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The Restatement (Second) of Agency *and several states provide that a third party suing an undisclosed principal and his agent must elect to take judgment against one, releasing the other from further liability. In contrast, when the existence of a principal but not his identity is disclosed at the time of agreement, a court may enter judgment against both the partially disclosed principal and his agent, releasing neither until the judgment is satisfied. The authors examine the theories and case law supporting the election doctrine in the light of public policy favoring complete disclosure. The authors conclude that a rule of release upon satisfaction of judgment should be applied to undisclosed principals and their agents. In the context of a partially disclosed principal, however, courts should consider applying a rule of election to encourage full disclosure.*

I. INTRODUCTION

The rule that an undisclosed principal may enforce and be sued on a contract made by his agent is well-established.[1] Some

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1. RESTATEMENT (SECOND) OF AGENCY §§ 186, 302 (1958). A principal is undisclosed if the party with whom the agent deals has no notice that the agent is acting for a principal. If the third party has notice of the principal's existence, but not his identity, the principal is

common-law theorists argue that this rule is inconsistent with the basic rules of contract[2] because it grants contractual rights and obligations to a person whose existence is hidden from the third party at the time the third party enters into the contract. Although the third party agreed to be bound only to the agent, he may also find himself bound to the unknown principal—a person of whom he knew nothing at the time of the contract. Despite these criticisms, the rule has persisted.[3]

The anomalous character of the rule has led courts to recognize exceptions. For example, the third party may escape liability to the undisclosed principal if the contract terms specifically exclude liability to the undisclosed principal.[4] Similarly, the third party may rescind the contract if the principal's undisclosed status was a ploy to induce the third party to deal with a principal with whom the third party would not knowingly have dealt.[5] These exceptions ensure that the third party is not disadvantaged by the sudden appearance of the undisclosed principal. Conversely, to the third party's detriment, courts have hedged on the application of the rule by adopting the so-called doctrine of election. This doctrine prohibits the third party from holding both the principal and the agent liable on a contract made by an agent of an undisclosed principal. At some point before satisfaction of the claim, the third party must decide whether to take a judgment on the contract against the agent or the principal. Election of judgment against one precludes a subsequent action against the other. Unlike the exceptions, which further a basic policy of fairness,[6] the election doctrine has been labeled "abstruse legal theory."[7]

The doctrine of election has survived in some jurisdictions

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described as partially disclosed. *Id.* § 4(2).

2. *See* O.W. HOLMES, *The History of Agency*, in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 368 (1909); Ames, *Undisclosed Principal—His Rights and Liabilities*, 18 YALE L.J. 443, 443 (1909); 3 LAW Q. REV. 358, 359 (1887). Holmes assumed "that commonsense is opposed to allowing a stranger to my overt acts and to my intentions, a man of whom I have never heard, to set up a contract against me which I had supposed I was making with my personal friend." O.W. HOLMES, *supra*, at 404.

3. The rule is so well-established that Ames wrote, "it would be quixotic to attack it in the courts." Ames, *supra* note 2, at 443.

4. *See, e.g.*, RESTATEMENT (SECOND) OF AGENCY § 303(b) (1958). The third party is also relieved from liability if the contract is in the form of a sealed or negotiable instrument. *Id.* § 303(a).

5. *See, e.g., id.* § 304. For a famous discussion of when this exception will apply, see the opinion of Judge Cardozo in Kelly Asphalt Block Co. v. Barber Asphalt Paving Co., 211 N.Y. 68, 105 N.E. 88 (1914).

6. *See* Ferson, *Undisclosed Principals*, 22 U. CIN. L. REV. 131, 148 (1953).

7. Hill, *Some Problems of the Undisclosed Principal*, 1967 J. BUS. L. 122, 127.

with a weed-like tenacity.[8] Its persistence may be a result of both its relative obscurity and a lack of careful judicial analysis. Although there have been some thoughtful opinions,[9] most courts have applied or rejected the doctrine with little, if any, explanation.[10] Not all American jurisdictions, however, apply the doctrine of election. In fact, several jurisdictions have specifically repudiated it, holding that neither the principal nor the agent is discharged until the third party obtains satisfaction of his claim.[11] Furthermore, most commentators have argued that the election doctrine is illogical and unfair.[12]

This article will reexamine the doctrine of election by analyzing its theoretical foundations and the current state of the authorities. This reexamination will lead to a proposed new analysis of the election doctrine.

II. THE THEORETICAL FOUNDATIONS OF ELECTION

A. *The Liability of the Undisclosed Principal and His Agent*

As previously stated, the ability of an undisclosed principal to sue or be sued by a third party on a contract between the undis-

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8. Maurice Merrill first surveyed the state of authorities on this question in Merrill, *Election Between Agent and Undisclosed Principal: Shall We Follow the Restatement?*, 12 NEB. L. BULL. 100 (1933) [hereinafter cited as Merrill I], and its companion piece, Merrill, *Election Between Agent and Undisclosed Principal: Should Oklahoma Follow the Restatement*, 4 OKLA. ST. BAR J. 172 (1933) [hereinafter cited as Merrill II]. Merrill resurveyed the authorities in 1955. *See* Merrill, *Election (Undisclosed Agency) Revisited*, 34 NEB. L. REV. 613 (1955) [hereinafter cited as Merrill III]; *see also* W. SEAVEY, STUDIES IN AGENCY 215 (1949) [hereinafter cited as W. SEAVEY, STUDIES].

9. *See, e.g.*, N.K. Parrish, Inc. v. Southwest Beef Indus., 638 F.2d 1366, 1373 (5th Cir. 1981) (Henderson, J., dissenting); Klinger v. Modesto Fruit Co., 107 Cal. App. 97, 290 P. 127 (1930); Cheel Constr. Co. v. Lubben, 30 N.J. Super. 148, 103 A.2d 610 (App. Div. 1954); Tabloid Lithographers, Inc. v. Israel, 87 N.J. Super. 358, 209 A.2d 364 (Law Div. 1965); Hill v. Hill, 34 Tenn. App. 617, 241 S.W.2d 865 (1951).

10. Perhaps the most egregious example is Georgi v. Texas Co., 225 N.Y. 410, 122 N.E. 238 (1919), in which the court stated that "[t]here is . . . much virtue in this rule of election; it serves a good purpose, is well known and has become firmly embedded in our procedure by the many decisions in this and other states." *Id.* at 417, 122 N.E. at 240.

11. *See infra* notes 87-92 and accompanying text.

12. *See* Merrill I, *supra* note 8, at 102; Merrill II, *supra* note 8, at 173; *see also* 2 F. MECHEM, THE LAW OF AGENCY § 1751 (2d ed. 1914); F. MECHEM, OUTLINES OF THE LAW OF AGENCY §§ 158-160 (4th ed. 1952) [hereinafter cited as F. MECHEM, OUTLINES OF AGENCY]; Stecher, *The Doctrine of Election as Applied to Undisclosed Principal and Agent*, 7 MISS. L.J. 466 (1935); Comment, *Undisclosed Principal's Rights and Liabilities: A Test of Election of Remedies*, 39 CALIF. L. REV. 409 (1951); *infra* notes 54-58 and accompanying text. *But see* R. STEFFEN, AGENCY—PARTNERSHIP IN A NUTSHELL § 63 (1977); Note, *Election Between the Liability of an Agent and of His Undisclosed Principal*, 3 TEX. L. REV. 384 (1925).

closed principal's agent and the third party created analytical difficulties for some of the earlier commentators of the law of contract.[13] For example, Sir Frederick Pollock insisted that the right of a person to sue on a contract to which he was not an actual party violated the essential contract principle of mutual assent.[14] Dean Ames, citing Pollock's work, argued that only the agent should be able to sue, or be sued by, the third party,[15] since there is no direct relation between the undisclosed principal and the third party with whom the agent contracts.

Unable to identify the consensual dealing necessary to the formation of a contract, Pollock, Ames, and other contract law commentators groped for justifications of the undisclosed principal's rights and liabilities. For example, one commentator indicated that justice requires the undisclosed principal to bear the burdens, as well as enjoy the benefits, of a contract made on his behalf.[16] Others argued that the rule derives from the fiction of identity between the agent and the principal.[17] Ames suggested that the undisclosed principal's liability might derive from the third party's right to equitable execution on the agent's right of exoneration.[18]

Seavey eliminated much of this confusion in his seminal article, *The Rationale of Agency*.[19] First, he emphasized that the common law was fully capable of treating a nonconsensual relation as contractual, as in the case of quasi contract.[20] Second, he insisted that the undisclosed principal's liability does not depend on any fiction of contractual liability,[21] but on an obligation created by op-

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13. *See supra* note 2 and accompanying text.

14. 3 LAW Q. REV. 358, 359 (1887).

15. Ames, *supra* note 2, at 445; *see also* E. HUFFCUT, THE LAW OF AGENCY 161 (2d ed. 1901).

16. *See* Keighley, Maxsted & Co. v. Durant, 1901 A.C. 240. "In allowing [the undisclosed principal] to sue and be sued upon [the agent's contract], effect is given, so far as [the undisclosed principal] is concerned, to what is true in fact, although that truth may not have been known to the other contracting party." *Id.* at 261.

17. *See* Holmes, *Agency*, 5 HARV. L. REV. 1, 5 (1891); *see also* E. HUFFCUTT, *supra* note 15, at 161.

