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COMMENTS

THE DISTINCTION BETWEEN NEGOTIORUM GESTIO AND MANDATE

Both negotiorum gestio and mandate regulate an actor's management of another's affairs; however, the former relationship arises in quasi contract whereas the latter is contractual. Negotiorum gestio is the relationship that exists between two parties when one manages, without authority, the affairs of the other.¹ Mandate, on the other hand, is "an act by which one person gives power to another to transact for him and in his name, one or several affairs."² As Planiol explained, the essential difference between contract and quasi contract is the presence of mutual consent.³ The distinction between the quasi contract of negotiorum gestio and the contract of mandate becomes difficult to make when one considers that consent to a contract may be implied from the action, inaction, or silence of a party.⁴ The difficulty exists because both implied contract and negotiorum gestio arise without an express agreement between the parties. That is, distinction must be based on something other than the expressions of the parties.

The objective of this paper is to set forth a method of analysis by which negotiorum gestio may be distinguished from mandate.⁵ To this end, there will be presented: first, a discussion of the significance of making the distinction; second, the criteria developed in civilian jurisdictions by which to distinguish negotiorum gestio from mandate; third, a proposed analysis for making the distinction; fourth, the Louisiana

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1. See La. Civ. Code arts. 2295-2300.
2. La. Civ. Code art. 2985.
3. 2 M. Planiol, *Traité Élémentaire de Droit Civil*, pt. 1, No. 811, at 432 (La. St. L. Inst. trans. 1959).
4. La. Civ. Code arts. 1927, 1942.
5. This discussion could be founded on the simple factual situation wherein one party acts in the affairs of another. Without more information, the legal relationship between the actor and principal cannot be classified. It is essential that one know whether the principal consented, expressly or implicitly, to the action. This situation is to be differentiated from that where the acting party did not intend to manage another's affairs but, rather, was concerned only with his own interest. In the latter situation, negotiorum gestio is wholly inapplicable. See *Hartford Ins. Co. v. Stablier*, 476 So. 2d 464 (La. App. 1st Cir. 1985). This is not necessarily true for mandate. See *Sentell v. Richardson*, 211 La. 288, 29 So. 2d 852 (1947).

jurisprudence that supports this method of analysis; and fifth, an application of the rules derived in the above sections to one particular case.

I. SIGNIFICANCE OF DISTINGUISHING MANDATE AND NEGOTIORUM GESTIO

The classification of an actor's management of another's affairs results in important legal consequences. These consequences include the actor's standard of care and potential liability, the actor's duty of performance, the effect of the principal's death on the duty of the actor, the actor's rights of action, and the capacities of the parties. In some instances, classification of a relationship as either mandate or negotiorum gestio will have little or no effect on its outcome. At other times, however, such a classification may result in pronounced distinctions. Thus, it becomes necessary to be aware of not only the similarities that exist between mandate and negotiorum gestio, but more importantly, the legal distinctions that exist.

A. *Standard of Care and Liability*

1. *Negotiorum Gestio*

The Louisiana Civil Code specifically outlines the degree of care required of the gestor. Civil Code article 2298 provides that the gestor is "obliged to use all the care of a prudent administrator" when managing the affairs of another. This degree of care also has been referred to as "ordinary care"⁶ or "ordinary diligence."⁷ A gestor who fails to use ordinary care in the management of another's affairs will be held liable for his improper or negligent management. For example, in *Beavers v. Stephens*,⁸ a father who undertook the management of his daughter's one-half interest in a liquor store was held accountable for the serious decline in profits that were caused by his mismanagement.

Likewise, in *Smith v. Hudson*,⁹ article 2298 was used to define the standard of performance required of a party seeking recovery under a quasi contract. Smith was seeking recovery for his costs of renting heavy equipment on behalf of the defendant. The court found that Smith's rental of heavy equipment too small to perform the job adequately was

6. *American Mfrs. Mut. Ins. Co. v. United Gas Corp.*, 159 So. 2d 592, 596 (La. App. 3d Cir. 1964).

7. *Bayon v. Prevost*, 4 Mart. (o.s.) 58 (La. 1815).

8. 341 So. 2d 1278 (La. App. 3d Cir. 1977).

9. 519 So. 2d 783 (La. App. 1st Cir. 1987), discussed *infra* in text accompanying notes 167-81.

