CHAPTER NINE

OFFICER & DIRECTOR LIABILITY TO THIRD PARTIES

Section 9.01 Generally

Sometimes, corporations are unable to pay their debts. In such cases, corporate creditors often seek to find a solvent party to pay these debts. A corporation's shareholders, directors and officers are likely candidates.

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. Some cases analyzing these theories fail to clearly articulate whether the person liable was held liable in that 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 facts justify piercing the corporate veil – sometimes referred to as the theory of corporate disregard. Piercing the corporate veil is discussed in Chapter Ten.

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 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 signing for a disclosed corporate principal – 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 also be personally liable to that injured party. Typically, the corporation will be jointly and severally liable, 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. An officer's tort liability is discussed in Section 9.05 of this Chapter.

C. Directors.

Directors generally set policy; generally they 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 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

Long ago, 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. *Florida Air Conditioners, Inc. v. Colonial Supply Co.*, 390 So2d 174 (Fla 5th DCA 1980), *appeal after remand*, 421 So2d 1106 (1982); *Roger v. Maib*, 6 Wash 2d 286, 107 P2d 335 (1940), *affirmed on rehearing*, 6 Wash 286, 111 P2d 593 (1941).

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." ORS 60.054; *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. *Silvers v. R&F Capital Corp.*, 123 Or App 35, 858 P2d 895 (1993); *Equipto Division Aurora Equipment Co. v. Yarmouth*, 134 Wash 2d 356, 950 P2d 451 (1997); *Royal Development and*

Management Corp. v. Guardian 50/50 Fund V, Ltd., 583 So2d 403 (Fla 3d DCA 1991).

Promoter liability for pre-incorporation acts is discussed in Section 2.06 of this book. A discussion of *de facto* and other defective corporations, and the liability of officers and directors of such corporations, is contained in Sections 3.04 and 9.03 of this book.

Section 9.03 Defective Corporations

As discussed in Section 3.04 of this book, Oregon no longer recognizes *de facto* corporations. *Timberline Equipment Co., Inc. v. Davenport*, 267 Or 64, 514 P2d 1109 (1973). Persons who purport to act for a corporation – knowing that no corporation exists – are jointly and severally liable. ORS 60.054.

Interpreting a similarly worded statute, one court held that persons purporting to act on behalf of corporation – who know no corporation exists – are jointly and severally liable. *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 ORS 60.651 on a number of statutory grounds set forth in ORS 60.647. Even though the corporation is so dissolved, it "continues its corporate existence but may not carry on any business except" winding up and liquidating its business and affairs. ORS 60.651(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. *Wohrman v Rogers,* 274 Or App 846, 362 P3d 704 (2015); *Silvers v. R&F Capital Corp.*, 123 Or App 35, 858 P2d 895 (1993); *Creditors Protection Association, Inc. v. Baksay*, 32 Or App 223, 573 P2d 766, 768 (1978).

> All persons purporting to act as or on behalf of a corporation, knowing there was no incorporation, are jointly and severally liable for all liabilities created while so acting. ORS 60.054.

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). *See also Hoppe v. Percheron Associates, LLC*, Case No: 11-cv-03233-CBS (D Colo Aug 1, 2012) ("At the heart of the mutuality requirement is the notion of fundamental fairness."); *T Street Development LLC v. Dereje*, 2005

US Dist LEXIS 38713, at *14-15 (D DC December 19, 2005) (holding that a promoter liable under a contract must also have the right and standing to enforce that same contract under the principle of mutuality); *Fish v. Tandy Corp.*, 948 SW 2d 886, 890 (Tex App Fort Worth 1997) ("Because any enforceable agreement is mutual and binding on both parties, logic indicates a promoter who is liable under an agreement may also make a claim under such a contract."); *In re Berris,* 2009 WL 1139085, at *2-4 (Bankr SD Fla April 27, 2009) (holding mutuality should extend to allow the Debtor who executed the purchase contract at issue to sue on behalf of the non-existent entity); *Gardner v. Madsen,* 949 P2d 785, 789 (Utah Ct App 1997) ("The individual who signs a contract in the name of a nonexistent corporation can be a party to the contract.").

Under a predecessor statute, the directors of an involuntarily dissolved corporation were not 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 of this book.

Section 9.04 Contract Liability

A corporation is an artificial entity which can only act through its officers, employees and other agents. *Doe v. Oregon Conference of Seventh-Day Adventists,* 199 Or App 319, 328, 111 P3d 791 (2005); *State v. Oregon City Elks Lodge No. 1189, BPO Elks*, 17 Or App 124, 520 P2d 900 (1974); *State v. Gourley*, 209 Or 363, 305 P2d 396 (1956), *rehearing denied*, 209 Or 363, 306 P2d 1117 (1957); *Sherman, Clay & Co. v. Buffum & Pendleton*, 91 Or 352, 358, 179 P 241 (1919); *Guthridge v. Pen-Mod, Inc.*, 239 A2d 709 (Del Supr 1967).