18. Ames, *supra* note 2, at 449-53. Dean Ames argues that the agent's right of exoneration requires the principal to hold him harmless from all liabilities associated with authorized undertakings by the agent, and that the third party can secure the principal's liability through equitable execution on the agent's right of exoneration. According to Dean Ames, a recovery on this basis would not violate the fundamental principles of contract. *See also infra* note 80.

19. 29 YALE L.J. 859 (1920) [hereinafter cited as Seavey, *Rationale*].

20. *Id.* at 878; *see also* Ferson, *supra* note 6, at 133-34; Müller-Freienfels, *The Undisclosed Principal*, 16 MOD. L. REV. 299 (1953).

21. Seavey, *Rationale*, *supra* note 19, at 878.

eration of law: the law of agency.[22] This reasoning led Seavey to conclude in a later work "that there are two groups of liabilities—one running between the third person and the agent and the other between the third person and the principal."[23] Seavey's theory of two independent obligations—the agent's based on contract law, and the undisclosed principal's based on agency law—has been well-accepted.[24]

B. *Rationales for Election*

1. ONE OBLIGATION/ALTERNATIVE CLAIMS

Courts have at times suggested that the doctrine of election is based on the premise that the liability of the undisclosed principal on a contract made by an agent on behalf of the undisclosed principal creates only one obligation, upon which the third party has alternative claims.[25] This theory presumes that the third party has contracted for only one liability, with the intention of binding only the agent, and concludes that the operation of law should not give the third party the right to obtain a judgment against the undisclosed principal as well. Since the third party intended to bind only one person, binding another would be a windfall.[26]

Although the equitable nature of this theory has appealed to some courts,[27] its analytical shortcomings have prevented its wide

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22. If, however, we conceive that there is, running between the principal and the third person, an obligation created by law in the terms of the contract made by [the agent] with [the third party] and based upon the justice of the situation, we have no difficulty with the question of suit by the agent or with the single signature.

Id.

23. Seavey, *Discussion of Agency Tentative Draft No. 4*, 7 A.L.I. PROC. 233, 256, 257 (1929) [hereinafter cited as Seavey, *Discussion*]; *see also* Seavey, *Undisclosed Principal, Unsettled Problems*, 1 How. L.J. 79 (1955) [hereinafter cited as Seavey, *Unsettled Problems*].

24. *See, e.g.*, Grinder v. Bryans Rd. Bldg. & Supply Co., 290 Md. 687, 706, 432 A.2d 453, 463 (1981); Ferson, *supra* note 6, at 142; Weinrib, *The Undisclosed Principle of Undisclosed Principals*, 21 McGILL L.J. 298, 299 (1975).

25. *See, e.g., Grinder*, 290 Md. at 695-98, 432 A.2d at 458-59.

26. As the United States Court of Appeals for the Seventh Circuit stated,

We perceive no solid reason why the law, in behalf of the seller, who in both cases has really contemplated and contracted for a single credit only, should in the one case more than the other create a contract under which the agent and principal stand as joint and several, or several, obligors.

Barrell v. Newby, 127 F. 656, 660-61 (7th Cir. 1904).

27. *See, e.g.*, Tabloid Lithographers, Inc. v. Israel, 87 N.J. Super. 358, 209 A.2d 364 (Law Div. 1965); *see also* Ewing v. Hayward, 50 Cal. App. 708, 195 P. 970 (1920) (Finlayson, J., concurring):

acceptance. Its shortcomings are twofold. First, the theory is inconsistent with the rule that an undisclosed principal is not discharged from liability if the third party obtains a judgment against the agent before discovery of the undisclosed principal's existence and identity.[28] If the contract created only one obligation, then a suit against the subsequently discovered principal should not be allowed. Second, the theory ignores the fundamental rule that the third party can hold the undisclosed principal liable, without ever having intended to do so,[29] and that the third party is potentially liable to the undisclosed principal without ever having intended to incur that risk. In short, the one obligation/alternative claims theory reflects a fundamental misunderstanding of the liabilities involved,[30] and cannot support any doctrine of election.

2. MERGER

The doctrine of election has also been explained in terms of merger; when judgment is taken against either the principal or the agent, the third party's claim is said to have merged into the judgment, so that no further action upon that claim is possible.[31] Under this theory, the claim is "exhausted" by the judgment

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> There is, as we have said, but one contract in such cases. And though the plaintiff may elect to hold either one of two persons liable on that contract, either the agent or his undisclosed principal, he cannot make two contracts out of the one contract by seeking to hold each of those two persons liable severally as an independent obligor.

Id. at 717, 195 P. at 974. The view espoused in *Ewing v. Hayward*, however, was not adopted by subsequent California cases. Comment, *supra* note 12, at 410.

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

29. *See* F. MECHEM, OUTLINES OF AGENCY, *supra* note 12, § 153.

30. *See supra* notes 14-24 and accompanying text. Another reason for rejecting the alternative liability theory is that it may conflict with provisions of the Uniform Partnership Act ("UPA"). *See* UNIF. PARTNERSHIP ACT, 6 U.L.A. 174 (1969). If one partner is authorized by his partners to contract on behalf of the partnership, and is also instructed not to disclose the identity or existence of the partnership and the partners, the contracting partner would be the agent, and the other partners would be undisclosed principals. If the alternative liability theory is accepted, the contracting partner's liability would be alternative to the liability of the other partners. The UPA, however, provides that each partner is jointly liable for the contract liabilities arising from partnership business. *Id.* § 15. Because alternative liability is different from joint liability, *see* Kraehe v. Dorsey, 432 S.W.2d 367 (Mo. Ct. App. 1968), the alternative liability theory conflicts with the UPA. In view of the intimate relationship between partnership and agency law, any agency law principle that conflicts with the UPA should be rejected.

31. Kendall v. Hamilton, 4 App. Cas. 504, 513 (1879); Clarkson Booker, Ltd. v. Andjel, [1964] 2 Q.B. 775, 789 (C.A.); *see* Moore v. Flanagan, [1920] 1 K.B. 919, 928; *see also* Pople v. Evans, [1968] 2 All E.R. 743, 748 (Ch. 1967); Swanton Seed Serv., Ltd. v. Kulba, 64 W.W.R. 161, 166-67 (1968); Firm of M.R.M.V.L. v. Firm of R.M.K.R.M., [1926]3 W.W.R. 144, 151; Ferson, *supra* note 6, at 146; Müller-Freienfels, *supra* note 20, at 315.

against one party, and cannot be pursued against the other. Merger is almost exclusively a British and Canadian doctrine,[32] with only one modern American court hinting that merger might be the basis for discharge of one party after judgment against the other.[33]

There are two reasons why the theory of merger cannot support any doctrine of election. First, the merger theory is simply not a theory of *election*. Election requires a conscious choice between alternatives; the merger theory permits discharge of the undisclosed principal by a judgment against the agent whether the third party knew of his existence at the time of judgment or not.[34] Discharge by judgment pursuant to the doctrine of election occurs only if the third party knew of the principal's existence.[35] Second, the notion of "exhaustion" of the claim upon judgment assumes that the third party has only one obligation which can be enforced

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32. *See* cases cited *supra* note 31.

33. *See* Cheel Constr. Co. v. Lubben, 30 N.J. Super. 148, 103 A.2d 610 (App. Div. 1954).

34. *See supra* note 31; *see also* Hill, *supra* note 7, at 126.

35. This requirement is made explicit in RESTATEMENT (SECOND) OF AGENCY § 210(2) (1958), which provides that "[t]he principal is not discharged by a recovery of judgment against the agent by the other party before knowledge of the identity of the principal." *See also id.* § 210(1) & comment a & b.

This distinction is also implicit in British law. British courts recognize that the undisclosed principal or his agent may be discharged before satisfaction due to a genuine election by the third party. Election occurs, however, not at judgment, but at the time the third party decides to file suit against one party or the other, after learning the identity of the undisclosed principal. The British courts will not find such an election unless the commencement of an action against one party is shown to be both unequivocal and taken with full knowledge of the facts.

The discharging effects of an election by suit and by merger thus arise under different circumstances. The filing of suit results in a discharge only when the plaintiff knew the principal's identity. A discharge pursuant to merger, however, will result whether the plaintiff knew his identity or not. The British authorities have been careful to draw this distinction, but have not precisely defined the relationship between election by suit and merger. The relationship may be defined in these terms: An action brought by a third party against either the agent or the nondisclosed principal, which shows full knowledge of their relation and an unequivocal decision to hold one as distinct from the other, will constitute a binding election, and will cause discharge of the other. If, however, the commencement of the action does not meet those criteria, no discharge will result until judgment, and discharge at the time will result whether the third party knew the undisclosed principal's identity or not. *See* Clarkson Booker, Ltd. v. Andjel, [1964] 2 Q.B. 775, 790-93 (C.A.); Scarf v. Jardine, 7 App. Cas. 345 (1882); Hill, *supra* note 7, at 126.