"less than prudent" and awarded him only a fraction of the actual rental expense.¹⁰

Article 2298 provides an exception in situations where the gestor undertakes management due to "circumstances of friendship or of necessity."¹¹ In such instances, the judge may allow these considerations "to mitigate the damages which may arise from the faults or the negligence of the manager."¹² *Chance v. Stevens of Leesville, Inc.*,¹³ is a recent case that applied and broadly extended the "mitigation of damages" principle. In *Chance*, a mobile home purchaser brought a redhibition action against Stevens of Leesville, the seller, and Winston Homes, Inc., the purchaser of the assets of the bankrupt mobile home manufacturer. The trial court awarded judgment in favor of the plaintiff and against Winston Homes.¹⁴ Winston Homes appealed, contending that the trial court erred in finding that it had assumed the manufacturer's warranty obligations on the plaintiff's trailer when it purchased the assets of the bankrupt mobile home manufacturer. Applying the principles of negotiorum gestio, the third circuit held that the voluntary act of Winston Homes in undertaking the bankrupt manufacturer's warranty obligations on the plaintiff's mobile home created a quasi contract, which rendered Winston Homes liable for the purchase price and reasonable expenses occasioned by the sale.¹⁵ However, noting "that Winston Homes undertook the warranty obligations upon the [plaintiff's] mobile home as a *good-will measure*,"¹⁶ the court utilized article 2298 to mitigate the plaintiff's recovery so as to exclude an award of damages or attorney's fees. According to the court, "Under C.C. art. 2298 the circumstances surrounding the undertaking of another's obligations may authorize the mitigation of damages by the court."¹⁷ Although Winston Homes' undertaking did not arise out of "circumstances of friendship or of necessity," the court considered its goodwill gesture sufficient to warrant the "mitigation of damages" protection authorized by Louisiana Civil Code article 2298.

2. *Mandate*

Although the Louisiana Civil Code does not provide the specific degree of care required of a mandatary, article 3003 renders a mandatary

10. *Id.* at 787.

11. La. Civ. Code art. 2298.

12. *Id.*

13. 491 So. 2d 116 (La. App. 3d Cir.), writ denied, 495 So. 2d 302 (1986).

14. *Id.* at 118.

15. *Id.* at 122.

16. *Id.* at 123 (emphasis added).

17. *Id.*

liable "not only for his unfaithfulness in his management, but also for his fault or neglect."¹⁸ The mandatary is bound to discharge the functions of his procuration with "ordinary diligence"¹⁹ or "that degree of care required of an ordinarily reasonably prudent person under the same or similar circumstances."²⁰ In *Batiste v. Security Insurance Group*,²¹ the court held an insurance agent liable for failing to use reasonable diligence in procuring the requested coverage. The court stated that the cause of action for a mandatary's negligence "brought under the provisions of LSA-C.C. Article 3003 are identical to those of a cause of action brought under the provisions of LSA-C.C. Articles 2315 and 2316"²²

As with negotiorum gestio, however, the provisions on mandate provide an exception in favor of the gratuitous mandatary. Article 3003 also provides that "the responsibility with respect to faults is enforced less rigorously against the mandatary acting gratuitously, than against him who receives a reward." In *Weinhardt v. Weinhardt*,²³ for example, a gratuitous mandatary acting with indefinite powers was held not to be personally liable for the monies lost from her principal's estate. Although the mandatary's decisions in handling the estate "were unwise and ill-advised," the court found that she had acted "in complete good faith and only with the best interests of [the principal] in mind."²⁴ While *Weinhardt* presents a good example of the less rigorous enforcement of a gratuitous mandatary's fault, it is also illustrative of Civil Code article 3006, which provides that a mandatary with an indefinite power²⁵ "can not be sued for what he has done with good intention."²⁶

Although the degree of care required of the mandatary and the gestor are essentially the same, the provisions governing mandate are more detailed and provide for the imposition of liability upon the mandatary in a number of specific situations. For example, the mandatary may be held liable when he procures a substitute to act in his place. Article 3007 provides that

[t]he attorney is answerable for the person substituted by him to manage in his stead if the procuration did not empower him to substitute. If the agent engages a substitute to act for him

18. La. Civ. Code art. 3003.

19. *Madeira v. Townsley*, 12 Mart. (o.s.) 84, 87 (La. 1822).

20. *Johnson v. Schneider*, 271 So. 2d 579, 586 (La. App. 1st Cir. 1972).

21. 416 So. 2d 279 (La. App. 3d Cir.), writ denied, 421 So. 2d 909 (1982).

22. *Id.* at 284.

23. 214 So. 2d 254 (La. App. 4th Cir. 1968).

24. *Id.* at 259.

