

But if a corporation is administratively dissolved, its officers will not be liable for contracts entered into during the period of dissolution if: (i) the corporation is reinstated within five years of the dissolution pursuant to RCW 23B.14.220; (ii) the contract is entered into to wind up the corporation's business and affairs pursuant to RCW 23B.14.210(3); or (iii) the officer did not have actual knowledge of the dissolution. *Equipto Division Aurora Equipment Co. v. Yarmouth*, 134 Wash 2d 356, 950 P2d 451 (1997); *Creditors Protective Association, Inc. v. Baksay*, 32 Or App 223, 573 P2d 766 (1978); *Spector v. Hart*, 139 So2d 923 (Fla 2d DCA 1962). *See:* Sections 9.03 and 12.05 of this book.

G. Agents liable if they personally guarantee contracts.

Officers and other agents are liable when they personally contract to guarantee or otherwise pay a corporate debt. *Columbia Bank, NA v. New Cascadia Corp.*, 37 Wash App 737, 682 P2d 966 (1984); *Washington Perfection Co. v. Davin*, 138 Wash 427, 244 P 697 (1926); *Schwab v. Getty*, 145 Wash 66, 258 P 1035 (1927); *Fred Shearer & Sons, Inc. v. Prendergast*, 152 Or App 657, 955 P2d 324 (1998); *Weeks v. Kerr*, 486 NE2d 10 (Ind App 1985). But such a guarantee must be supportable by consideration or by estoppel in order to be enforceable. *Umpqua Valley Bank v. Wilson*, 120 Or 396, 252 P 563 (1927).

> Of course, a corporate officer may make himself personally liable on a corporate contract or for a corporate debt by an express agreement, provided the agreement is supported by a valuable consideration. . . . Moreover, the officers and stockholders of a corporation who give their personal obligation for the payment of a debt of the corporation and thus secure time on the debt cannot maintain that their promise to pay the debt is without consideration. But in order to bind corporate officers by an agreement on their part to be answerable for the debts of the corporation, it is not necessary that a consideration should have moved to them personally; their agreement to be answerable for the advances made to it followed by the advances actually made to their principal is sufficient to fix liability. . .
>
> . . . Thus, an officer may make himself personally liable on a corporate contract by guaranteeing its performance, if such appears to have been the intention of the parties, but not otherwise, and provided no fraud or accident appears. *Inland-Ryerson Construction Products Co. v. Brazier*

> *Construction Co.*, 7 Wash App 558, 500 P2d 1015, 1020-1 (1972)(quoting Fletcher, Private Corporations § 1119).

If an officer guarantees a corporate debt, the officer is liable on that particular guarantee only, not on all corporate debts generally.

> Moreover, a corporate officer who does personally guarantee an obligation may be personally liable for the performance of *that* particular obligation, but such a personal guarantee does not render him personally liable on *any and all* corporate obligations. Any evidence that Hester personally guaranteed the installation of a central air conditioning system in appellees' home would *not* be evidence that he disregarded the corporate entity in such a manner as to authorize his personal liability for the Corporation's breach of contract or tort in any other regard. (emphasis in original). *Hester Enterprises, Inc. v. Narvais*, 198 Ga App 580, 581, 402 SE2d 333, 335 (1991).

The intention of the parties govern whether the agent has acted to bind the agent personally, as well as the corporation.

Section 9.05 Tort Liability

As a general rule, corporate directors, officers and agents are personally liable for their own tortious conduct, even if at the time of that conduct, such persons were acting for the corporation.

Merely by virtue of holding corporate office, officers and directors are not personally liable for the tortious conduct of the corporation or the tortious conduct of other corporate agents. *Messenger v. Frye*, 176 Wash 291, 295, 28 P2d 1023, 1025 (1934); *Munder v. Circle One Condominium, Inc.*, 596 So2d 144 (Fla 4th DCA 1992); *Lewis v. Devils Lake Rock Crushing Co.*, 274 Or 293, 545 P2d 1374 (1976).

> It is a generally accepted rule that an officer of a corporation who takes part in the commission of a tort by the corporation is personally liable therefor, but an officer of a corporation who takes no part in the commission of a tort committed by the corporation is not personally liable unless he specifically directed the particular act to be done or participated or co-operated therein. *Levi v. Schwartz*, 201 Md 575, 95 A2d 322, 327 (1953).

"A corporation is liable in the same way as a natural person for torts committed by its agents within the scope of their authority and course of employment." *Oregon Natural Resources Council, Inc.*, 659 F Supp 1441, 1449 (D Or 1987), *affirmed in part, vacated in part, reversed in part*, 834 F2d 842 (9th Cir 1987).

A. Agent liable for own tortious act.

When an officer or director personally commits a tortious act against a third party, even while acting within the scope of his/her duties, the officer or director is personally liable. *Johnson v. Harrigan - Peach Land Development Co.*, 79 Wash 2d 745, 489 P2d 923 (1971); *Beri, Inc.*

v. Salishan Properties Inc., 282 Or 569, 580 P2d 173 (1978).

> The liability of an officer of a corporation for his own tort committed within the scope of his official duties is the same as the liability for tort of any other agent or servant. That the agent acts for his principal neither adds to nor subtracts from his liability.
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> * * *
>
> Where the officer performs an act or a series of acts which would amount to conversion if he acted for himself alone, he is personally liable even though the acts were performed for the benefit of his principal and without profit to himself personally. (citations omitted) *Dodson v. Economy Equipment Co.*, 188 Wash 340, 343, 62 P2d 708, 709 (1936).