The British doctrine of election by suit has been adopted by only one American court. *See* Walston v. R.B. Whitley & Co., 226 N.C. 537, 39 S.E.2d 375 (1946). In other American jurisdictions, filing of suit against the principal will discharge an agent only when it induces some detrimental reliance on the part of the agent. *See* RESTATEMENT (SECOND) OF AGENCY § 337 (1958); *infra* notes 133 and accompanying text.

against either of two parties.[36] Because that presumption is erroneous, the merger theory cannot support the doctrine of election.[37]

3. INCONSISTENCY

Several distinct arguments comprise the theory that judgments against both an agent and his undisclosed principal are "inconsistent." On one level, the arguments reaffirm that the third party has but one obligation with alternative claims, and conclude that two judgments would be mutually inconsistent. On another level, the concept of inconsistency is implicit in the merger theory. A court applying the doctrine of merger would describe a second judgment on the single claim as inconsistent, since that single claim has been merged into the first judgment.[38] Because these ar-

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36. *See, e.g.*, Kendall v. Hamilton, 4 App. Cas. 504, 514 (1879) ("But it would be no less contrary to justice that the creditor should be able to sue first the agent and then the principal, when there was no contract, and when it was never the intention of any of the parties that he should do so."); *see also* M. Brennen & Sons v. Thompson, 22 D.L.R. 375, 379 (Ont. 1915):

> [T]here is only one cause of action, the one contract: a contract to which C. is one party and either B. or A. (at C.'s option) the other. If he takes judgment against either, the contract *transit in rem judicatam* and is merged, gone. He cannot thereafter say that the contract is in existence. Nor can he, having taken a judgment against one, revive against the other the dead contract; it stays dead.

See also Merrill I, *supra* note 8, at 118. Merrill failed to distinguish between the British doctrine of election by suit and the British doctrine of merger.

The British doctrine of merger may, in fact, be a more consistent application of the one obligation/alternative claims theory. If there is actually one obligation, then a judgment recognizing that obligation should foreclose a subsequent action regardless of the third party's knowledge. The *Restatement*'s doctrine of election upon judgment may represent a logically inconsistent attempt to mitigate the harsh effect of a rigorous application of the one obligation/alternative claims theory.

37. The British doctrine of merger has been criticized by commentators. *See, e.g.*, Hill, *supra* note 7, at 127 ("[T]he concept of alternative liability does not appear to be founded on any commercial basis, but merely on abstruse legal theory, in contrast with the general body of agency law and the doctrine of undisclosed principal . . . ."); Müller-Freienfels, *supra* note 20, at 315-16; Reynolds, *Personal Liability of an Agent*, 85 L.Q. REV. 92, 101 (1969).

38. Kendall v. Hamilton, 4 App. Cas. 504 (1879): "[T]he right of action which [the third party] pursued could not, after judgment obtained, co-exist with a right of action on the same facts against another person." *Id.* at 515. This comment followed the court's statement that dual judgments would mean that "you would have two judgments in existence for the same debt or cause of action." *Id.* The British version of election by suit may also be rooted in the one obligation/alternative claims theory, since a second suit may be described as inconsistent with an unequivocal decision to sue only one party. In Clarkson Booker Ltd. v. Andjel, [1964] 2 Q.B. 775, 790 (C.A.), the court stated that "the mere institution of proceedings against one or other of principal and agent may amount to a case of true election, that is, the unequivocal choice between one of two inconsistent rights so as to bar the subsequent assertion of the other, inconsistent, right."

guments depend on the one obligation/alternative claims theory, which is itself unsupportable and incompatible with Seavey's definition of the liability of the undisclosed principal and his agent, they cannot support the doctrine of election.

A third version of the inconsistency argument is derived from the doctrine of election of remedies. Under the doctrine of election of remedies, a party with two inconsistent theories of liability or two inconsistent remedies cannot pursue one after he has chosen the other.[39] At least four American jurisdictions have treated the problem of election between an undisclosed principal and his agent as a problem of election of remedies,[40] but have done so without ever acknowledging that there are, in fact, two parties potentially obligated on the contract with noncontradictory obligations that derive from the peculiar relationship of principal and agent.[41] Applying the election of remedies analysis without attempting to deal with this distinction amounts to little more than an acceptance of the one obligation/alternative claims theory. The distinct liabilities of the undisclosed principal and his agent are consistent because there are two separate liabilities—one based on the agent's status as a party to the contract, and one based on the undisclosed principal's jural status under agency law. Any attempt to allocate liabilities between the agent and the principal in terms of election of remedies is thus misconceived.[42]

Finally, a combination of the election of remedies doctrine and equitable estoppel may form the basis for a claim of inconsistency. For example, a California court referred to the election between

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39. For a critical summary of the doctrine of election of remedies, see Fraser, *Election of Remedies: An Anachronism*, 29 OKLA. L. REV. 1, 2 (1976).

40. *See* Roam v. Koop, 41 Cal. App. 3d 1035, 1043, 116 Cal. Rptr. 539, 545 (1974); Klinger v. Modesto Fruit Co., 107 Cal. App. 97, 103, 290 P. 127, 129 (1930); Campbell v. Alford, 155 Ga. App. 689, 689-90, 272 S.E.2d 553, 554-55 (1980) (applying GA. CODE § 3-114 (1978)); Cook v. Weir, 2 A.D.2d 680, 681, 152 N.Y.S.2d 590, 591 (1956) (applying N.Y. CIV. PRAC. LAW § 3002(b) (McKinney 1954)); Atlas Paving Co. v. Tate, 559 P.2d 1269, 1271 (Okla. Ct. App. 1977).

41. *See supra* notes 25-30 and accompanying text.

42. If application of the election of remedies in this context is misconceived, then N.Y. CIV. PRAC. LAW § 3002(b) (McKinney 1974) adds nothing when it declares that the recovery of judgment against either the agent or the principal "shall not be deemed an election of remedies which bars an action against the other." Equally inapposite is Campbell v. Alford, 155 Ga. App. 689, 272 S.E.2d 553 (1980), which applied a similar election of remedies statute, GA. CODE § 3-114 (1978) (presently codified at GA. CODE ANN. § 9-2-4 (1982)), to reach the same result. Similarly, Atlas Paving Co. v. Tate, 559 P.2d 1269 (Okla. Ct. App. 1977), which characterized dual judgments as consistent only because the action against the agent was based on fraud, and not on the contract, ignores the basic consistency between the two actions.

agent and undisclosed principal as a form of election of remedies, and then argued that "[t]he doctrine of election of remedies is but an extension of the general principles of equitable estoppel and is based upon a like theory that inconsistent actions will put [the] adversary to some disadvantage."[43] The court applied similar reasoning to justify the California demand rule. The demand rule requires the defendant agent or principal to demand at trial that the third party elect the party against whom he will take judgment.[44] A demand must be made because "a party who has an opportunity to plead an estoppel on which his cause of action or defense is premised must do so and a failure to so plead constitutes a waiver of the estoppel."[45] The court thus concluded that the agent or the principal must demand election by the third party, just as the estoppel holder must plead the estoppel in order for it to take effect.

This approach is unsound. First, its dependence on the election of remedies doctrine reflects a misconception of the underlying liabilities. Second, it ignores a basic requirement of equitable estoppel—detrimental reliance. In order to establish equitable estoppel, detrimental reliance must be proven.[46] In the typical election case, however, the principal has not changed his position in reliance on any action or representation by the third party. The use of equitable estoppel to justify an election doctrine is therefore misplaced. This approach is also incompatible with the *Restatement*'s distinction between the discharging effect of judgment against the principal and the discharge that results when the agent is prejudiced by his justifiable reliance on the third party's manifestation that he will look solely to the principal for payment.[47] If the election upon judgment rule was based on equitable estoppel, there would be no need for two separate *Restatement* provisions.

4. VEXATIOUSNESS

Some courts have reasoned that an election doctrine is needed to prevent vexatious double litigation that would result if a third

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43. Roam v. Koop, 41 Cal. App. 3d 1035, 1044, 116 Cal. Rptr. 539, 545 (1974); *see also* Klinger v. Modesto Fruit Co., 107 Cal. App. 97, 103, 290 P. 127, 129 (1930).

44. For a discussion of the demand rule in California and other jurisdictions, see *infra* notes 93-106 and accompanying text.

45. *Roam*, 41 Cal. App. 3d at 1044, 116 Cal. Rptr. at 545.

46. *See* City of Long Beach v. Mansell, 3 Cal. 3d 462, 488-91, 476 P.2d 423, 441-44, 91 Cal. Rptr. 23, 41-44 (1970).

47. *See* RESTATEMENT (SECOND) OF AGENCY § 337 (1958); *see also infra* note 133 and accompanying text.

party was entitled to judgments against both the agent and undisclosed principal. One court has suggested that the mere commencement of proceedings against two parties is unduly burdensome.[48] The typical version of this argument for an election doctrine, however, is based on the agent's right of indemnification against the principal.[49] The argument is that the principal may be "vexed" by two suits: one by the third party on the contract, the other by the agent seeking indemnification. Such potential vexation is seen as inappropriate; defining liabilities as alternative thus becomes necessary.