25. La. Civ. Code art. 2995. An indefinite power allows the mandatary "to do whatever may appear conducive to the interest of the principal" *Id.*

26. La. Civ. Code art. 3006.

without the consent of the principal, the agent alone is responsible for the substitute's negligent or unlawful acts.²⁷

However, it has been held that if the procuration did empower the mandatary to substitute, the mandatary will not be liable for the acts of the substitute.²⁸ This broad statement must be qualified by article 3008, which renders a mandatary who is empowered to appoint an unnamed substitute answerable if "he has appointed for his substitute a person notoriously incapable, or of suspicious character."

B. *Duty of Performance*

1. *Negotiorum Gestio*

When a gestor undertakes the management of another's affairs, he "contracts the tacit engagement to continue [the management he has begun] and to complete it, until the owner shall be in a condition to attend to it himself . . ." ²⁹ Thus, in addition to the duty of performing the management with ordinary care, the gestor also assumes a duty to complete the management.³⁰ The Civil Code has no provision allowing the gestor to terminate unilaterally his management prior to either the completion of the task or the assumption of the management by the owner. However, the gestor who undertakes the management of a particular affair is not bound to manage other, unconnected affairs.³¹

2. *Mandate*

The mandatary "is bound to discharge the functions of the procuration, as long as he continues to hold it, and is responsible to his principal for the damages that may result from the non-performance of his duty."³² The Civil Code provides eight instances in which a mandatary would no longer continue to hold his procuration.³³ Reasons for termination include such occurrences as revocation by the principal, resignation or renunciation by the mandatary, and the occurrence of a resolutive condition stipulated in the procuration. Assuming that a mandatary's power did not terminate prior to the accomplishment of the purpose for which the power was created, his duty to discharge the

27. *Buisson v. Potts*, 180 La. 330, 340, 156 So. 408, 411 (1934).

28. *Hum v. Union Bank*, 4 Rob. 109 (La. 1843).

29. La. Civ. Code art. 2295.

30. *American Mfrs. Mut. Ins. Co. v. United Gas Corp.*, 159 So. 2d 592, 596 (La. App. 3d Cir. 1964).

31. La. Civ. Code art. 2296.

32. La. Civ. Code art. 3002.

33. La. Civ. Code art. 3027.

procuration with ordinary care would be very similar to the duty of a gestor. A key distinction, however, is the mandatary's ability to renounce the procuration prior to its completion, an ability that the gestor does not have. Finally, incidental to the mandatary's duty of performance, Civil Code article 3004 requires the mandatary to render an account of his management, unless the principal expressly dispenses with the requirement.

C. *Death*

1. *Negotiorum Gestio*

Civil Code article 2297 provides that the duties undertaken by the gestor do not cease, even if the person for whom the gestor is acting dies prior to the completion of the management. The duties of the gestor continue until the deceased's heirs can take over the management. The Civil Code does not provide for what should occur upon the death of the gestor.

2. *Mandate*

The mandatary's power terminates upon the death of either the principal or the mandatary.³⁴ The mandatary, however, is bound to complete a task commenced at the time of the principal's death if danger would result from the delay of performance.³⁵ Also, if the mandatary, ignorant of the principal's death, continues under his power of attorney, the transactions performed during the period of the mandatary's ignorance are considered valid, provided that the third persons with whom the mandatary contracts are in good faith.³⁶ If the mandatary should die, article 3034 provides that "his heir ought to inform the principal of it, and in the meantime, attend to what may be requisite for the interest of the principal."

D. *Rights of Action of the Gestor and the Mandatary*

1. *Negotiorum Gestio*

The owner whose business has been well managed is obliged by equity "to comply with the engagements contracted by the manager, in his name; to indemnify the manager in all the personal engagements he

34. La. Civ. Code art. 3027(3).

35. La. Civ. Code art. 3002.

36. La. Civ. Code art. 3032, 3033.

has contracted; and to reimburse him *all useful and necessary expenses*.”³⁷ In *Police Jury v. Hampton*,³⁸ the police jury of Orleans Parish sued Hampton, a South Carolina resident, to recover the amount it had expended to repair the levee on Hampton’s uninhabited plantation. The court rendered its judgement in favor of the police jury for the cost of the repairs. While the amount of recovery was limited to the “necessary expenses” of the police jury, the court used very broad language in describing a gestor’s right of reimbursement. According to the court, a gestor who undertakes necessary and useful work on behalf of an owner “could recover the amount of the expenses incurred, or the value of the repairs.”³⁹ The court apparently combined the principle of unjust enrichment with the negotiorum gestio doctrine,⁴⁰ for it later stated, “[Hampton] should, therefore, pay for the labour by which he was benefitted; and it would be unjust that, in this manner, he should enrich himself at the expense of others.”⁴¹