A person is liable for his/her own tortious conduct, regardless of whether such person is acting for himself/herself or is acting for another. *Harper v. Interstate Brewery Co.*, 168 Or 26, 120 P2d 757 (1942).

The liability of an officer or director for his/her own tortious act is a separate and district basis for liability. It is not premised on an alter ego or corporate disregard theory. *Grayson v. Nordic Construction Company, Inc.*, 92 Wash 2d 548, 599 P2d 1271 (1979); *In re Interstate Agency, Inc.*, 760 F2d 121, 125 (6th Cir 1985)(discussing Michigan law). The theory of corporate disregard is discussed in Chapter Ten of this book.

> There is a distinction between liability for individual participation in a wrongful act and an individual's responsibility for any liability-creating act performed behind the veil of a sham corporation. Where the court pierces the corporate veil, the owner is liable because the corporation is not a bona fide independent entity; therefore, its acts are truly his. Under the participation theory, the court imposes liability on the individual as an actor rather than as an owner. Such liability is not predicated on a finding that the corporation is a sham and a mere alter ego of the individual corporate officer. Instead, liability attaches where the record establishes the individual's participation in the tortious activity. (footnote omitted) *Wicks v. Milzoco Builders, Inc.*, 503 Pa 614, 470 A2d 86, 89-90 (1983).

A director/officer is personally liable where the director/officer personally commits a tortious act. Thus, a director/officer who causes an automobile accident while on company business is personally liable for any resulting damages, as may be the corporation.

B. Officers and directors not liable for tortious acts of others.

Individual employees are agents of the corporation, not agents of its officers and directors. Generally, neither an officer nor director is personally liable for the tortious acts of other corporate agents in which the director/officer did not participate. *Air Traffic Conference of America v. Marina Travel, Inc.*, 69 NC App 179, 316 SE2d 642 (1984); *Hoff v.*

Peninsula Drainage District No. 2, 172 Or 630, 143 P2d 471 (1943).

> [Directors] are not insurers of the fidelity of the agents whom they have appointed, who are not their agents but the agents of the corporation; and they cannot be held responsible for losses resulting from the wrongful acts or omissions of other directors or agents, unless the loss is a consequence of their own neglect of duty, either for failure to supervise the business with attention or in neglecting to use proper care in the appointment of agents. *Briggs v. Spaulding*, 141 US 132, 147 (1891).

An director/officer may be liable for the tortious act of another corporate agent when the director/officer participates in that tortious conduct or with knowledge approves the tortious conduct. *Grayson v. Nordic Construction Company, Inc.*, 92 Wash 2d 548, 599 P2d 1271 (1979); *State v. Ralph Williams' North West Chrysler Plymouth, Inc.*, 87 Wash 2d 298, 553 P2d 423 (1976); *Dodson v. Economy Equipment Co.*, 188 Wash 340, 62 P2d 708, 709 (1936); *Lewis v. Devils Lake Rock Crushing Co.*, 274 Or 293, 545 P2d 1374 (1976).

> The general, if not the universal, rule is that an officer of a corporation who takes part in the commission of a tort by the corporation is personally liable therefor; but that an officer of a corporation who takes no part in the commission of a tort committed by the corporation is not personally liable to third parties for such tort, nor for the acts of other officers, agents or employees of the corporation in committing it, unless he specifically directed the particular act to be done, or participated or cooperated therein. *Messenger v. Frye*, 176 Wash 291, 295, 28 P2d 1023, 1025 (1934).

Another decision has elaborated on the general rule, stating:

> Ordinarily, the only grounds upon which directors or other officers can be held liable for the acts of other officers are that (1) they participated therein, or (2) were negligent in supervising the corporate business, or (3) were negligent in the appointment of the wrongdoer. *Angelus Securities Corp. v. Ball*, 20 Cal App 2d 423, 67 P2d 152, 157-8 (1937).

A director can be held liable for the tort of a corporate agent by voting for the commission of the tort. *Jabczenski v. Southern Pacific Memorial Hospitals, Inc.*, 119 Ariz App 15, 579 P2d 53 (1978).

C. Specific torts.

In handling corporate business, officers and directors are liable if they violate the standards of care imposed upon them by RCW 23B.08.300 and 23B.08.420. *See:* Sections 5.12 (directors) and 5.10 (officers) of this book.

To establish liability for a director's breach of duty, either the corporation or the shareholder (whichever is bringing the suit) has the burden of showing (i) that the director breached his/her fiduciary duty, and (ii) that the breach was a proximate cause of the losses sustained. *Senn*

v. Northwest Underwriters, Inc., 74 Wash App 408, 875 P2d 637 (1994); *Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wash App 502, 728 P2d 597 (1986), *review denied*, 107 Wash 2d 1022 (1987).

An officer or director is liable to a third party if the officer/director makes fraudulent statements, regardless of whether such statements are made for personal reasons or to benefit the corporation. Likewise, an officer or director is liable for any fraudulent act in which he/she participates, sanctions, approves or adopts.