As such, the corporation itself is generally liable for the authorized acts of its agents. *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); *Puget Sound Pulp & Timber Co. v. Clear Lake Cedar Corp.*, 15 Wash 2d 707, 132 P2d 363 (1942). *See* Chapter Six of this book.

General principles of agency govern the relationship between a corporation and its officers, employees and other agents. *Synectic Ventures I, LLC v. EVI Corp.,* 241 Or App 550, 251 P3d 216 (2011), *reversed on other grounds,* 353 Or 62, 294 P3d 478 (2012); *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); *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); *Sons of Norway v. Boomer*, 10 Wash App 618, 519 P2d 28 (1974).

Generally, officers, employees and other agents are not liable on contracts which they sign on behalf of the corporation – as long as they disclose their representative capacity.

> 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).

Another court held:

> 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; *WSB Invs., LLC v. Pronghorn Dev. Co.,* 269 Or App 342, 344 P3d 548, 558 (2015); *Hirsovescu v. Shangri-La Corp.*, 113 Or App 145, 831 P2d 73 (1992); *Wiggins v. Barrett & Associates, Inc.*, 295 Or 679, 669 P2d 1132 (1983); *Porter Construction Co. v. Berry*, 136 Or 80, 298 P 179 (1931).

A. Directors not usually liable on corporate contracts.

Directors are usually corporate decision-makers, not corporate agents. Thus, directors are usually not liable to third parties for contracts which they sign on behalf of the corporation. *WSB Invs., LLC v. Pronghorn Dev. Co.,* 269 Or App 342, 344 P3d 548, 558 (2015).

> 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).

But when directors serve as agents, their conduct is judged by the same principles of agency as are other corporate agents. There are other 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 usually 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 contracts signed by the agent. RESTATEMENT OF AGENCY (SECOND) §§ 320 & 322; *Maxwell's Electric, Inc. v. Hegeman-Harris Company of Canada, Ltd.*, 18 Wash App 358, 567 P2d 1149 (1977). Officers and other agents are liable to third parties when they fail to disclose their representational capacity when entering into the contract. *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); *Schwab v. Getty*, 145 Wash 66, 258 P 1035 (1947).

> 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. *Matsko v. Dally*, 49 Wash 2d 370, 301 P2d 1074, 1077 (1956).

For instance, in *Salem Tent & Awning Co. v. Schmidt*, 79 Or App 475, 719 P2d 899 (1986), the plaintiff had long dealt with the defendants as individuals under their assumed business name. The defendants eventually incorporated, but did not disclose the incorporation to the plaintiff. The old assumed business name and the name of the new corporation were essentially the same. The defendants again contracted with plaintiff under this name and, after they were sued on the contract, claimed they had signed as agents of the corporation. The court disagreed, holding that they had failed to disclose they were acting in an agency – rather than principal

– capacity. *See also Burke Machinery Co. v. Copenhagen*, 138 Or 314, 6 P2d 886 (1932).

Similar facts occurred in *Andrews v. Spencer*, 193 Or 615, 238 P2d 729 (1953). There, a new corporation used the same name as its shareholder's old assumed business name. When an employee signed the disputed contract, the employee added the word "Inc." after the old name, even though no "Inc." actually appeared in the corporation's name. When the corporation breached the contract, the other party sued the shareholder, but the court held the employee had disclosed he was acting as an agent of a corporation, not the individual shareholder.

Sometimes other factors obscure the principal/agency relationship. In *Mackenzie Engineering v. Peters*, 263 Or 20, 500 P2d 699 (1972), a corporate president hired plaintiff to perform engineering services. Plaintiff testified that he did not know that defendant's business was a corporation. In response to plaintiff's question "For whom am I working?", defendant replied, "You are working for me." The president was held personally liable.

In *Guthrie v. Imbrie*, 12 Or 182, 6 P 664 (1885), the officers remembered to put their titles after their names: "James Imbrie, Prest." and "J.J. Imbrie, Sec. G.M.Co." Unfortunately, they neglected to mention the name of their corporation anywhere on the document. The court held them personally liable.

In *Preferred Funding, Inc. v. Jackson,* 185 Or App 693, 61 P3d 939 (2003), a 50% shareholder borrowed funds which he then used to finance the corporation. He signed the loan documents “Clifton Platt, a single man." The court rejected arguments that Platt was acting as agent for the corporation.

Whether or not 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 also 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).

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Many cases involve whether the form of the officer's or agent's signature makes the agent or the corporation liable. *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.

In one case, 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). In another case, 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.
an Oregon corporation

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).

ORS 73.0402 governs a corporate agent's signature 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. *In re Pendleton Hardware Co.*, 24 Or 330, 33 P 544 (1893); *Maxwell's Electric, Inc. v. Hegeman-Harris Company of Canada, Ltd.*, 18 Wash App 358, 567 P2d 1149 (1977); *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 generally 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). This rule no longer applies in Washington. *Crown Controls, Inc. v. Smiley*, 110 Wash 2d 695, 706, 756 P2d 717, 722 (1988). Its status in Oregon is unclear.