Assuming *arguendo* that proof of vexation would justify an election doctrine, the degree of potential vexatiousness associated with the agent's right of indemnification is questionable. Ordinarily, a principal does not have to indemnify his agent unless the agent has paid a judgment to the third party.[50] Upon full payment by the agent to the third party, the principal is discharged from liability to the third party. The principal, therefore, is vulnerable to only one suit—the indemnification claim of his agent. Conversely, if the principal is sued by the third party and the principal pays the judgment, the principal will not be bothered by a second suit (this time brought by his agent) because the agent would have no indemnifiable loss.[51]

Two actions against the principal conceivably might arise if the first person against whom the third party obtains a judgment does not fully satisfy the judgment. The third party could initiate an action against the person not originally pursued in order to collect the unsatisfied portion of the judgment. For example, if the third party pursues the principal first, but the principal does not fully satisfy the judgment, the principal could face a second suit—this one from his agent, claiming indemnification for paying the unsatisfied portion of the judgment. On the other hand, if the third party initially pursues the agent and obtains judgment but

48. Walston v. R.B. Whitley & Co., 226 N.C. 537, 39 S.E.2d 375 (1946).

49. *See* Hill v. Hill, 34 Tenn. App. 617, 630, 241 S.W.2d 865, 870 (1951). For a critical discussion of this argument, see Grinder v. Bryans Rd. Bldg. & Supply Co., 290 Md. 687, 698, 432 A.2d 453, 459 (1981). For a more general discussion of the relation between the agent's right of indemnification and the undisclosed principal's liability, see Ames, *supra* note 2, at 449-52.

50. *See* RESTATEMENT (SECOND) OF AGENCY § 439(c) (1958); *see also* A. STEARNS, THE LAW OF SURETYSHIP § 11.39 (5th ed. 1951); 10 S. WILLISTON, THE LAW OF CONTRACTS § 1274 (3d ed. 1967); Merrill III, *supra* note 8, at 615.

51. Only one qualification to this basic rule is necessary: An agent who has prevailed against the third party's claim may be entitled to recover the reasonable costs of his defense. *See* RESTATEMENT (SECOND) OF AGENCY § 438 comment e (1958).

not full satisfaction, the principal could then face two suits—one by the third party to recover the unsatisfied portion of the judgment, and one by the agent seeking indemnification for that portion of the judgment satisfied.

The possible burden of these actions does not justify the election doctrine. After all, the principal will face a second action only if he fails to satisfy the judgment against him. Furthermore, the principal's duty to indemnify his agent is a cost of doing business through agents. In no other agency context does the existence of that duty cause discharge of a principal's liability to a third party. Similarly, a court should not discharge an agent from liability merely because he has a potential right of indemnification.[52] In short, there is no reason why a third party who deals with an agent of an undisclosed principal should be disadvantaged because of the duty of indemnification inherent in every agency relationship.

Even if double litigation can be characterized as "vexatious," modern procedural devices would limit sharply any vexatious effect. As the court in *Grinder v. Bryans Road Building & Supply Co.* said:

> [P]revention of vexatious double litigation against the principal as an explanation for the election rule is greatly undercut by modern practice. If the agent is sued first, he may implead the principal as a third party defendant on the indemnification claim. If the parties are sued jointly, the agent may cross-claim for indemnity.[53]

These procedural reforms would seem to diminish the possibility of a vexatious second action. The problem of vexatiousness thus does not lend support to the election doctrine.

III. THE DIVISION OF AUTHORITY

The previous discussion should illustrate that the doctrine of election rests on an improper analysis of the liability of an undisclosed principal and his agent, and that the doctrine cannot be justified by the traditional theories used to support it. But despite the doctrine's inadequacy, the American Law Institute included it within the *Restatement of Agency*.[54] Although the drafters agreed

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52. *See* Grinder v. Bryans Rd. Bldg. & Supply Co., 290 Md. 687, 697, 432 A.2d 453, 459 (1981).

53. *Id.*

54. *See* RESTATEMENT (SECOND) OF AGENCY § 210 (1958).

that the doctrine was theoretically unsound,[55] they adopted the rule solely on the conclusion that the doctrine, however wrong, reflected the majority position.[56]

Even assuming that the majority status of a rule justifies its adoption by the drafters of the *Restatement*,[57] the election doctrine adopted by the *Restatement* is not and never was the majority rule. Criticizing the *Restatement* position shortly after its publication, Merrill showed convincingly that the authorities were considerably more divided than the drafters had realized, and that much of the "authority" for the doctrine depended on the interpretation and weight given to the existing decisions.[58] In only five states had a court of last resort applied the doctrine in an actual holding;[59] ten states had recognized the doctrine only in dicta, authority to which Merrill accorded little weight;[60] seven others that had apparently recognized the doctrine were actually treating the problem as one of procedure rather than of substance, and did not in fact hold that the third party was entitled to but one judgment;[61] and four states treated satisfaction of the claim as the decisive act.[62] Analyzing the force of this authority, Merrill concluded that "the compulsion of authority alone is not sufficient to require

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55. As Professor Seavey, the Reporter for the *Restatement*, stated: "We do not like [election by judgment]. We think it is not consistent with the underlying theory in regard to [the] undisclosed principal . . . and we think it works injustice." Seavey, *Discussion, supra* note 23, at 256; *see also* RESTATEMENT OF AGENCY § 435 comment a (Tent. Draft No. 4, 1929) ("The Reporter, his Advisers and some members of the council believe [section 435] to be unsound . . . ."); Seavey, *Unsettled Problems, supra* note 23, at 80 n.5.

56. *See* Seavey, *Discussion, supra* note 23, at 275.

57. *See* Merrill I, *supra* note 8, at 130.

58. *See id.* at 116.

59. *Id.* These states were Massachusetts, Maryland, Mississippi, Missouri, and New York. Merrill added, however, that "in Massachusetts the rule has been so modified as to avoid its harsher manifestations, in Missouri and Mississippi there are late expressions inconsistent with it, in Maryland it has but a single decision to sustain it and in New York judicial dissatisfaction [has been] indicated . . . ." *Id.* at 117.

60. *Id.* These states were Georgia, Minnesota, New Jersey, Tennessee, Utah, Virginia, Washington, Wisconsin, and possibly California and Kansas.

61. *Id.* By this Merrill meant that those states which applied the California rule did not really accept the doctrine of election by judgment:

> As things now stand, the California rule apparently is that the plaintiff may join the principal and the agent in the same suit, that he may be required to elect at the close of the case against which one he will seek judgment, that if election is not required from him, that is if, as it is phrased, there is "waiver", he is entitled to judgment against both.

Id. at 107 (footnote omitted). Aligned with California in this group are Minnesota, Missouri, Colorado, Iowa, Nevada, and South Carolina. For a discussion of the California rule today, see *infra* notes 94-102 and accompanying text.

62. Merrill I, *supra* note 8, at 117.

adoption of a rule so reprobated by legal scholars."[63]

Twenty-two years after his first article, Merrill resurveyed the states. He found little new support for election by judgment, but acknowledged that two states had produced dicta that seemed to approve of the rule,[64] and that another had held election to be fixed when suit commences.[65] He emphasized, however, that two states had adopted the satisfaction rule, one by statute,[66] and another by judicial decision,[67] and that the trend of authority seemed to be moving in that direction.[68]

A survey of the states in 1982 does not reveal a movement toward the satisfaction rule that Merrill had hoped would prevail. His basic point, however, remains true today—there is no "majority rule" that compels acceptance of the doctrine of election by judgment. In fact, the authorities are even more fragmented today than they were at the time of Merrill's survey. Our survey shows that only eleven states,[69] as well as Britain[70] and Canada,[71] have adopted the doctrine of election by judgment. One state has an election doctrine, but uses the filing of a complaint as the point of discharge.[72] Six states have rejected outright the doctrine of election by judgment, and rule that only satisfaction of the judgment in favor of the third party operates as a discharge.[73] Seven states take an intermediate approach, recognizing the doctrine of election by judgment, but applying it only if the defendant demands at

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63. *Id.* at 118.

64. Merrill III, *supra* note 8, at 614. The two states were Florida and Louisiana.

65. *Id.* (North Carolina).

66. *Id.* at 616 (New York: N.Y. CIV. PRAC. LAW § 112-b (Gilbert-Bliss 1941) (current version at N.Y. CIV. PRAC. LAW § 3002(b) (McKinney 1974))).

67. *Id.* (New Hampshire: Manchester Supply Co. v. Dearborn, 90 N.H. 447, 10 A.2d 658 (1940)).

68. *Id.* at 616-17. *But see* W. SEAVEY, STUDIES, *supra* note 8, at 215: "[M]ost of the cases I have noticed since the publication of the Restatement have been in accord with the rule stated in [section 210]."

69. These states are Florida, Kentucky, Illinois, Massachusetts, Mississippi, Missouri, New Jersey, Oklahoma, Tennessee, Texas, and Washington. *See infra* notes 75-86 and accompanying text.

70. *See supra* note 35.

71. *See* Swanton Seed Serv., Ltd. v. Kulba, 64 W.W.R. 161, 166-67 (1968); Firm of M.R.M.V.L. v. Firm of R.M.K.R.M., [1926] 3 W.W.R. 144, 151.

72. *See* Walston v. R.B. Whitley & Co., 226 N.C. 537, 541, 39 S.E.2d 375, 377 (1946). But see Howell v. Smith, 261 N.C. 256, 259, 134 S.E.2d 381, 383 (1964), in which the Supreme Court of North Carolina referred to the doctrine of election and cited *Walston*, but made no reference to the possibility of election by suit. In fact, no North Carolina decisions follow *Walston* on this point, nor even refer to the point in dicta.