> Corporate officers are not personally and civilly immune from the fraud of the corporation even though not personally participating in or making the statements or misrepresentations upon which the claim of fraud is based if they sanction or approve or adopt the false statements or misrepresentations; or, as officers, if they know that false and fraudulent misrepresentations were being made for and on behalf of the corporation; of if they exercise such close control, direction and management of the corporation that the law as a matter of elemental justice ought to charge them with knowledge of such fraud. *Johnson v. Harrigan-Peach Land Development Company, Inc.*, 79 Wash 2d 745, 754, 489 P2d 923, 928 (1971).

See also: Franklin v. Gilbert Ice Cream Co., 191 Wash 269, 71 P2d 52 (1937); *Shingleton v. Armor Velvet Corp.*, 621 F2d 180, 183 (5th Cir 1980).

An officer who participates in wrongful conduct, or knowingly approves of wrongful conduct, may be liable for penalties in a civil action brought by the state. *State v. WWJ Corp.*, 88 Wash App 167, 941 P2d 717 (1997); *State v. Ralph Williams' North West Chrysler Plymouth, Inc.*, 87 Wash 2d 298, 553 P2d 423 (1976). An officer guilty of such conduct may also be held criminally liable. *State v. Thomas*, 123 Wash 299, 212 P 253 (1923); *Dodson v. Economy Equipment Co.*, 188 Wash 340, 62 P2d 708 (1936); *State v. Paggett*, 8 Wash 579, 36 P 487 (1894); *State v. Baker*, 48 Or App 999, 618 P2d 997 (1980).

> If a corporate officer participates in the wrongful conduct, or knowingly approves of the conduct, then the officer, as well as the corporation, is liable for penalties. This rule, known as the responsible corporate officer doctrine, was first enunciated by the Supreme Court in *States v. Dotterweich*, 320 US 277 (1943). The Court held it was appropriate to hold a corporate officer criminally liable where the officer stands in responsible relation to a public danger. Central to this holding was the recognition that the only way in which a corporation can act is through the individuals who act on its behalf. (citations, footnotes & internal quotation marks omitted) *Department of Ecology v. Lundgren*, 94 Wash App 236, 243, 971 P2d 948 (1999).

Traditionally, corporate officers and agents have not been held to be personally liable "for mere nonfeasance, as distinguished from

misfeasance." *Mitchell v. Ausplund*, 150 Or 572, 47 P2d 256, 259 (1935).

> A corporation can only act through its officers. Before a corporate officer acting as agent can be held liable individually to third parties it must appear that the acts were other than the ordinary acts of corporate agents acting for their principal or that they were in exclusive and complete control of the management and operation of the building. When acting as agents of the corporate owner they are liable for misfeasance only. "The rule of nonliability for the negligence of an agent or servant on account of nonfeasance is limited to breaches of duty owed by him to his principal, and has no application where there is a breach of duty owing by the agent himself to third persons." (citations omitted) *Michaels v. Lispendard Holding Corp.*, 11 App Div 2d 12, 201 NYS 2d 611, 614 (1960).

Thus, where a corporation has an agent take care of one of its apartment buildings, but itself retains possession and control of the property, the corporation, but not the agent, is liable when a tenant falls over an unrepaired torn carpet. *Jacobs v. Mutual Mortgage & Investment Co.*, 2 Ohio App 2d 1, 206 NE2d 30 (1965).

It should be noted, however, that the distinction between malfeasance and nonfeasance is not a clear one and some jurisdictions fail to recognize it. *Adams v. Fidelity and Casualty Company of New York*, 107 So2d 496 (La App 1958).

For a director to be liable for corporate fraud, the director must have actively participated in the fraud. Thus, to be held liable for fraud, a director "requires knowledge of the untruth"; the "fraud must be brought home to him individually." *McFarland v. Carlsbad Sanatorium Co.*, 68 Or 530, 137 P 209 (1914). *See also: Northern Codfish Co. v. Stiberg*, 96 Wash 126, 164 P 750 (1917).

A director does not have knowledge just because the corporation has knowledge; that is, the knowledge of the corporation is not imputed to its directors. *Washburn v. Inter-Mountain Mining Co.*, 56 Or 578, 109 P 382 (1910).

Under Washington law, "officers and directors have an affirmative duty to be aware of the companies they serve and that they can be held liable for activities of other officers and directors which they reasonably should know about." *Senn v. Northwest Underwriters, Inc.*, 74 Wash App 408, 414, 875 P2d 637, 640 (1994).

Under Washington law, officers have been held liable for trespass, *Lytle Logging & Mercantile Co. v. Humptulips Driving Co.*, 60 Wash 559, 111 P 774 (1910), and for making false representations about the financial condition of the corporation. *Pacific Fruit & Produce Co. v. Modern Food Stores, Inc.*, 158 Wash 212, 290 P 859 (1930).

D. Civil & criminal actions brought by the state.

An officer who participates in wrongful conduct, or knowingly approves of wrongful conduct, may be liable for penalties in a civil action brought by the state. *State v. WWJ Corp.*, 88 Wash App 167, 941 P2d 717 (1997); *State v. Ralph Williams' North West Chrysler Plymouth, Inc.*, 87 Wash 2d 298, 553 P2d 423 (1976). An officer guilty of such conduct may also be held criminally liable, even though the officer performed the act in a representative capacity on behalf of the corporation or directed another to perform the illegal act. *State v. O'Brien*, 96 Or App 498, 774 P2d 1109, *review denied*, 308 Or 466, 781 P2d 1214 (1989); *State v. Baker*, 48 Or App 999, 618 P2d 997 (1980).