***E. Agents are liable for unauthorized acts*.**

A corporate agent is personally liable on a contract which the agent signs for the corporation, but which exceeds the agent's authority. *Deers, Inc. v. DeRuyter*, 9 Wash App 240, 511 P2d 1379 (1973). "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. *Brown v. Farmers' Supply Co.*, 23 Or 541, 32 P 548 (1893); *Florida Capital Corp. v. Robert J. Bissett Construction, Inc.*, 167 So2d 595 (Fla 2d DCA 1964); *Farmers' Market v. Austin*, 118 Wash 103, 203 P 42 (1921). But a corporation may be liable if the agent had apparent authority or if the corporation later ratifies the contract. *See* Sections 6.07 and 6.08 of this book.

***F. Agents are 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); *Royal Development and Management Corp. v. Guardian 50/50 Fund V, Ltd.*, 583 So2d 403 (Fla 3d DCA 1991).

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

On the other hand, even if a corporation is administratively dissolved, its officers are not usually personally liable on contracts entered into during the period of dissolution. *Creditors Protective Association, Inc. v. Baksay*, 32 Or App 223, 573 P2d 766 (1978); *Equipto Division Aurora Equipment Co. v. Yarmouth*, 134 Wash 2d 356, 950 P2d 451 (1997); *Spector v. Hart*, 139 So2d 923 (Fla 2d DCA 1962). *See* Sections 9.03 and 12.05 of this book.

G. Agents are liable if they personally guarantee contract.

Officers and other agents are liable when they personally contract to guarantee or otherwise pay a corporate debt. *Fred Shearer & Sons, Inc. v. Prendergast*, 152 Or App 657, 955 P2d 324 (1998); *Weeks v. Kerr*, 486 NE2d 10 (Ind App 1985); *Columbia Bank, NA v. New Cascadia Corp.*, 37 Wash App 737, 682 P2d 966 (1984). 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 intended to bind both the corporation and the agent personally.

Officers and shareholders who guarantee corporation debts are "compensated guarantors" who are discharged from liability if terms of the guaranteed contract are modified in a way which increases the guarantor's risk – absent an agreement to the contrary. *Marc Nelson Oil Products, Inc. v. Grim Logging Co., Inc.,* 199 Or App 73, 110 P3d 120, *modified on other grounds*, 200 Or App 239, 115 P3d 935 (2005). "Under Oregon law, a guarantor is discharged from his obligations when, without the guarantor's consent, the principal and creditor materially alter the terms of their contract." *Park & Flanders, LLC v. Brewster*, Case No: 3:12-cv-01636-JE (D Or Sept 17, 2014).

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

> 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).

But "a director or an officer of a corporation will be liable for a subordinate's tortious acts if the officer knew of those acts or participated in them." *Cortez v. NACCO Material Handling Grp., Inc.,* 356 Or 254, 270, 337 P3d 111 (2014).

While neither an officer nor director would normally be liable for the acts of corporate agents, 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).

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Although the standard of care for directors of profit and nonprofit corporations are essentially the same (compare ORS 60.357 and 65.357), the civil liability of a qualified nonprofit director may sometimes be limited to acts of gross negligence or intentional misconduct. ORS 65.369; *WSB Invs., LLC v. Pronghorn Dev. Co.,* 269 Or App 342, 344 P3d 548 (2015).

A. Agents are liable for own tortious acts.

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. *Beri, Inc. v. Salishan Properties Inc.*, 282 Or 569, 580 P2d 173 (1978); *Pelton v. Gold Hill Canal Co.*, 72 Or 353, 142 P 769 (1914); *Hill v. Tualatin Academy*, 61 Or 190, 121 P 901 (1912); *Johnson v. Harrigan - Peach Land Development Co.*, 79 Wash 2d 745, 489 P2d 923 (1971). This is also true for a member or manager of a limited liability company. *Cortez v. Nacco Materials Handling Group, Inc*, 356 Or 254, 337 P3d 111 (2014). Any 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 fact that one is acting as a corporate representative does not insulate him [or her] from individual liability for his [or her] tortious acts. In other words, if an officer or agent of the corporation through his or her own fault injures another to whom he or she owes a personal duty, that officer or agent is personally liable to the injured third party regardless of whether the act resulting in injury is committed by or for the corporation. It does not matter that liability might also attach to the corporation. Personal liability attached, regardless of whether the breach was through malfeasance, misfeasance or nonfeasance. *Fields v. Jantec, Inc.*, 317 Or 432, 438, 857 P2d 95, 97 (1993)(quoting Fletcher Cyclopedia of the Law of Private Corporations).

Another court held:

> 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.
>
> * * *
>
> 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, 62 P2d 708, 709 (1936).