73. These states are Arkansas, Georgia, Maryland, New Hampshire, New York, and Pennsylvania. *See infra* notes 87-92 and accompanying text.

trial that the third party make a binding election.[74]

The law of the eleven states classified as following the doctrine of election by judgment further demonstrates the underlying confusion of authority. Florida, Illinois, Missouri, and New Jersey all have distinct lines of authority that support the doctrine of election by judgment, but much of that authority is from intermediate appellate courts or is in the form of dicta.[75] Two states, Kentucky and Washington, are in this category even though their classification depends on dicta in cases that did not clearly present the election issue.[76] Mississippi's support for the rule is based solely on a 1909 decision that is better explained on grounds of res judicata than on any election theory.[77]

Massachusetts generally accepts the doctrine of election by

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74. These states are Alabama, California, Colorado, Kansas, Minnesota, Nevada, and Utah. *See infra* notes 94-106 and accompanying text.

75. *See* Winter v. International Motel Brokers, Inc., 388 So. 2d 232, 233 (Fla. 5th DCA 1980) (per curiam); Bertram Yacht Sales, Inc. v. West, 209 So. 2d 677, 679 (Fla. 3d DCA 1968); Armstrong v. Blackadar, 118 So. 2d 854, 861 (Fla. 2d DCA 1960); Hohauser v. Schor, 101 So. 2d 169, 170-71 (Fla. 3d DCA 1958); General Refrigeration & Plumbing Co. v. Goodwill Indus., 30 Ill. App. 3d 1081, 1088, 333 N.E.2d 607, 613 (1975); Vander Wagen Bros. v. Barnes, 15 Ill. App. 3d 550, 554, 304 N.E.2d 663, 665 (1973); Johnson v. Fischer, 108 Ill. App. 2d 433, 437-38, 247 N.E.2d 805, 807 (1969); Hugener v. Greider's Wooden Shoe, Inc., 108 Ill. App. 2d 98, 100, 246 N.E.2d 323, 325 (1969); Capitol Hardware Mfg. Co. v. Naponiello, 345 Ill. App. 272, 275, 102 N.E.2d 685, 686 (1951); Limousine & Carriage Mfg. Co. v. Shadburne, 185 Ill. App. 403, 406 (1914); Burckhardt v. General Am. Life Ins. Co., 534 S.W.2d 57, 71 (Mo. Ct. App. 1975); Kraehe v. Dorsey, 432 S.W.2d 367, 371 (Mo. Ct. App. 1968); Stambaugh v. Wedlan, 371 S.W.2d 361, 363 (Mo. Ct. App. 1963); Moss v. Jones, 93 N.J. Super. 179, 184-85, 225 A.2d 369, 371-72 (App. Div. 1966); Tabloid Lithographers, Inc. v. Israel, 87 N.J. Super. 358, 364, 209 A.2d 364, 368-69 (Law Div. 1965); Coles v. McKenna, 80 N.J.L. 48, 49-50, 76 A. 344, 345-46 (Sup. Ct. 1910). *But see* Central Lumber & Mfg. Co. v. Reyburn-Laird Real Estate, Bldg. & Constr. Co., 189 Mo. App. 405, 408-09, 176 S.W. 509 (1915) (suggesting Missouri would apply a California-type waiver rule); *cf.* Newark Paraffine Paper Co. v. Dugan, 162 N.J. Super. 575, 579, 394 A.2d 114, 116 (App. Div. 1978) (distinguishing *Tabloid* on the ground that no judgment had been entered against principal).

76. *See* Moore v. Spicer, 249 Ky. 464, 467, 61 S.W.2d 5, 6 (1933) (undercutting Merrill's suggestion that Jones v. Johnson, 86 Ky. 530, 6 S.W. 582 (1888), and Hoffman v. Anderson, 112 Ky. 893, 67 S.W. 49 (1902), supported the satisfaction rule); Pennsylvania Casualty Co. v. Washington Portland Cement Co., 63 Wash. 689, 693, 116 P. 284, 285-86 (1911); Maxwell's Electric, Inc. v. Hegeman-Harris Co. of Canada, 18 Wash. App. 358, 362-65, 567 P.2d 1149, 1152-53 (1977).

77. *See* Murphy v. Hutchinson, 93 Miss. 643, 650-51, 48 So. 178, 180 (1909). In *Murphy* the third party brought a contract action against the undisclosed principal but lost on the merits, not on the agency question. The court did not allow a subsequent suit against the agent, invoking the doctrine of election by judgment. The same result could have been reached, however, by reasoning that the third party had lost on the merits, and holding that he could not relitigate the same question on the basis of evidence that had already been considered. Reliance on *Murphy* as authority for the doctrine of election has been soundly criticized. *See* Merrill I, *supra* note 8, at 128; Stecher, *supra* note 12, at 475.

judgment,[78] but there is authority that seems to modify the doctrine in order to mitigate its potentially harsh effect. In *Evans, Coleman & Evans, Ltd. v. Pistorino*,[79] the third party was permitted to join the principal and the agent in an action to subrogate the third party to the agent's right of exoneration.[80] When the third party's judgment against the agent remained unsatisfied, the court conceded that the third party's prior judgment constituted an election, but held nevertheless that equity would permit collection from the person liable to his debtor.[81]

The only reported Oklahoma decision reaching the issue adopted the doctrine of election by judgment purely as a derivative of the election of remedies doctrine. In reaching its decision, the court in *Atlas Paving Co. v. Tate*[82] questioned whether a third party should be treated as having irrevocably elected its remedy when it obtains a judgment against the undisclosed principal for breach of contract and subsequently brings an action against the agent for fraud. The court suggested that a prior judgment on the contract would bar a subsequent action, but went on to hold that the rule would not apply when the action against the undisclosed principal is on the contract and the action against the agent is for fraudulent inducement to enter into the contract.[83]

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78. *See* Gavin v. Durden Coleman Lumber Co., 229 Mass. 576, 579-80, 118 N.E. 897, 898 (1918); Kingsley v. Davis, 104 Mass. 178, 180 (1870); *see also* Williams v. Investors Syndicate, Inc., 327 Mass. 124, 127-28, 97 N.E.2d 395, 396 (1951) (holding that a third party may not seek to have the undisclosed principal satisfy a judgment against the agent); Allen v. Liston Lumber Co., 281 Mass. 440, 445-47, 183 N.E. 747, 749 (1933).

79. 245 Mass. 94, 139 N.E. 848 (1923).

80. *Id.* at 102-03, 139 N.E. at 852. The court apparently reasoned that the agent's right to be protected by the principal from liability could be enforced by the third party—the agent's judgment creditor—before the agent incurred a loss by paying the judgment. In fact, the third party's right to subrogation did not depend upon the third party having obtained a judgment against the agent. The weight placed on the agent's "right of exoneration" by this analysis may be too great, since that right is extremely limited. The *Restatement* suggests that the right of exoneration, under which the agent may require the principal to defend the agent against the claim brought by the third party, exists when an innocent agent has been directed to perform a tortious act, or when the agent stands surety on goods bought on the principal's credit, but fails to identify any other circumstances in which exoneration might be available. *See* RESTATEMENT (SECOND) OF AGENCY § 438 comment b (1958); *see also* W. SEAVEY, HANDBOOK OF THE LAW OF AGENCY § 168(C) (1964). Furthermore, the *Pistorino* court's analysis may derive from Ames's assertion that the undisclosed principal's liability can be justified only through defining it as a result of the third party's equitable execution on the agent's right of exoneration. *See* Ames, *supra* note 2, at 449-53. In any event, *Pistorino* has not been followed in any reported decision. *But see* Comment, *supra* note 12, at 412-13.

81. 245 Mass. at 101, 139 N.E. at 852.

82. 559 P.2d 1269 (Okla. Ct. App. 1977).

83. *Id.* at 1271. For a discussion of how the election doctrine is sometimes analyzed in

Tennessee's only reported decision, *Hill v. Hill*,[84] adopted the election doctrine because of the potentially vexatious effect of the agent's right of indemnification. The Tennessee court's analysis, however, may be more consistent with a satisfaction rule, since its holding that the principal will be discharged from liability only when the agent has a right of indemnification, amounts to a holding that the principal will be discharged only by the agent's satisfaction of the third party's claim.

Texas applies a modified version of the election doctrine. The Texas courts hold that suit may be brought against both the agent and principal, but that the third party must elect at trial the person against whom he will take judgment.[85] Two recent decisions have held, however, that the third party may make that election on appeal.[86]

Those states that have adopted the satisfaction rule also demonstrate different approaches to the problem. Arkansas, New Hampshire, and Pennsylvania courts hold that neither the undisclosed principal nor his agent is discharged until the third party satisfies his claim against one or the other.[87] Maryland has recently

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terms of the election of remedies, see *supra* notes 39-47 and accompanying text.

84. 34 Tenn. App. 617, 628-30, 241 S.W.2d 865, 870 (1951). For a discussion of how the potentially "vexatious" effect of a suit to enforce the agent's right of indemnification is sometimes used to justify the election doctrine, see *supra* notes 48-53 and accompanying text.