Corporate officers may be held criminally responsible for an unlawful corporate act in which they were involved. *State v. Thomas*, 123 Wash 299, 212 P 253 (1923); *Dodson v. Economy Equipment Co.*, 188 Wash 340, 62 P2d 708 (1936); *State v. Paggett*, 8 Wash 579, 36 P 487 (1894).

> There is no language in the statute which exempts from its operation a person who shall obtain money or property with fraudulent intent by means of a check which he draws or makes in a representative capacity. If he draws the check as the representative or officer of a corporation, he is none less the maker or drawer within the contemplation of this statute, and the fraud which the statute is designed to prevent is personal to him. There is no doctrine of agency in the criminal law which will permit an officer of a corporation to shield himself from criminal responsibility for his own act on the ground that it was the act of the corporation and not his personal act. *State v. Cooley*, 141 Tenn 33, 206 SW 182, 184 (1918).

This would not be true, however, if the criminal offense is such that only the corporation falls within its terms. *State v. Lyon*, 175 Wash 199, 27 P2d 131 (1933)(failure to report and pay excise tax). The wording of the criminal statute is, of course, significant. If a criminal statute does not encompass officers, officers cannot be indicted under it. *O'Brien v. DeKalb County*, 256 Ga 757, 353 SE2d 31 (1987); *United States v. Harvey*, 54 F Supp 911 (D Or 1943).

Section 9.06 Interference with Contract & Civil Conspiracy

A. Interference with contract.

Washington recognizes the tort of wrongful interference with economic relationships. Such a cause of action arises either (i) when the defendant is motivated by a desire to harm the plaintiff, or (ii) when the defendant uses improper means that cause injury to the plaintiff's business or contractual relationships. *Pleas v. City of Seattle*, 112 Wash 2d 794, 774 P2d 1158 (1989). Such a claim is established:

> when interference resulting in injury to another is wrongful by some measure beyond the fact of the interference itself. Defendants' liability may arise from improper motives or from the use of improper means . . . . No question of privilege arises unless the interference would be wrongful but for the privilege . . . . Even a recognized privilege [however] may be overcome when the means used by defendant are not justified by the reason for recognizing the privilege . . . . Interference can be "wrongful" by reason of a statute or other regulation, or a recognized rule of common law, or an established standard of trade or profession. Therefore, plaintiff must show not only that the defendant intentionally interfered with his business relationship, but also that the defendant had a "duty of non-interference: *i.e.*, that he interfered for an improper purpose . . . or . . . used improper means. *Pleas v. City of Seattle*, 112 Wash 2d 794, 804-4, 774 P2d 1158, 1163 (1989).

There are five essential elements to an interference claim:

> A claim for tortious interference with a contractual relationship or business expectancy requires five elements: (1) the existence of a valid contractual relationship or business expectancy; (2) that defendants had knowledge of that relationship; (3) an intentional inducing or causing a breach or termination of that relationship or expectancy; (4) that defendants interfered for an improper purpose or used improper means; and (5) resulting damage. *Leingang v. Pierce County Medical Bureau, Inc.*, 131 Wash 2d 133, 157, 930 P2d 288, 300 (1997).

See also: Havsy v. Flynn, 88 Wash App 514, 945 P2d 221 (1997); *Goodyear Tire & Rubber Co. v. Whitman Tire, Inc.*, 86 Wash App 732, 935 P2d 628 (1997); *Commodore v. University Mechanical Contractors, Inc.*, 120 Wash 2d 120, 839 P2d 314 (1992); *Kieburtz & Associates, Inc. v. Rehn*, 68 Wash App 260, 842 P2d 985 (1992).

In an interference claim, the plaintiff must show that the defendant "intentionally" interfered. *White River Estates v. Hiltbruner*, 134 Wash 2d 761, 953 P2d 796 (1998). Incidental or indirect interference alone is not enough. *Burke & Thomas, Inc. v. International Organization of Masters, Mates & Pilots*, 21 Wash App 313, 585 P2d 152 (1978). The interference must have been purposefully improper or it must have involved an improper objective or the use of wrongful means. *Havsy v. Flynn*, 88 Wash App 514, 945 P2d 221 (1997).

A party to a contract cannot be held liable for interference with that contract. *Houser v. City of Redmond*, 16 Wash App 743, 747, 559 P2d 577, 580 (1977); *Hein v. Chrysler Corp.*, 45 Wash 2d 586, 277 P2d 708 (1954); *Banaitis v. Mitsubishi Bank, Ltd.*, 129 Or App 371, 879 P2d 1288, *review granted*, 320 Or 407 (1994), *review dismissed*, 321 Or 511, 900 P2d 508 (1995). This is true whether the party is a natural person or a corporation. *Lewis v. Oregon Beauty Supply Co.*, 302 Or 616, 733 P2d 430 (1987). Unlike a natural person, a corporation's breach of contract will necessarily involve the action of some other person since a

corporation can only act through a natural person. *Olympia Fish Products, Inc. v. Lloyd*, 93 Wash 2d 596, 611 P2d 737 (1980); *Daly v. Nau*, 167 Ind App 541, 339 NE2d 71 n 6 (1975). As a consequence, courts are reluctant to hold corporate officers, employees and agents liable for tortiously interfering with the contracts of their corporations.

> Agents and employees are not subject to liability for inducing their principal's breach of contract if they act in their official capacity on behalf of their principal or employer. Their actions are privileged. *Houser v. City of Redmond*, 16 Wash App 743, 747, 559 P2d 577, 580 (1977).