An officer or director's liability for his/her own tortious act is a separate and district basis for liability. It is not premised on an alter ego or piercing the corporate veil theory. *In re Interstate Agency, Inc.*, 760 F2d 121, 125 (6th Cir 1985)(discussing Michigan law); *Grayson v. Nordic Construction Co., Inc.*, 92 Wash 2d 548, 599 P2d 1271 (1979). The theory of piercing the corporate veil 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 & 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. *Hoff v. Peninsula Drainage District No. 2*, 172 Or 630, 143 P2d 471 (1943); *Doernbecher Manufacturing Co.*, 153 Or 152, 56 P2d 318 (1936); *McFarland v. Carlsbad Sanatorium Co.*, 68 Or 530, 137 P 209 (1914); *Tauscher v. Air Traffic Conference of America v. Marina Travel, Inc.,* 69 NC App 179, 316 SE2d 642 (1984).

> [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 he/she participates in the tort, when he/she has knowledge amounting to acquiescence, and/or when he/she breaches some duty directly owed to a third party. *Lewis v. Devils Lake Rock Crushing Co.*, 274 Or 293, 545 P2d 1374 (1976); *Grayson v. Nordic Construction Co., 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).

This rule also applies to members and managers of limited liability companies. *Cortez v. Nacco Materials Handling Group, Inc*, 356 Or 254, 337 P3d 111 (2014).

> 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).

Another court has said:

> 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).

In a fraud action against an officer, personal liability attaches when "the officer had knowledge of the fraud, either actual or imputed, or . . . he personally participated in the fraud." *Osborne v. Hay*, 284 Or 133, 145-6, 585 P2d 674, 681 (1978).

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 ORS 60.357 and 60.377. *See* Sections 5.12 (directors) and 5.10 (officers).

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. Some jurisdictions fail to recognize it. *Adams v. Fidelity and Casualty Company of New York*, 107 So2d 496 (La App 1958). Case law is also evolving and Oregon's current position on this issue is unclear.

> One final point deserves mention. The "participation" doctrine that the court stated in *Pelton [v. Gold Hill Canal Co., 72 Or 353, 142 P 769 (1914)]* and that we apply here rests on a distinction between misfeasance and nonfeasance. *See Pelton,* 72 Or at 358 (recognizing that distinction). As the California Court of Appeal explained

> in *Towt v. Pope,* 336 P.2d 276 (Cal App 1959), "[i]n the absence of active participation in an act of misfeasance, generally an officer of a corporation is not personally liable to a third person for nonfeasance." *Id.* at 283. As noted, one potential problem with the participation doctrine is that it is sometimes difficult to categorize a specification of negligence as either nonfeasance or misfeasance. *See Miller v. Muscarelle*, 170 A.2d 437, 447 (NJ Super Ct App Div 1961) (discussing the inconsistencies that have resulted in applying that distinction). Another potential problem is that the doctrine can foreclose any inquiry into an officer's negligent failure to carry out an assigned task. *See Schaeffer,* 403 N.E.2d at 1020.
>
> Initially, most American courts adopted the participation doctrine to determine when an officer or manager will be liable for a subordinate or fellow employee's negligence. *See Miller,* 170 A.2d at 447 (describing the development of the doctrine). A substantial number of jurisdictions still adhere to it. *See* 3A Fletcher's Corporate Cyclopedia § 1161 (listing jurisdictions). Other jurisdictions have rejected or modified the doctrine. *See Miller,* 170 A.2d at 447-49 (rejecting the standard); *Schaefer,* 403 N.E.2d at 1020 (describing cases rejecting the doctrine as reflecting the modern trend); *Martin v. Wood,* 400 F.2d 310, 312-13 (3d Cir 1968) (same). Those courts that have rejected or modified the doctrine have not always been consistent in articulating a new standard; however, they have recognized, as a general rule, that an officer or manager whose assigned task is the supervision of others will be liable for a negligent failure to carry out that task even though that failure could be characterized as nonfeasance. *See* Restatement (Third) of Agency § 7.01 comment d (2006). (footnote omitted).

Cortez v. Nacco Materials Handling Group, Inc, 356 Or 254, 271-2, 337 P3d 111 (2014)(leaving a decision of this issue to another case).

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.

> 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 Co., Inc.*, 79 Wash 2d 745, 754, 489 P2d 923, 928 (1971).

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

In general, officers and directors are liable for any fraudulent act in which they participate, sanction, approve or adopt. An officer may be held liable for the fraud of an agent or employee of a corporation is if "the officer had knowledge of the fraud, either actual or imputed, or . . . he personally participated in the fraud." *Osborne v. Hay*, 284 Or 133, 145-6, 585 P2d 674, 681 (1978).

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 itself 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).

D. Civil & criminal actions brought by 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 (1989); *State v. Baker*, 48 Or App 999, 618 P2d 997 (1980); *State v. German*, 162 Or 166, 90 P2d 185 (1939).

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

> 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 significant. If a criminal statute does not encompass officers, officers cannot be indicted under it. *United States v. Harvey*, 54 F Supp 911 (D Or 1943); *O'Brien v. DeKalb County*, 256 Ga 757, 353 SE2d 31 (1987).