85. Sherrill v. Bruce Advertising, Inc., 538 S.W.2d 865, 867 (Tex. Civ. App. 1976); Owen v. King, 84 S.W.2d 743, 750 (Tex. Civ. App. 1935), *rev'd on other grounds*, 130 Tex. 614, 111 S.W.2d 695 (1938); Diacomis v. Wright, 20 S.W.2d 139, 140 (Tex. Civ. App. 1929), *modified*, 34 S.W.2d 806 (Tex. App. Comm'n 1931); Nail v. Boothe, 265 S.W. 1051 (Tex. Civ. App. 1924); Veazie v. Beach Plumbing & Heating Co., 235 S.W. 695, 697-98 (Tex. Civ. App. 1921); *see also* Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc., 630 F.2d 250, 274 (5th Cir. 1980); Heffron v. Pollard, 73 Tex. 96, 99-101, 11 S.W. 165, 166 (1889).

86. In Medical Personnel Pool, Inc. v. Seale, 554 S.W.2d 211, 214-15 (Tex. Civ. App. 1977), the trial court found that the agent was not liable to the third party, but entered judgment against the principal. The plaintiff appealed the dismissal of his action against the agent, but the agent contended that the judgment against the principal amounted to an election barring any further claim. The court of civil appeals disagreed, stating that there had been no voluntary election below, and that the plaintiff should be permitted to elect on appeal the party against whom it would take judgment. *Id.* at 215. The case was recently followed by the United States Court of Appeals for the Fifth Circuit in N.K. Parrish, Inc. v. Southwest Beef Indus. Corp., 638 F.2d 1366 (5th Cir. 1981), and may represent a significant modification of Texas's doctrine of election. *But see id.* at 1373-74 (Henderson, J., concurring in part, dissenting in part).

87. *See* Williams v. O'Dwyer & Ahern Co., 127 Ark. 530, 532-33, 192 S.W. 899, 899 (1917); Hoyt v. Horst, 105 N.H. 380, 387-90, 201 A.2d 118, 123-24 (1964); Manchester Supply Co. v. Dearborn, 90 N.H. 447, 448-49, 10 A.2d 658, 659-60 (1940); Joseph Melnick Bldg. & Loan Ass'n v. Melnick, 361 Pa. 328, 334-38, 64 A.2d 773, 776-77 (1949); Beymer v. Bonsall, 79 Pa. 298, 300 (1875). The court in *Hoyt v. Horst* suggested that the third party may,

joined this group by virtue of the Maryland Court of Appeals' decision in *Grinder v. Bryans Road Building & Supply Co.*,[88] which overruled a line of cases supporting the election doctrine.[89]

Two states have also adopted the satisfaction rule by statute. The New York statute characterizes the question as one of election of remedies, and provides that the recovery of an unsatisfied judgment against one party "shall not be deemed an election of remedies which bars an action against the others."[90] The Georgia statute is similar; it provides that "[a] plaintiff may pursue any number of consistent or inconsistent remedies against the same person or different persons until he shall obtain a satisfaction from some of them."[91] The Georgia statute has been interpreted to allow a third party to sue an agent after a judgment against the undisclosed principal has been left unsatisfied.[92]

Compounding the confusion are the seven states that take an intermediate approach.[93] These states will permit entry of judgment against both the agent and principal, and execution on those judgments until satisfaction, unless the defendant demands at trial that the plaintiff elect the party against whom he will seek judgment. Judgment against both parties will be entered only if the defendant fails to make that demand.[94]

The California courts have taken the lead in developing this position. The leading decision, *Klinger v. Modesto Fruit Co.*,[95] departed from earlier case law supporting the election doctrine by holding that the third party could obtain judgments against both parties unless one of the defendants moved before judgment to require an election.[96] The *Klinger* court emphasized that the defendants would not have to make that motion until the relationship

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by an objection made at trial, require the third party to elect against whom he will take judgment. 105 N.H. at 387-90, 201 A.2d at 123-24. No subsequent New Hampshire decisions explain what the *Hoyt* court might have meant by this reference to a California-type rule.

88. 290 Md. 687, 432 A.2d 453 (1981).

89. *See* Traylor v. Grafton, 273 Md. 649, 332 A.2d 651 (1975); Garfinkel v. Schwartzman, 253 Md. 710, 254 A.2d 667 (1969); Wheaton Lumber Co. v. Metz, 229 Md. 78, 181 A.2d 666 (1962); Hospelhorn v. Poe, 174 Md. 242, 198 A. 582 (1938); E.J. Codd Co. v. Parker, 97 Md. 319, 55 A. 623 (1903).

90. N.Y. CIV. PRAC. LAW § 3002(a) (McKinney 1974).

91. GA. CODE ANN. § 9-2-4 (1982).

92. *See* Campbell v. Alford, 155 Ga. App. 689, 272 S.E.2d 553 (1980).

93. *See supra* note 74 and accompanying text.

94. *See supra* notes 44-45 and accompanying text.

95. 107 Cal. App. 97, 290 P. 127 (1930).

96. *See, e.g.*, McDevitt v. Chas. Corriea & Bros., 70 Cal. App. 245, 254, 233 P. 381, 385-86 (1924); Ewing v. Hayward, 50 Cal. App. 708, 717-18, 195 P. 970, 974 (1920) (Finlayson, J., concurring).

and liabilities of the parties had been established, but if the motion were not then made, the right to make the demand would be deemed waived.[97] The *Klinger* rule has been applied consistently and carefully by the California courts.[98] For example, one court has held that the election belongs to the third party and that the defendant cannot appropriate it by moving that the action be dismissed as to him.[99] Similarly, the courts have held that the trial court may not insist on an election if the defendants fail to demand one,[100] and that the entry of default judgment before the issue of agency is determined is not a binding election.[101] Finally, a recent decision rejected the argument that the demand for election could be made for the first time on appeal, reaffirming the theory that the demand for election must be made before final judgment.[102]

Colorado, Minnesota, and Nevada have developed a demand rule, but none have a line of authority comparable to California's.[103] Alabama and Kansas have also adopted the California rule in recent holdings,[104] as has the Supreme Court of Utah in *Costello v. Kasteler*.[105] Subsequent Utah decisions, however, have been silent about the demand requirement, thus raising some question about its status in that state.[106]

The survey conducted by the authors shows that the authorities are divided into at least three major groups,[107] that the author-

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97. 107 Cal. App. at 103-04, 290 P. at 129.

98. *See, e.g.*, Craig v. Buckley, 218 Cal. 78, 21 P.2d 430 (1933); Fleming v. Dolfin, 214 Cal. 269, 4 P.2d 776 (1931); J.M. Wildman, Inc. v. Stults, 176 Cal. App. 2d 670, 1 Cal. Rptr. 651 (1959); McEwen v. Taylor, 106 Cal. App. 2d 25, 234 P.2d 754 (1951); Miller v. San Francisco Church Extension Soc'y, 125 Cal. App. 85, 13 P.2d 824 (1932). For a discussion of the California rule, see generally Comment, *supra* note 12.

99. Miller v. San Francisco Church Extension Soc'y, 125 Cal. App. 85, 89, 13 P.2d 824, 826 (1932).

100. *See* Fleming v. Dolfin, 214 Cal. 269, 271, 4 P.2d 776, 777 (1931).

101. *See* Standard Oil Co. v. Doneux, 192 Cal. App. 2d 608, 613, 13 Cal. Rptr. 749, 751-52 (1961).

102. Roam v. Koop, 41 Cal. App. 3d 1035, 1044-45, 116 Cal. Rptr. 539, 545-46 (1974) (criticizing Acme Paper Co. v. Goffstein, 125 Cal. App. 2d 175, 270 P.2d 505 (1954)).

103. *See* Burnell v. Morrison, 46 Colo. 533, 537, 105 P. 876, 878 (1909); Conner v. Steel, Inc., 28 Colo. App. 1, 5, 470 P.2d 71, 73 (1970); Lindquist v. Dickson, 98 Minn. 369, 372, 107 N.W. 958, 959 (1906); Pecole v. Fresno Air Serv., 86 Nev. 377, 469 P.2d 397, 399 (1970); Nesbitt v. Cherry Creek Irrigation Co., 38 Nev. 150, 154, 145 P. 929, 931 (1914).

104. *See* Davis v. Childers, 381 So. 2d 200, 202 (Ala. Civ. App. 1980); Amortibanc Inv. Co. v. Rampart Associated Management, Inc., 6 Kan. App. 227, 232, 627 P.2d 389, 393 (1981).

105. 7 Utah 2d 310, 312, 324 P.2d 772, 773 (1958).

106. *See* Wilkerson v. Stevens, 16 Utah 2d 173, 174, 397 P.2d 983, 983 (1965).

107. *See supra* notes 69-74 and accompanying text. Iowa, Michigan, Ohio, South Caro-

ities within each group are themselves fragmented, and that the divisions of authority are marked by obscure and inconsistent reasoning. In sum, no "majority" rule compels adoption of the doctrine of election.