See also: Hein v. Chrysler Corp., 45 Wash 2d 586, 277 P2d 708 (1954).

Another decision addressed this issue by stating:

> In the usual interference with a contract situation, the person interfering is a complete stranger to the contractual relationship. A complicating ingredient is added where the party induced to breach to breach its contract is a corporation and the third person who induces the breach is not a stranger, but is a person who, by reason
>
> of his position with the corporation, owes a duty of advice and action to the corporation.
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> * * *
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> A corporation can only act upon the advice of officers or employees and through the actions of agents. Doing business through corporate structures is a recognized and necessary incident of business life. A party is usually able to abandon a disadvantageous but valid contract and be responsible for breach of contract only. Corporations would substantially be prevented from similarly abandoning disadvantageous but valid contracts, and from securing related business advice, if the officers and employees who advised and carried out the breach had to run the risk of personal responsibility in an action for interference with contract. Therefore, the courts have tended to shield such persons from responsibility for inducing the breach of the corporate contract, often saying that they are not liable if the action was taken in "good faith" and for the benefit of the corporation. (footnote omitted) *Wampler v. Palmerton*, 250 Or 65, 74-5, 439 P2d 601, 606 (1968).

While courts are reluctant to hold corporate officers, employees and agents liable for tortious interference with corporate contracts, the Washington courts require some slight degree of good faith.

> The privilege afforded a corporate officer, however, is not absolute. . . . We . . . hold that an officer or director of a corporation is not personally liable for inducing the corporation to violate a contractual relation provided the officer or director acts in good faith. Good faith in this context means nothing more than an intent to benefit the corporation.
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> * * *
>
> Good faith, however, is not equated with the lack of selfish interest in enhancing the financial condition of the corporation. Although corporate officers may benefit from a breach of contract, they need not curtail any

> advice as long as it is given with the intention to serve the best interests of the corporation. The good faith test merely prevents corporate officers from pursuing purely personal goals with no intent to benefit the corporation. (citations omitted) *Olympic Fish Products, Inc. v. Lloyd*, 93 Wash 2d 596, 599-600, 611 P2d 737, 738-9 (1980).

Thus, corporate officers and agents may be liable for tortious interference when they act to cause the corporation to breach a contract for substantially personal reasons. *Hein v. Chrysler Corp.*, 45 Wash 2d 586, 277 P2d 708 (1954).

Other decisions have held that corporate officers, employees and agents may be liable for tortious interference when they act maliciously, that is, "in the sense of spite or ill will and a desire to do harm for its own sake." *Welch v. Bancorp Management Services*, 296 Or 208, 216, 675 P2d 172, 178 (1983), *modified*, 296 Or 713, 679 P2d 866 (1984). *See also: Straube v. Larson*, 287 Or 357, 600 P2d 371 (1979).

Some states strongly disfavor lawsuits by third parties against officers and directors for interfering with a contract between the corporation and the third party. *Colburn v. Trustees of Indiana University*, 739 F Supp 1268, 1302 (SD Ind 1990), *affirmed*, 973 F2d 581 (7th Cir 1992). Most states hold that officers and directors are not liable for tortious interference when they are merely acting on behalf of the corporation, but rather, impose liability only when officers and directors are acting for their own personal advantage or acting maliciously. For instance, the Illinois Supreme Court said:

> A corporate officer may, for a proper business purpose and in good faith, influence the actions of the corporation. Thus, to be tortious, a corporate officer's inducement of his corporation's breach of contract must be done "without justification or maliciously." (citations omitted) *Swager v. Couri*, 77 Ill 3d 173, 395 NE2d 921, 927 (1979).

In summary, an officer may cause his/her corporation to breach a contract with a third party without risk of personal liability as long as the officer's motivation is not a personal one or one motivated by malice against the third party. Personal liability will attach, however, when the officer's personal motivation is the overwhelmingly important motivation in causing the breach of contract, particularly where the breach is contrary to the best interests of the corporation.

***B. Civil conspiracy*.**

Civil conspiracy is a combination of two or more persons who, by some concerted action, accomplish some criminal or unlawful purpose or accomplish some purpose not in itself criminal by unlawful means.

> A civil conspiracy is a combination of two or more persons agreeing to commit a criminal or unlawful act, or to commit a lawful act by criminal or unlawful means, or by concerted action to accomplish a lawful or unlawful purpose by unlawful means. *O'Brien v. Larson*, 11 Wash App 52, 55, 521 P2d 228, 230-1 (1974).

See also: Sterling v. Thorpe, 82 Wash App 446, 918 P2d 531 (1996); *John Davis & Co. v. Cedar Glen # Four, Inc.*, 75 Wash 2d 214, 450 P2d 166 (1969).

In an earlier decision, the Washington Supreme Court stated:

> civil conspiracy exists if two or more persons combine to accomplish an unlawful purpose or combine to accomplish some purpose not in itself unlawful by unlawful means. In order to establish a conspiracy the plaintiff must show that the alleged coconspirators entered into an *agreement* to accomplish the object of the conspiracy. Even more important, the plaintiff has the burden of preponderating the evidence; and furthermore, the existence of an alleged civil conspiracy must be established by *clear, cogent,* and *convincing* evidence. (emphasis in original; citations omitted) *Corbit v. J.I. Case Co.*, 70 Wash 2d 522, 528-9, 424 P2d 290, 295 (1967).