E. Punitive damages.

Officers and other corporate agents may be liable for punitive, as well as general, damages. *Harper v. Interstate Brewery Co.*, 168 Or 26, 120 P2d 757 (1942). If an officer/agent is liable for punitive damages, the corporation may be liable for punitive damages as well, even though its liability is based solely on a theory of vicarious liability. *Andor v. United Air Lines*, 79 Or App 311, 719 P2d 492, *reversed*, 303 Or 505, 739 P2d 18 (1987).

Section 9.06 Interference with Contract & Civil Conspiracy

A. Interference with contract

Under Oregon law, a person may be liable on a theory of tortious interference with contract (or economic relations). A claim for interference with contractual or other economic relations is made out:

> when interference resulting in injury to another is wrongful by some measure beyond the fact of the interference itself. Defendant's liability may arise from improper motives or from the use of improper means. They may be wrongful by reason of a statute or other regulation, or a recognized rule of common law, or perhaps an established standard of a trade or profession. (footnote omitted) *Top Service Body Shop v. Allstate Insurance Co.*, 283 Or 201, 209-210, 582 P2d 1365, 1371 (1978).

There are five essential elements to an interference claim in Oregon:

> (1) the existence of a professional or business relationship (which could include, e.g., a contract or a prospective economic advantage); (2) intentional interference with that relationship or advantage; (3) by a third party; (4) accomplished through improper means or for an improper purpose; (5) a causal effect between the interference and the harm to the relationship or prospective advantage; and (6) damages. *Allen v. Hall* , 328 Or 276, 281-81, 974 P2d 199 (1999).

See also Grimstad v. Knudsen, 283 Or App 28, 386 P3d 649 (2016); *Northwest Natural Gas Co. v. Chase Gardens, Inc.*, 328 Or 487, 498, 982 P2d 1117 (1999)*; McGanty v. Staudenraus,* 321 Or 532, 901 P2d 841, 844 (1995).

In an interference claim, the plaintiff must show that the defendant "intentionally" interfered. In Oregon, “intent” is an element of an interference claim, but the "intent standard is somewhat flexible.” *Lewis v. Oregon Beauty Supply Co.*, 302 Or 616, 621, 733 P2d 430, 433 (1987).

> To satisfy the element of improper means, the actionable conduct must be 'wrongful by some measure beyond the fact of the interference itself. Measures commonly included among improper means are violence, threats or other intimidation, deceit or misrepresentation, bribery, unfounded litigation, defamation, or disparaging falsehood. *Plotkin v. State Accident Ins. Fund*, 280 Or App 812, 823-24, 385 P3d 1167 (2016).

See also *Barr v. Ross Island Sand & Gravel Co.*, Case No: 3:17-cv-01225-MO (D Or Dec 4, 2017).

> Moreover, deliberate interference alone does not give rise to tort liability. A claim of tort liability for intentional interference with a contractual or other economic relations is made out when interference resulting in injury to another is wrongful by some measure beyond the fact of the interference itself. Defendant's liability may arise from improper motives or from the use of improper means. They may be wrongful by reason of a statute or other regulation, or a recognized rule of common law, or perhaps an established standard of a trade or profession.
> * * *
>
> To be entitled to reach a jury, a plaintiff must not only prove that defendants intentionally interfered with its business relationship but also that defendant had a duty of non-interference; i.e., that they interfered for an improper purpose rather than for a legitimate one, or that defendants used improper means which resulted in injury to plaintiff. Therefore, a case is made out which entitles plaintiff to go to a jury only

> when interference resulting in injury to another is wrongful by some measure beyond the fact of the interference itself.
> * * *
>
> If liability in tort is to be based on an actor's purpose, then the purpose must be to inflict injury on the plaintiff "as such." And, if liability in tort is based on an actor's means, then the means must violate some objective, identifiable standard, such as a statute or other regulation, or a recognized rule of common law, or, perhaps, an established standard of a trade or profession.
>
> Under Oregon law, therefore, a third-party's interference with another party's economic relations is not improperly motivated when its purpose is the pursuit of the third parties' own interests.
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> *Giuliano v. Anchorage Advisors, LLC*, Case No: 3:11-CV-1416-PK (D Or May 13, 2014) (citations & internal quotations omitted).

A party to a contract cannot be held liable for interference with that contract. *Banaitis v. Mitsubishi Bank, Ltd.*, 129 Or App 371, 879 P2d 1288 (1995); *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). 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 a 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 liable corporate officers and agents for tortiously interfering with the contracts of their corporations. “Whether an employee is a third party to her employer's contract with another person or entity depends on whether that employee, in performing the alleged interference, was acting within the scope of her employment.” *Kaelon v. USF Reddaway, Inc.,*180 Or App 89, 96, 42 P3d 344 (2002).