IV. A Proposed Election Analysis: Furthering a Policy of Disclosure

This article has argued that the doctrine of election for undisclosed principals and their agents is not supported by any of the arguments that have perpetuated the doctrine for over fifty years. The invalidity of most of the theoretical justifications results from an incorrect analysis of the undisclosed principal's liability.[108] Furthermore, the doctrine of election upon judgment has never be-

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lina, Virginia, and Louisiana, while not having sufficient case law to indicate which view would govern, do have fragments of authority on the question; the authority, however, is mostly in the form of dicta. *See* Campbell v. Murdock, 90 F. Supp. 297, 298 (N.D. Ohio 1950) (dictum suggesting that Ohio law permits suit against only one party); Lull v. Anamosa Nat'l Bank, 110 Iowa 537, 542, 81 N.W. 784, 784 (1900) (suggesting that Iowa might follow a California-type rule); Dodge v. Blood, 299 Mich. 364, 374-75, 300 N.W. 121, 125 (1941) (dictum supporting election by judgment); Old Ben Coal Co. v. Universal Coal Co., 248 Mich. 486, 491, 227 N.W. 794, 795 (1929) (dictum supporting election by judgment); Goodale v. Page, 92 S.C. 413, 415-16, 75 S.E. 700, 701 (1912) (joint judgment reversed on procedural grounds, not express adoption of election theory); Harris v. McKay, 138 Va. 448, 458-59, 122 S.E. 137, 140 (1924) (dictum supporting election by judgment).

Louisiana has several decisions on the question, but the direction of the Louisiana law is somewhat unclear. One case, for example, suggests that commencement of a proceeding against either party would constitute an election not to hold the other liable. Dumaine & Co. v. Gay, Sullivan & Co., 192 So. 117, 119-20 (La. Ct. App. 1939). Another case suggests that the agent and undisclosed principal may be sued in the alternative, but that a judgment *in solido* (i.e., establishing their joint and several liability on the contract) could not be obtained against them. LaBella Insulation, Inc. v. Connolly, 182 So. 2d 117, 119 (La. Ct. App. 1966). *LaBella* seems to indicate that only one judgment can be obtained. A more recent case, however, suggests that *LaBella* "stands only for the proposition that where a plaintiff seeks to recover *in the alternative* from either an agent or his undisclosed principal, he cannot obtain the *same* judgment against both," and then went on to hold that a plaintiff may obtain a judgment binding both the agent and his principal *in solido*. Intercontinental Eng'g-Mfg. Co. v. C.F. Bean Corp., 647 F.2d 621, 630 (5th Cir. 1981) (citing Foshee v. Hand-Enis Realty Co., 237 So. 2d 437, 440 (La. Ct. App. 1970) (affirming a judgment holding principal and agent liable *in solido* on a contract)) (emphasis in original). *Bean* thus seems to place Louisiana in the satisfaction camp, but further clarification from the Louisiana courts is needed.

There is also some scattered authority for election by judgment in the older federal cases that purported to apply federal common law. *See* The Jungshoved, 290 F. 733 (2d Cir.), *cert. denied*, 263 U.S. 707 (1923); Johnson & Higgins v. Charles F. Garrigues Co., 30 F.2d 251, 254 (2d Cir. 1929) (over strong dissent by Judge Augustus N. Hand); *see also* Pittsburgh Terminal Coal Corp. v. Bennett, 73 F.2d 387, 389 (3d Cir. 1934) (dicta erroneously suggesting that Pennsylvania recognizes election by judgment). *But see* Ore S.S. Corp. v. D/S A/S Hassel, 137 F.2d 326, 330 (2d Cir. 1943) (dicta critical of election by judgment).

108. *See supra* text accompanying notes 13-30.

come a "majority rule" that should be accepted for the sake of uniformity.[109]

As previously stated, there are two independent liabilities involved in the undisclosed principal context: 1) the agent's, based on his status as a contracting party under contract law; and 2) the undisclosed principal's, based on his jural status under agency law.[110] Thus, taking and executing two separate judgments is analytically consistent. Analytical consistency alone, however, may not justify abandonment of an election doctrine that has long been followed in some jurisdictions. The question becomes whether there may be another reason for replacing a rule of discharge upon judgment with a rule of discharge upon satisfaction. That reason is the need to promote efficiency and fairness in ordinary commercial dealings[111] by favoring full disclosure of material information in the marketplace.

Unfortunately, the courts that have evaluated the election doctrine have not considered these policy concerns. This is true even for those courts that have rejected the doctrine. For example, of the six states that have adopted the satisfaction rule, two (New York and Georgia) have done so simply by characterizing the question as one of election of remedies.[112] Three states (Arkansas, Pennsylvania, and New Hampshire) have adopted a satisfaction rule without a serious attempt to explain their action.[113] A recent Maryland decision adopting the satisfaction rule did explain its position in great detail, but that explanation focused primarily on why the arguments in favor of election upon judgment should be rejected.[114] The basis for that explanation, however, was reasoned acceptance of Seavey's definition of the two independent liabilities of the undisclosed principal and his agent.[115] While this approach is analytically consistent with the underlying liabilities of undisclosed principals and their agents, analytical consistency is not enough. Analysis of the election doctrine should also account for considerations of market efficiency and fairness. Evaluation of these policy considerations leads to the conclusion that courts should adopt a satisfaction rule for the undisclosed principal and

109. *See supra* text accompanying notes 54-107.

110. *See supra* text accompanying notes 13-24.

111. *See* 24 IND. L.J. 446 (1949).

112. *See supra* text accompanying notes 39-41.

113. *See supra* note 87 and accompanying text.

114. Grinder v. Bryans Rd. Bldg. Supply Co., 290 Md. 687, 432 A.2d 453 (1981).

115. *Id.* at 698-704, 432 A.2d at 460-62; *see* Seavey, *Rationale*, *supra* note 19.

his agent.

A satisfaction rule would encourage full disclosure of material information and thus promote efficiency and fairness in the marketplace.[116] When a third party deals with the agent of an undisclosed principal, he lacks the power to bring about full disclosure because he is unaware of anything further to be disclosed. In this context, only the principal has the power to create full disclosure, and he should be penalized for failing to exercise that power. His penalty should be liability to the third party until satisfaction of the third party's claim. This rule is not designed to destroy the ability of a principal to operate undisclosed; it simply imposes an additional cost for contracting without full disclosure. The satisfaction rule is thus consistent with both the liability of the undisclosed principal and a policy of full disclosure.

Analysis of an election doctrine in terms of a policy favoring full disclosure leads not only to rejection of the *Restatement* rule for undisclosed principals,[117] but also to reevaluation of the *Restatement*'s treatment of partially disclosed principals.[118] The *Restatement*'s position on the application of an election doctrine to the partially disclosed principal is that "there is no room" for such a doctrine.[119] This conclusion reflects the premise that unlike the undisclosed principal, the partially disclosed principal is a party to the contract, because the third party did intend to deal with the principal and the principal intended to be bound. The *Restatement* further provides that recovery of judgment against the agent of a partially disclosed principal does not discharge the principal.[120] The *Restatement* applies the same rules to lawsuits against

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116. *See* R. POSNER, ECONOMIC ANALYSIS OF THE LAW § 4.1 (2d ed. 1977). Posner argues that resources can be better moved from less to more valuable uses when costs and benefits involved in an exchange are fully known by the parties at the time of the exchange as opposed to when the costs and benefits involved in the exchange are not known to one party until after his agreed-upon performance.

117. RESTATEMENT (SECOND) OF AGENCY § 210 (1958).

118. *Id.* § 184. A principal is partially disclosed when the third party knows that the agent is contracting on behalf of a principal, but does not know the principal's identity. *Id.*

119. *Id.* § 184(1) comment a.

120. *Id.* § 184(1). This rule first appeared in 1929 in the RESTATEMENT OF AGENCY § 408 (Tent. Draft No. 4, 1929). Curiously, the commentary to this section stated that "[t]here are no cases upon the subject." *Id.* § 408 commentary at 25. Seavey later wrote that not only were there no cases supporting the rule but "there are a number of dicta, *contra*." W. SEAVEY, STUDIES, *supra* note 8, at 209-10. Despite this lack of authority, courts have adopted the *Restatement* rule as the "correct rule." *See* Clifton Cattle Co. v. Thompson, 43 Cal. App. 3d 11, 16-17, 117 Cal. Rptr. 500, 504 (1974); Wheaton Lumber Co. v. Metz, 229 Md. 78, 85, 181 A.2d 666, 670 (1962); *see also* Small v. Ciao Stables, Inc., 289 Md. 554, 425 A.2d 1030 (1981).

disclosed principals[121] and their agents, thus providing for purposes of election that partially disclosed and disclosed principals should be treated identically, and not discharged until satisfaction.[122]

The need to reevaluate the *Restatement* position on the rule of election and partially disclosed principals derives, in part, from this grouping of disclosed and partially disclosed principals. When a third party contracts with the agent of a disclosed principal, only the principal is a party to the contract.[123] Since a third party who knows the identity of the principal is relying only on the principal's credit and ability to perform, he is restricted to the one cause of action against the principal. If the third party was not satisfied with the principal's exclusive liability, he could make a special agreement with the agent for the agent to become a party to the contract. In the absence of such a special agreement, the law presumes that the principal will be the only party bound by the contract. Because there is no choice of defendants available to the third party, no doctrine of election can apply to suits against the disclosed principal.

In contrast, both the partially disclosed principal and his agent are parties to a contract made by the agent on behalf of the partially disclosed principal.[124] The fact that the third party did not know the principal's identity at the time the contract was made does not preclude the third party from enforcing the contract against the principal,[125] and against the agent as well. The result is that the third party has rights against both undisclosed and partially disclosed principals and their respective agents, although the nature of these liabilities may differ.[126]

These rules of liability for the three types of principals and their agents are well-settled. When dealing with the agent of the disclosed principal, the third party knows the principal's identity and is able to assess the risk of contracting with him. But when dealing with the agents of partially disclosed and undisclosed principals, the third party is unable to fully assess his contract risks and is relying, at least in part, on the agent's ability to perform. He

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121. If the third party knows the identity of the agent's principal, the principal is disclosed. RESTATEMENT (SECOND) OF AGENCY § 4(1) (1958).