"Civil conspiracy is not an `independent tort,' and it presupposes an underlying unlawful purpose or unlawful means." *Stringer v. Car Data Systems, Inc.*, 108 Or App 523, 528, 816 P2d 677, 680, *opinion modified on reconsideration*, 110 Or App 14, 821 P2d 418 (1991), *affirmed*, 314 Or 576, 841 P2d 1183 (1992), *reconsideration denied*, 315 Or 308, 844 P2d 905 (1993).

There must be more than one conspirator; a person may not conspire with himself/herself. *Harrington v. Richeson*, 40 Wash 2d 557, 245 P2d 191 (1952). One of the parties to a conspiracy can be a corporation. *Koehring Co. v. National Automatic Tool Co.*, 257 F Supp 282 (SD Ind 1966), *affirmed*, 385 F2d 414 (7th Cir 1967); *National Association for the Advancement of Colored People v. Overstreet*, 221 Ga 16, 142 SE2d 816, 822 (1965). Yet, as with tortious interference claims, discussed above, courts are reluctant to hold an officer, director, employee or agent liable for conspiring with his/her own corporation.

> A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation. *Bliss v. Southern Pacific Co.*, 212 Or 634, 321 P2d 324, 328 (1958).

In another decision, the court held:

> It is basic to the law of conspiracy that there must be at least two persons or entities to constitute a conspiracy. A corporation cannot conspire with an agent when that agent is acting within the scope of his authority. A corporation acts through its agents and the acts of the agent are the acts of the corporation. (citations omitted) *Soft Water Utilities,*

Inc. v. LeFevre, 159 Ind App 529, 308 NE2d 359, 399 (1974).

In an early case, the Washington Supreme Court found that officers could not be held liable for civil conspiracy where the officers "acted for and had the same justification for their acts as did the [corporation]." *Manhattan Quality Clothes, Inc. v. Cable*, 154 Wash 654, 658, 283 P 460, 461 (1929).

In a later Washington case, the court upheld a trial court's finding that there was no civil conspiracy between a corporation and its employees, although the trial court's finding does not appear to be based on a legal impediment to conspiracies between a corporation and one of its officers, directors or employees. *John Davis & Co. v. Cedar Glen # Four, Inc.*, 75 Wash 2d 214, 450 P2d 166 (1969). *See also: Kietz v. Gold Point Mines, Inc.*, 5 Wash 2d 224, 105 P2d 642 (1940). Another Washington case held that a corporation could not enter into a conspiracy with its subsidiary, and in dicta, the court stated that a conspiracy could not exist between an individual and his wholly-owned corporation. *Corbit v. J.I. Case Co.*, 70 Wash 2d 522, 528, n 3, 424 P2d 290, 295, n 3 (1967).

If a civil conspiracy exists between an officer acting on behalf of the corporation and someone unaffiliated with the corporation, the corporation, the officer and the unaffiliated person will all be liable for civil conspiracy. *National Association for the Advancement of Colored People v. Overstreet*, 221 Ga 16, 142 SE2d 816 (1965).

At least one court has held that a corporation may be held liable for conspiring with its officers in a RICO context. *Ashland Oil, Inc. v. Arnett*, 875 F2d 1271 (7th Cir 1989).

Section 9.07 Improper Distributions

If a director fails to exercise the standard of care imposed on directors by RCW 23B.08.300, that director may be held to be personally liable to the corporation for the improper distributions which that director voted for, or assented to. RCW 23B.08.310. Any director held liable under RCW 23B.08.310 may seek contribution from every other director "who could be held liable under" RCW 23B.08.310(1) and from each shareholder "for the amount the shareholder accepted knowing the distribution was made in violation of RCW 23B.06.400 or of the articles of incorporation." RCW 23B.08.310(2).

This liability is not new. Courts have long held directors personally liable for dividends paid while the corporation is insolvent or paid out of funds not available for distribution to shareholders as dividends.

Brenamen v. Whitehouse, 85 Wash 355, 148 P 24 (1915); *Patterson v. Wade*, 115 F 770 (9th Cir), *certiorari denied*, 188 US 741 (1902); *Scullin v. Mutual Drug Co.*, 138 Ohio St 132, 33 NE2d 992 (1941).

> The courts have recognized the remedial feature of the statutes, in that they inure to the benefit of the creditors, for whose protection they are intended; but they have also held that, so far as the directors are concerned, the liability is in the nature of a penalty, and that the statutory provisions must be strictly construed. In this respect, reason is clearly coincident with the weight of authority. The liability imposed upon directors under the statute is absolute. It is not apportioned to the amount of the interest which the directors may have in the corporation, as stockholders or otherwise, thus differing from the statutory liability of stockholders. It is not predicated upon the amount of the benefit which may accrue to the directors from the illegal dividend. It does not depend upon the amount of the dividend which is declared, nor the extent of the injury to the creditor, which is thereby occasioned. It is intended by such statutes, upon grounds of public policy, to require the directors of corporations to exercise diligence, to deal honestly with creditors, and to faithfully perform their duties. The law clearly presumes that the director is bound to know the condition of his corporation, and to know whether or not dividends are payable; and it makes no excuse or release of liability on account of his failure to acquire such knowledge. It is immaterial that the statute contains no direct prohibition of the payment of dividends under the circumstances mentioned therein. It is sufficient that a penalty is denounced against the act. That penalty can be regarded in no other light than as a punishment for the injurious act. (citations omitted) *Patterson v. Thompson*, 86 F 85, 86 (CC Or 1898).