2. Mandate

Civil Code article 3022 provides that “[t]he principal ought to reimburse the expenses and charges that the agent has incurred in the execution of the mandate, and pay his commission where one has been stipulated.” If the mandatary is without fault, the principal cannot dispense with or reduce the amount of reimbursement, even if the procuration was unsuccessful.⁴² Article 3023 gives the mandatary the right to satisfy his expenses and costs by retaining property he is holding on behalf of the principal. The expenses and charges incurred by the mandatary in the execution of his procuration should be useful and necessary for the exercise of such power. If the mandatary’s expenses were not useful or necessary in accomplishing the mandate, the incursion of such an expense would not be consistent with the requirement that the mandatary use ordinary care in fulfilling his power. Thus, as with the gestor, the mandatary also should be limited to recovering expenses and charges that are necessary and useful.

Unlike the gestor, however, the mandatary is entitled to recover a commission for his services where one has been stipulated. A procuration is presumed to be gratuitous unless there is an agreement to the contrary.⁴³ An express agreement regarding compensation is not essential.

37. La. Civ. Code art. 2299 (emphasis added).

38. 5 Mart. (n.s.) 389 (La. 1827).

39. Id. at 392.

40. Comment, Negotiorum Gestio in Louisiana, 7 Tul. L. Rev. 253, 257 (1933).

41. 5 Mart. (n.s.) at 397.

42. La. Civ. Code art. 3022.

43. La. Civ. Code art. 2991.

Such an agreement can be inferred from the relation of the parties and the nature of the services rendered.⁴⁴ In such situations, the principal must pay the agent reasonable compensation for his services.⁴⁵ If the principal revokes the procuration, rendering the compensation provision unenforceable, the mandatary is entitled to compensation for the services he provided prior to the revocation. Such compensation is generally determined on a quantum meruit basis.⁴⁶ A mandatary is also entitled to be compensated for losses he has incurred in executing his mandate, provided that he has not acted imprudently.⁴⁷

E. Capacity of the Parties

1. Negotiorum Gestio

Any person, even a person who is incapable of consent, may, by the act of another, become bound to that person in a quasi contractual obligation.⁴⁸ The reason for this, according to Civil Code article 2300, is "because the use of reason, although necessary on the part of the person whose act forms the quasi contract, is not requisite in those by whom, or in whose favor, the obligations resulting from the act, are contracted." As stated by one author, "[I]ncapacity protects the individual against his own acts, but not against obligations which originated in a juridical act not accomplished by him and independent of his will."⁴⁹ Regarding the capacity of the gestor, the Code is not specific. One might assume that a gestor would be required to have the capacity to contract⁵⁰ since his acts of management give rise to the quasi contractual relationship between he and the owner. However, the Civil Code requires only that the gestor have "the use of reason."⁵¹ Since the use of reason on the part of the person who acts to form the quasi contract is contrasted, in article 2300, with the incapacity of the person in whose favor the act is performed, it is plausible to equate the use of reason with the capacity to consent or the capacity to contract.

44. Succession of Krekeler, 44 La. Ann. 726, 11 So. 35 (1892); Succession of Fowler, 7 La. Ann. 297 (1852); McMahon v. Baench, 13 Orleans App. 383 (1916).

45. Interstate Elec. Co. v. Neugas, 3 La. App. 353 (Orl. 1925).

46. Bown v. Holland, 392 So. 2d 726 (La. App. 3d Cir. 1980); Barranger, Barranger and Jones v. Crompt, 286 So. 2d 474 (La. App. 1st Cir. 1973), writ denied, 288 So. 2d 647 (1974).

47. La. Civ. Code art. 3024.

48. La. Civ. Code art. 2300.

49. Comment, *supra* note 40, at 256.

50. La. Civ. Code art. 1918.

51. La. Civ. Code art. 2300.

2. Mandate

Unlike the capacity of the owner under *negotiorum gestio*, the power conferred by a procuration must be one that the principal himself is capable of exercising.⁵² A principal who is incapable of acting on his own cannot circumvent his incapacity by acting through a capable mandatary. The Civil Code is less specific regarding the capacity of the mandatary. The only provision on the subject is article 3001, which allows an emancipated minor to be appointed as a mandatary. In such instances, the principal has no action against the minor, "except according to the general rules relative to the obligations of minors."⁵³ By specifically allowing an emancipated minor to act as a mandatary, article 3001, *a contrario sensu*, could be said to implicitly exclude unemancipated minors from holding such a position. Extending this reasoning a bit further, if an unemancipated minor is prohibited from acting as a mandatary, similarly situated individuals (namely, persons without contractual capacity) should be prohibited from holding the position as well. Therefore, reading article 1918 *in pari materia* with article 3001, interdicts and persons deprived of reason should also be incapable of acting as mandataries.