122. *Id.* § 184.

123. *Id.* §§ 147, 320.

124. *Id.* §§ 147, 321.

125. *Id.* § 147 comment a.

126. *See supra* text accompanying notes 13-24.

thus has the benefit of two independent liabilities, upon each of which he may, in the *Restatement*'s view, take judgment.

The availability of these two liabilities, however, should not foreclose the possibility of an election rule in the partially disclosed principal context. The parties, after all, have been dealing on the basis of incomplete disclosure; the policy favoring full disclosure may mandate that some rule be applied to compensate for the informational imbalance. This rule may be an election doctrine. The question thus becomes whether a policy favoring full disclosure requires application of the same rule to both the undisclosed and the partially disclosed principal, or whether different rules should be developed to account for the different status of each in light of ordinary commercial practices.[127]

At first blush, the policy of full disclosure seems to mandate a satisfaction rule for a partially disclosed principal, since he, like the undisclosed principal, has withheld his identity from the third party. The partially disclosed principal, however, has disclosed his existence, and the third party is aware of the presence of an interest other than the agent's. This disclosure may justify treating the undisclosed and partially disclosed principals differently.[128] If they are not treated differently, the partially disclosed principal would be paying a penalty for the third party's assumption of the risk of dealing on the basis of incomplete information. Since both the partially disclosed principal and the third party share responsibility for the lack of full disclosure, it is improper to place the burden wholly on the partially disclosed principal by analogizing him to the undisclosed principal. The question now becomes how to allocate the responsibility and the burdens of incomplete disclosure.

It could be argued that more responsibility should be placed on the partially disclosed principal, because he is the one who had initiated dealings on the basis of incomplete disclosure. The third party, however, has assumed the risks of incomplete disclosure, and this should mitigate the principal's fault. In fact, the peculiarity of the third party's position suggests that his responsibility might be greater, and that application of a rule of election upon judgment to suits by the third party against the partially disclosed

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127. *See generally* 24 IND. L.J. 446 (1949).

128. The undisclosed principal has been described as a "device . . . of dubious social utility. . . . Often it is the cloak behind which it is sought to perpetrate outright fraud." Merrill I, *supra* note 8, at 129. As a result, "[t]here is no reason why the law should seek to relieve those who have adopted the device at the expense of the one against whom they have employed it." *Id.* at 129-30.

principal or his agent may be appropriate.

Under the *Restatement*'s satisfaction rule for partially disclosed principals,[129] a third party who makes no further inquiry when he learns of the principal's existence, but not his identity, and agrees to contract with someone of whom he knows nothing, is given a virtual windfall. A windfall results because the *Restatement*'s election rules do not require the third party to make an election, but permit him to proceed against both the partially disclosed principal and his agent until satisfaction. This rule is designed to protect the third party who has relied on the credit of both principal and agent, but the effect of the rule may be to reward third parties who are willing to deal without full knowledge of the other contracting party.

This result is undesirable even if the third party assumed the risks of partial disclosure, and even if he has jeopardized no interests but his own.[130] Although the third party should be allowed to assume the risk of incomplete disclosure, he should not be rewarded for doing so.[131] A rule of election upon judgment in suits by a third party against a partially disclosed principal or his agent would deny the third party that reward.[132] Although this election

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129. *See* RESTATEMENT (SECOND) OF AGENCY § 184 (1958).

130. *But see* R. POSNER, *supra* note 116, § 4.1 (efficiency of marketplace may be damaged by parties who contract without fully and correctly apprehending costs and benefits of the exchange).

131. The authors do not intend to change the rule that an agent who seeks to avoid personal liability on a contract he has signed on behalf of his principal has a duty to disclose his principal's identity; the third party with whom he deals does not have the duty to discover it. *See* Hodges-Ward Assocs. v. Ecclestone, 156 Ga. App. 59, 63, 273 S.E.2d 872, 876 (1980); Saco Dairy Co. v. Norton, 140 Me. 204, 206, 35 A.2d 857, 858 (1944); Casey v. Sanborn's Inc., 478 S.W.2d 234, 239 (Tex. Civ. App. 1972). We agree that if the agent wants to avoid liability on the contract, the burden to disclose should be on him. We do believe, however, that the third party's failure to ask the principal's identity when he has been told of the principal's existence should not generate a reward. The third party should not lose all rights against the agent, but should lose his right to pursue the agent after judgment has been entered against the partially disclosed principal.

132. *See* Comment, *Election of Remedies by Party Dealing with Agent of Undisclosed Principal*, 39 YALE L.J. 265 (1929). This Comment appears to be the only support for the view that a partially disclosed principal should be discharged earlier than an undisclosed principal. The Comment argues that because of the "deception" involved in the undisclosed principal context, the law should "go further" to protect the third party than in the partially disclosed principal context. *Id.* at 267. The Comment also argues that in the partially disclosed principal context, "business convenience of both buyer and seller demands that the responsibility be fixed on one party as soon as possible, [because] where all the parties anticipated an eventual election, there can be little unfairness in requiring an early choice." *Id.* at 270. In the undisclosed principal context, however, the third party has acted reasonably and is unaware of the eventual need of an election, and therefore should be permitted to recover a judgment against both the agent and the principal.

rule might discharge the party initially responsible for the incomplete disclosure, that result is justifiable because it prevents a third party from capitalizing on his own perpetuation of the incomplete disclosure.

This analysis in terms of a policy of full disclosure should lead to the conclusion that the rule of election upon judgment should not be applied to suits against the undisclosed principal or his agent. There is no conflict between this conclusion and the formal analysis that derives a satisfaction rule from the existence of two independent liabilities of principal and agent. There is a certain tension, however, between the suggestion that a doctrine of election may have some place in suits against the partially disclosed principal and his agent, and the formal analysis, which derives a satisfaction rule from the independent contractual liabilities of the partially disclosed principal and his agent. A decision to resolve this tension in favor of a rule of election depends on the weight attributed to a policy favoring full disclosure, and the degree of incompatibility between the formal analysis and that policy.

The key point of this thesis is that formal analysis of the underlying liabilities of principal and agent must be coordinated with a policy that takes into account the need to promote efficiency and fairness in the marketplace. That policy produces a clear conclusion with respect to undisclosed principals; however, with respect to partially disclosed principals, it generates recognition of the need for a more complex balancing of the interests involved.

One distinction should be drawn. If the undisclosed principal or his agent can prove that he changed his position in justifiable reliance upon the third party's manifestation that he would look solely to the other, and that this change of position caused prejudice, there may be an equitable basis for discharge before satisfaction. A discharge based on detrimental reliance derives from basic equitable principles, and not from any principles of agency law. An equitable discharge should, therefore, be available to both the agent and the undisclosed principal.[133] The same equitable

133. This conclusion is at odds with the *Restatement* approach, which permits discharge on the basis of detrimental reliance only for the agent of the undisclosed principal, not for the undisclosed principal. *See* RESTATEMENT (SECOND) OF AGENCY §§ 209, 336, 337 (1958). A discharge of the undisclosed principal or his agent on the basis of detrimental reliance is not inconsistent with the rule of discharge upon satisfaction. *See* Newark Parafine Paper Co. v. Dugan, 162 N.J. Super. 575, 394 A.2d 114 (App. Div. 1978); *see also* Tabloid Lithographers, Inc. v. Israel, 87 N.J. Super. 358, 209 A.2d 364 (Law Div. 1965) (recognizing an election doctrine based on justifiable detrimental reliance); *cf.* Grinder v. Bryans Rd. Bldg. & Supply Co., 290 Md. 687, 432 A.2d 453 (1981). *Grinder* expressly overruled E.J.

considerations should also permit discharge of both the partially disclosed principal and his agent on the grounds of detrimental reliance.

V. CONCLUSION

The agency doctrine of election has remained obscure for too long because of imprecise formal analysis and a lack of policy analysis. As this article has demonstrated, the traditional doctrines of election rest upon an erroneous conception either of the liability of undisclosed principals, the potentially "vexatious" effect of double actions, or the weight of authority. Furthermore, the doctrine of election conflicts with a policy favoring full disclosure in commercial dealings. Reevaluation of the undisclosed and partially disclosed principal in terms of that policy suggests that while a rule of election upon judgment may not be appropriate for undisclosed principals, it may further the goal of full disclosure when applied in the context of partially disclosed principals.

Codd Co. v. Parker, 97 Md. 319, 55 A. 623 (1903), which not only adopted the election upon judgment rule, but held, in effect, that "election is estoppel." *Id.* at 707-08, 432 A.2d at 464. But it is doubtful that by overruling *Codd, Grinder* rejected not only the election by judgment rule, but also election by estoppel. This argument would be reading too much into *Grinder* as no estoppel argument was presented in the case, and estoppel was never discussed in the opinion. Moreover, *Grinder*'s basis for rejecting the doctrine of election upon judgment was based on its rejection of the one obligation/alternative claims theory and did not question a rule of discharge based on detrimental reliance.