> Whether an employee is a third party to her employer's contract with another person or entity depends on whether that employee, in performing the alleged interference, was acting within the scope of her employment. That question, in turn, is analyzed by reference to the respondeat superior doctrine. The test is whether: (1) the act occurred substantially within the time and space limits authorized by the employment; (2) the employee was motivated, at least partially, by a purpose to serve the employer; and (3) the act is of a kind that the employee was hired to perform.
>
> A corporate agent who induces a corporation to breach a contract with another party cannot be liable for intentional interference with that contract if the agent acted in the scope of the agent's employment. In that situation, the agent is the corporation. While a party to a contract may breach it, it is logically impossible for a party to interfere tortiously with its own contract. However, if the agent's sole purpose is one that is not for the benefit of the corporation, the agent is not acting within the scope of employment and may be liable.

> Thus, so long as the actor's conduct is within the scope of his or her authority and is undertaken at least in part to further the best interests of the employer, it is immaterial that the actor has additional motives-even improper ones. In contrast, when the actor acts against the best interests of the employer or solely for her own benefit, she could be held liable in tort for the harm done to the other contracting party.
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> *Mannex Corp. v. Bruns,* 250 Or App 50, 279 P3d 278 (2012) (citations & internal quotations omitted).

The Oregon Supreme Court has said:

> 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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> * * *
>
> A corporation can only act upon the advice of officers or employes 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 employes 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).

The Oregon Court of Appeals has said:

> A corporate agent who induces a corporation to breach a contract with another party cannot be liable for intentional interference with that contract if the agent acted in the scope of the agent's employment. In that situation, the agent is the corporation. While a party to a contract may breach it, it is logically impossible for a party to interfere tortiously with its own contract. However, if the agent's sole purpose is one that is not for the benefit of the corporation, the agent is not acting within the scope of employment and may be liable. *Boers v. Payline Systems, Inc.,* 141 Or App 238, 242-43, 918 P2d 432 (1996).

While courts are reluctant to hold corporate officers and agents liable for tortious interference with corporate contracts, there two principal exceptions.

First, corporate officers 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).

Second, corporate officers and agents may be liable for tortious interference when they act for substantially personal reasons.

> We reaffirm that the proper test is whether the agent acts within the scope of his authority and with the intent to benefit the principal. When this test is met an agent

> is not liable to a third party for intentional interference with contract even if the agent acts with "mixed motives" to benefit himself or another principal as well. (footnotes omitted) *Welch v. Bancorp Management Services*, 296 Or 208, 216, 675 P2d 172, 178 (1983), *modified*, 296 Or 713, 679 P2d 866 (1984).

See also Boers v. Payline Systems, Inc., 141 Or App 238, 918 P2d 432 (1996); *McGanty v. Staudenraus,* 321 Or 532, 901 P2d 841 (1995).

When an employee – even a "managing officer" – of a corporation interferes with a contract to serve interests other than the corporation's interests (motives not intended to serve the corporation's interest), the employee may be liable for interference. *RMS Technology, Inc. v. Stenbock*, 113 Or App 344, 832 P2d 1260 (1992); *Giordano v. Aerelift, Inc.*, 109 Or App 122, 818 P2d 950 (1991); *Hein v. Chrysler Corp.*, 45 Wash 2d 586, 277 P2d 708 (1954).

Courts are less willing to shield shareholders from liability for tortious interference with corporate contracts – at least shareholders who are not also officers, employees or controlling shareholders. *Banaitis v. Mitsubishi Bank, Ltd.*, 129 Or App 371, 879 P2d 1288 (1995).

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 held:

> 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).

The Washington Supreme Court held that 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, 774 P2d 1158, 1163 (1989).

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.

Authorities are split on whether a corporate parent can interfere with the contract of its subsidiary. corporation.