Under the current Washington Act, a director continues to be personally liable to the corporation for improper distributions which that director votes for, or assents to, unless that director acted in good faith and with the care of an ordinarily prudent person (as defined in RCW 23B.08.300). RCW 23B.08.310(1).

There is a two-year period for bringing such lawsuits against directors. RCW 23B.08.310(3).

This director liability is one which runs to the corporation, although a creditor may be able to obtain relief against the directors through a bankruptcy trustee, through a receiver, or through some other type of proceeding in equity. *Rosebud Corp. v. Boggio*, 39 Colo App 84, 561 P2d 367 (1977). Creditors do not have an action at law against an individual director, but rather, must file an equitable action in which all creditors must be made parties. *Royer v. Maib*, 6 Wash 2d 286, 107 P2d 593 (1940); *Wakeman v. Paulson*, 264 Or 524, 506 P2d 683 (1973).

A discussion of director and shareholder liability for improper distributions under Washington common law and under the earlier 1967 Business Corporation Act appears in Kummert, *The Financial Provisions of the New Washington Business Corporation Act: Part III*, 43 WASH L

REV 337, 402-420 (1967).

Section 9.08 Officer & Director Liability to Creditors

Even if they are also creditors of the corporation, officers and directors cannot use their positions to obtain for themselves an unfair advantage over other corporate creditors. In particular, officers and directors may be held liable to other corporate creditors if the officers/directors diverted corporate funds to themselves when the corporation is insolvent. *Tacoma Association of Credit Men v. Lester*, 72 Wash 2d 453, 433 P2d 901 (1967); *Barnard Mfg. Co. v. Ralston Milling Co.*, 71 Wash 659, 129 P 389 (1913); *Randall & Neder Lumber Company, Inc. v. Randall*, 202 Ga App 497, 414 SE2d 718 (1992); *Wortham v. Lachman-Rose Co.*, 440 SW2d 351 (Tex Civ App 1969).

> By the great weight of authority, where a corporation is insolvent or has reached such condition that its directors or officers see that they must deal with its assets in the view of its probable suspension, they cannot use those assets to prefer themselves as creditors or sureties in respect to past advances to the prejudice of general creditors. *Gantenbein v. Bowles*, 103 Or 277, 289-90, 203 P 614, 619 (1922).

This is particularly true when the transfer is for inadequate consideration. Under RCW 23.72.020, a creditor is permitted to seek court appointment of a receiver and to have that receiver cause to be set aside preferences made by the corporation to officers, directors and other creditors. Any such proceeding is governed by equitable principles. *Glendale Realty, Inc. v. Tennis World of Seattle*, Inc., 52 Wash App 892, 765 P2d 325 (1988). *See:* Section 12.07 of this book. Likewise, directors are personally liable to creditors if, after dissolution, they dissipate corporate assets. *Lents, Inc. v. Borstad*, 251 Or 296, 445 P2d 597 (1968).

Officers and directors may be liable to corporate creditors under the theory of corporate disregard, also known as the "piercing the corporate veil" and "alter ego" theories. *Culinary Workers and Bartenders Union No. 596 Health and Welfare Trust v. Gateway Cafe, Inc.*, 91 Wash 2d 353, 588 P2d 1334 (1979), *appeal after remand*, 95 Wash 2d 791, 630 P2d 1348 (1981), *changed in other respects*, 642 P2d 403, *cert denied*, 459 US 839 (1982); *Pohlman Investment Co. v. Virginia City Gold Mining Co.*, 184 Wash 273, 51 P2d 363 (1935); *Salem Tent & Awning Co. v. Schmidt*, 79 Or App 475, 719 P2d 899 (1986). In most such cases, but not all, the person upon whom liability is imposed is also a shareholder. Piercing the corporate veil is discussed in more detail in Chapter Ten of this book.

Certainly specific acts by an officer or director may give rise to direct liability by that officer or director to a creditor. For instance, a director who personally guarantees a corporate debt is liable to that creditor after the corporation becomes insolvent. *Fred Shearer & Sons, Inc. v. Prendergast*, 152 Or App 657, 955 P2d 324 (1998). Likewise, an officer who is a joint tortfeasor with the corporation (for instance, as the driver of a vehicle in an automobile accident) will be jointly liable to the victim of that tort. *Johnson v. Harrigan - Peach Land Development Co.*, 79 Wash 2d 745, 489 P2d 923 (1971); *Dodson v. Economy Equipment Co.*, 188 Wash 340, 62 P2d 708 (1936); *Fields v. Jantec, Inc.*, 317 Or 432, 857 P2d 95 (1993).

It is less clear whether a creditor, after insolvency, can impose liability on the officers and directors for actions which only caused the corporation direct harm (*e.g.*, an officer who negligently fails to renew a property insurance policy just before the corporation's property is destroyed in a fire).

The majority view is that creditors may maintain an action against directors for their tortious acts which caused harm to the corporation. 3A FLETCHER CYC CORP § 1182 (Perm Ed 1994). Yet, even courts which adhere to this position generally require more than mere negligence (*e.g.*, gross negligence or intentional acts). A minority of states adhere to the position that creditors may not bring such lawsuits. 3A FLETCHER CYC CORP § 1181 (Perm Ed 1994).