> The parties agree that the Oregon Supreme Court has not ruled on the issue of whether a parent corporation can be held liable as a third party for interfering with the economic relationships of its subsidiaries. *See Mentor Graphics Corp. v. Akar Armagan Ahnet,* No. 98-811-AS, 1999 U.S. Dist. LEXIS 6051, at *7 (D. Or. March 9, 1999) ("[T]he question of whether a parent can interfere with the contract of its subsidiary is an open question in Oregon"). This court therefore must make a reasonable determination about how the Oregon Supreme Court would resolve this issue. *Aetna Cas. & Sur. Co. v. Sheft*, 989 F.2d 1105, 1108 (9th Cir. 1993). Courts are split on this issue. Some have held that a parent corporation cannot, as a matter of law, be held liable for interfering with economic relations of its subsidiary so long as the parent controls the subsidiary and the entities have common economic interests. *See, e.g., First Nat'l Bank v. Lustig*, 809 F.Supp. 444, 448 (E.D. La. 1992); *F.C. Cycles Int'l v. Fila Sport, S.P.A.,* 184 F.R.D. 64, 80-81 (D. Md. 1998); *Am. Med. Int'l, Inc. v. Giutintano,* 821 S.W.2d 331, 336-37 (Tex. App. 1991); *Inland Waters Pollution Control., Inc. v. Jigawon, Inc.*, 05-74785, 2008 WL 205209 (E.D. Mich. Jan. 22, 2008), at * 12-13; *Perry v. Unum Life Ins. Co. of Am.,* 353 F.Supp.2d 1237, 1241 (N.D. Ga. 2005). These courts tend to focus on the issue of control and conclude that a parent is simply not an outside or third party to the economic relationship of its subsidiary. Courts in other jurisdictions have held that a parent corporation can be held liable for interfering with the economic relations of its subsidiary if that corporation employs improper means or acts with an improper purpose. *See, e.g., Boulevard Assocs. v. Sovereign Hotels*, 72 F.3d 1029, 1035 (2d Cir. 1995); *Bendix Corp. v. Adams*, 610 P.2d 24, 31 (Alaska 1980); *Phil Crowley Steel Corp. v. Sharon Steel Corp.,* 782 F.2d 781, 783 (8th Cir. 1986); *Waste Conversion Sys. v. Greenstone Indus.*, 33 S.W.3d 779, 784 (Term. 2000); *Paglin v. Saztec Int'l. Inc.*, 834 F.Supp. 1184, 1195-96 (W.D. Mo. 1993). These courts point out that the subsidiaries and parent are separate corporate entities, and state that a parent corporation should not be able to interfere with the economic relationships of its subsidiaries for any reason.
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> *Rentokil Initial (1896) Ltd. v. Jeld-Wen, Inc.*, Case No: 1:12-cv-01307-CL (D Or March 6, 2013) (holding that Oregon would allow such a claim).

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.

> [Civil] conspiracy is a combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose or to accomplish some purpose not in itself criminal by unlawful means.
>
> The primary purpose of the conspiracy must be to cause injury to another. (citations omitted) *Bliss v. Southern Pacific Co.*, 212 Or 634, 641, 321 P2d 324, 327 (1958).

More recently, the Oregon Supreme Court has said:

> 15A C.J.S. 599 Conspiracy § 1(2) sets out the elements of a civil conspiracy:
>
> " * * * In general, to constitute a civil conspiracy there must be: (1) Two or more persons, and for this purpose a corporation is a person; (2) an object to be accomplished; (3) a meeting of minds on the object or course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate result thereof. * * * "
>
> The primary purpose of a conspiracy must be to cause injury to another. In a civil conspiracy a criminal act is not necessary to establish liability. A civil conspiracy is not an independent tort, in the absence of a statute or unusual circumstances. The damage in a civil conspiracy flows from the overt acts and not from the conspiracy. (citations omitted) *Bonds v. Landers*, 279 Or 169, 174-5, 566 P2d 513 (1977).

"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). *See also Granewich v. Harding,* 329 Or 47, 55, 985 P2d 788 (1999).

> Under Oregon law, "neither 'conspiracy' nor 'aid and assist' is a separate theory of recovery." *Granewich v. Harding*, 329 Or. 47, 53, 985 P.2d 788 (1999), citing *Bonds v. Landers*, 279 Or. 169, 175, 566 P.2d 513 (1977). "Rather, conspiracy to commit or aiding and assisting in the commission of a tort are two of several ways in which a person may become jointly liable for another's tortious conduct." *Id.*; see also *Osborne v. Fadden,* 225 Or.App. 431, 436–437, 201 P.3d 278 (Or.Ct.App.2009) ("[a] civil conspiracy is ... not a separate tort or basis for recovery but, rather, a theory of mutual agency under which a conspirator becomes jointly liable for the tortious conduct of his or her coconspirators").
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> *Giuliano v. Anchorage Advisors, LLC,* 19 F.Supp3d 1087, 1113 (D Or 2014).

See also Yeti Enters. v. Tang, 2017 US Dist LEXIS 128779 (D Or Aug 14, 2017).

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).

Another 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).

"The intracorporate conspiracy doctrine provides a corporation cannot conspire with its own employees or agents as a matter of law." *Schmitz v. Mars, Inc.*, 261 F Supp2d 1226, 1233 (D Or 2003). *See also Hoefer v. Fluor Daniel, Inc.*, 92 F Supp 2d 1055, 1057 (CD Cal 2000).

One 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). But the reasoning related to interference claims against a parent corporation may apply. *See Rentokil Initial (1896) Ltd. v. Jeld-Wen, Inc.*, Case No: 1:12-cv-01307-CL (D Or March 6, 2013), which is discussed in Section 9.06(a) above.

On the other hand, a civil conspiracy may occur between an officer acting on behalf of the corporation and someone unaffiliated with the corporation. In such case, the corporation, its 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 held that a corporation may be 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 ORS 60.357, that director is personally liable to the corporation for improper distributions which the director votes for or assents to. ORS 60.367. Directors are liable if they are negligent in authorizing an illegal distribution – the directors do not need to have actual knowledge of the illegality. *In re Sheffield Steel Corp*., 320 BR 405 (NE Ok 2004).

Any director held liable under ORS 60.367 may seek contribution from every other director "who voted for or assented to the distribution without complying with the standards of conduct described in ORS 60.357," and from each shareholder "for the amount the shareholder accepted knowing the distribution was made in violation of this chapter or the articles of incorporation." ORS 60.367(2); *In re Enron Corp.*, 323 BR 857 (Bankr SDNY 2005)(discussing Oregon law).

The liability of directors for illegal distributions is not new. Courts long have 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. *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); *Brenamen v. Whitehouse*, 85 Wash 355, 148 P 24 (1915).

> 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).

ORS 60.367(1) makes directors liable to the corporation for an unlawful distribution. This statute does not, however, make directors liable to corporate creditors, but creditors should be able to reach directors through the a bankruptcy trustee, through a receiver or through some other proceeding in equity. *Rosebud Corp. v. Boggio*, 39 Colo App 84, 561 P2d 367 (1977). Creditors do not to have an action at law against individual directors for unauthorized distributions. *Wakeman v. Paulson*, 264 Or 524, 506 P2d 683 (1973); *Royer v. Maib*, 6 Wash 2d 286, 107 P2d 593 (1940).

The liability of shareholders for illegal distributions is discussed in Section 10.12 of this book.

Section 9.08 Liability of Officers & Directors 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. *Randall & Neder Lumber Co., Inc. v. Randall*, 202 Ga App 497, 414 SE2d 718 (1992); *Wortham v. Lachman-Rose Co.*, 440 SW2d 351 (Tex Civ App 1969); *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).

> 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. *See* Section 12.07 of this book.

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 on a theory of "piercing the corporate veil" – also known as the "alter ego" or "corporate disregard" theories. *Salem Tent & Awning Co. v. Schmidt*, 79 Or App 475, 719 P2d 899 (1986); *Rice v. Oriental Fireworks Co.*, 75 Or App 627, 707 P2d 1250 (1985); *Amfac Foods, Inc. v. International Systems & Controls Corp.*, 294 Or 94, 654 P2d 1092 (1982). In most – but not all – such cases, the person upon whom liability is imposed is also a shareholder. Piercing the corporate veil is discussed in more detail in Chapter Ten.

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).

> **NOTE:** Officers, directors and shareholders who guarantee corporation debts are “compensated guarantors” who are discharged from liability if terms of the guaranteed contract are modified in a way which increases the guarantor’s risk – absent an agreement to the contrary. *Marc Nelson Oil Products, Inc. v. Grim Logging Co., Inc.,* 199 Or App 73, 110 P3d 120, *modified on other grounds*, 200 Or App 239, 115 P3d 935 (2005).

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. *Fields v. Jantec, Inc.*, 317 Or 432, 857 P2d 95 (1993); *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).

It is less clear whether, after insolvency, a creditor can impose liability on officers and directors for actions which only caused direct harm to the corporation – *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. FLETCHER CYC CORP § 1182 (Perm Ed); *Anthony v. Jeffress*, 172 NC 378, 90 SE 414 (1916). 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. FLETCHER CYC CORP § 1181 (Perm Ed); *Speer v. Dighton Grain, Inc.,* 229 Kan. 272, 624 P.2d 952 (1981); *Webb v. Cash,35* Wyo 398, 250 P 1 (1926).

Some courts hold that a creditor who brings such a lawsuit must do so for the benefit of all creditors – not just the creditor bringing the lawsuit. *Sutton v. Reagan & Gee,* 405 SW2d 828 (Tex Civ App 1966). One court said:

> In general an action for mismanagement against corporate fiduciaries should be brought by the corporation or for its benefit and not by a single creditor in its own behalf. While Georgia has never explicitly adopted this view, it represents the better reasoned rule since it avoids the possibility of double liability on the director or officer. (citations omitted) *Super Valu Stores, Inc. v. First National Bank of Columbus, Georgia*, 463 F Supp 1183, 1196 (MD Ga 1979).

An officer who executes a contract on behalf of an administratively dissolved corporation is not personally liable. *Creditors Protective Association, Inc. v. Baksay*, 32 Or App 223, 573 P2d 766 (1978); *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 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.

> 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).

Another court held:

> 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, 129 P 389, 390-1 (1913).

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 the present-day securities laws, the liability of officers and directors continues and is broadened. *See* ORS 59.115(3).

Section 9.10 Statutory Liability

Certain federal and state statutes impose 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. *Adams v. U.S.* 504 F2d 73, 75 (7th Cir 1974). *See also Turner v. United States*, 423 F2d 448, 449 (9th Cir 1970); *Tedesco v. U.S.*, 733 F Supp 2d 566, 106 A.F.T.R.2d 2010 (MD Pa 2010); *Quattrone Accountants, Inc. v. IRS,* 895 F2d 921 (3d Cir 1990).

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); *Wanamaker v. Columbian Rope Co.,* 740 F Supp 127 (ND NY 1990).

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, ORS 59.115(3) and ORS 59.127(3) all impose liability on officers and directors for corporate violations of the securities laws. *See for example Everts v. Holtmann*, 64 Or App 145, 667 P2d 1028 (1983).

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).