The Washington courts do not seem to have taken a position on this issue although at least one early case indicates that Washington would follow the majority rule. *Barnard Mfg. Co. v. Ralston Milling Co.*, 71 Wash 659, 129 P 389 (1913).

If a corporation is administratively dissolved, its officers will not be liable for contracts entered into during the period of dissolution if: (i) the corporation is reinstated within five years of the dissolution pursuant to RCW 23B.14.220; (ii) the contract is entered into to wind up the corporation's business and affairs pursuant to RCW 23B.14.210(3); or (iii) the officer did not have actual knowledge of the dissolution. *Equipto Division Aurora Equipment Co. v. Yarmouth*, 134 Wash 2d 356, 950 P2d 451 (1997).

As discussed in Section 9.07 above, directors are liable to the corporation, but not corporate creditors, if the directors authorize illegal shareholder distributions.

Section 9.09 False Prospectuses & Annual Reports

Under common law, directors and officers are personally liable when they make false statements to the public concerning the corporation's affairs. To be liable, an individual director or officer either must know that the statement is false or must have no actual knowledge that the statement is true.

Under common law, directors and officers have a duty of due diligence regarding prospectuses, annual reports, and the like.

> A stockholder or officer of a corporation is no more immune for his false representations which result in a loss to one who relied upon the representations than any other individual. In other words, the rules of common honesty and common sense apply alike to all persons, without regard to the capacity in which they act. If the charges are true, the appellant has suffered a loss because it relied upon the respondents' representations as to material facts, which representations were false and known to be false when made. This view is elementary and would seem to require no sustaining authority. *Barnard Manufacturing Co. v. Ralston Milling Co.*, 71 Wash 659, 662, 129 P 389, 390-1 (1913).

In another decision, the court stated:

> Directors are liable for injuries to a person who relies upon a statement issued by them, which they did not know to be true, as well as when they knew it to be false. *Coughlin v. State Bank of Portland*, 117 Or 83, 97, 243 P 78, 83 (1926).

Under common law, directors are personally liable for their own fraudulent statements and statements made in prospectuses made to induce third parties to subscribe for corporate stock. *Howard v. Merrick*, 145 Or 573, 27 P2d 891 (1934); *Georgia Portland Cement Corp. v. Harris*, 178 Ga 301, 173 SE 105 (1934); *Dennis v. Thompson*, 240 Ky 727, 43 SW2d 18 (1931); *Manning v. Berdan*, 135 F 159 (D NJ 1905).

> Directors of a corporation who have put forth, or have permitted to be put forth in the name of the corporation, false and fraudulent statements, either in equivocal language or positive affirmations, in making up their prospectus, circulars, or other advertising matter, whereby members of the public are induced to purchase its shares of stock, make themselves liable to persons thereby deceived and defrauded jointly with the corporation itself. *Fuhrman v. American Nat. Building & Loan Ass'n.*, 126 Cal App 202, 14 P2d 601, 605 (1932).

Officer may be personally liable for publishing false annual reports of the corporation's condition. *Brown v. Clow*, 158 Ind 403, 48 NE 1034, 49 NE 1057 (1902).

Under present-day securities laws, the liability of officers and directors continues and is broadened. *See:* RCW 21.20.430(3).

Section 9.10 Statutory Liability

Certain federal and state statutes impose personal liability on directors and officers under certain circumstances. Below are a few examples.

The Internal Revenue Code imposes personal liability and penalties against "any person required to collect, truthfully account for, and pay over" any taxes imposed by the Code, including FICA (social security) and withholding taxes. 26 USC § 6672. This liability attaches to all who have a significant "word as to what bills should or should not be paid, and when" and may be imposed on corporate officers and directors. *Turner v. United States*, 423 F2d 448, 449 (9th Cir 1970).

The Fair Labor Standards Act, 29 USC § 203(d), broadly defines "employer" to include "any person acting directly or indirectly in the interest of an employer in relationship to an employee." The corporate form does not shield officers and directors from individual liability under this Act for an action taken on behalf of the corporation in its dealings with employees. *Donovan v. Maxim Industries, Inc.*, 552 F Supp 1024 (D Ma 1982).

Directors may be personally liable for knowing violations of the National Bank Act. 12 USC § 93.

Section 15 of the Securities Act of 1933, Section 20 of the Securities and Exchange Act of 1934, and RCW 21.20.430(3) all impose liability on officers and directors for corporate violations of the securities laws. *See, for example: Hines v. Data Line Systems, Inc.*, 114 Wash 2d 127, 787 P2d 8 (1990).

Officers and directors may be liable for corporate violations of the federal antitrust laws. *United States v. Wise*, 370 US 405 (1962); *Allen Organ Co. v. North American Rockwell Corp.*, 363 F Supp 1117 (ED Pa 1973).

Certain officers, directors and principal shareholders are personally liability for corporate acts under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 USC §§ 9601 *et seq*, related to the improper disposal of hazardous wastes. *See: Columbia River Service Corp. v. Gilman*, 751 F Supp 1448 (WD Wa 1990); *United States v. Amtreco, Inc.*, 809 F Supp 959 (MD Ga 1992); *CBS, Inc. v. Henkin*, 803 F Supp 1426 (ND Ind 1992); *United States v. Northeastern Pharmaceutical and Chemical Company, Inc.*, 579 F Supp 823 (WD Mo 1984), *affirmed*, 810 F2d 726 (8th Cir 1986).