F. Synopsis of Distinctions

The law governing mandate and *negotiorum gestio* is very similar in certain aspects while it is quite different in others. Both the gestor and the mandatary are held to a "reasonably prudent" or "ordinary" standard of care, but this standard will be less rigorously enforced in the case of the mandatary who is acting gratuitously, and damages may be mitigated in the case of the gestor who is acting out of necessity or friendship. Both the gestor and the mandatary are entitled to recover necessary and useful expenses and charges incurred in the course of their performance. Both the gestor and mandatary have a duty to complete their performance. However, only the mandatary, who is allowed to renounce the mandate, can unilaterally end his performance prior to completion of the task. This is but the first of several important distinctions.

The Civil Code, while silent on the liability of the gestor, extensively regulates the liability of the mandatary, imposing liability for negligent acts of an unauthorized substitute, and for negligent appointment of an authorized substitute. Unlike the gestor, who must continue his duties despite the death of the principal, the mandatary's duty of performance terminates upon the death of the principal. However, in circumstances

52. La. Civ. Code art. 2987.

53. La. Civ. Code art. 3001.

where a delay in the mandatary's performance would result in "danger," an exception is made, and the mandatary must complete the task.⁵⁴ The person for whom a gestor acts need not have capacity. Thus, a gestor may perform any useful act on his behalf. A mandatary's performance, however, is limited to acts that the principal has capacity to perform. Finally, a mandatary is entitled to recover a commission for his services if one has been agreed to. Such an agreement can be inferred from the nature of the services performed and the relation of the parties. The Code does not provide a commission for the services of the gestor.

Having explained the consequences of differentiating between mandate and negotiorum gestio, it next becomes important to discuss the method by which the two relationships are distinguished.

II. CRITERIA, AS ESTABLISHED IN CIVILIAN JURISDICTIONS, TO DISTINGUISH BETWEEN NEGOTIORUM GESTIO AND MANDATE

The task of distinguishing between negotiorum gestio and implied or tacit mandate has been considered in civilian jurisdictions. As noted by one writer, "[T]here are two elements which tend to confuse the line of demarcation between negotiorum gestio and express or tacit mandate: the knowledge of the owner and his express or tacit ratification."⁵⁵

A. Knowledge

Planiol agrees that knowledge of the management on the part of the principal gives rise to mandate, not negotiorum gestio:⁵⁶

Where the principal knows of the management and does not oppose it, the operation easily becomes a mandate, since mandate can be tacit: by allowing him to act as agent, the principal is reputed to have tacitly given him a mandate to do so.⁵⁷

Similarly, Raymundo M. Salvat noted in his treatise, that whether negotiorum gestio rather than mandate characterized the rights and obligations of two parties depends on when the principal learned of the actor's conduct.⁵⁸ More specifically, if the principal learned of it in time to object and failed to do so, then he will be held to have been a party

54. See *supra* text accompanying notes 34-35.

55. Comment, Management of the Affairs of Another, 36 Tul. L. Rev. 108, 124-25 (1961) (footnotes omitted).

56. 2 Planiol, *supra* note 3, pt. 2, No. 2273, at 309.

57. *Id.*

58. 3 R. Salvat, *Tratado de Derecho Civil Argentino: Fuentes De Las Ogligaciones* § 2582, at 595-96 (2d ed. 1954).

to a tacit mandate.⁵⁹ If, on the other hand, his knowledge was acquired too late, then the legal relationship is one of *negotiorum gestio*.⁶⁰

R. D. Leslie, in his commentary on *negotiorum gestio* in Scotland,⁶¹ concluded that the requirement⁶² that the principal of full capacity be absent during the gestor's undertaking means that the principal must be "absent from the administration in the sense of being ignorant of it"⁶³ If the principal is present and makes no objection, then, having given a tacit mandate, he has authorized conduct that is required to be unauthorized for *negotiorum gestio* to be applied.⁶⁴

Additionally, according to Pothier, *negotiorum gestio* requires that "[t]he person who has carried it out must have done so without the order *and* without the knowledge of the person to whom this business belongs."⁶⁵ From the structure of his analysis, Pothier clearly proposed two separate and distinct factors: that the gestor's conduct be without the principal's order and that it be without the principal's knowledge.⁶⁶

As to the former, he noted that if an actor manages the principal's affairs pursuant to his order then their relationship is in mandate.⁶⁷ Analysis of this requirement leads to other conclusions. For instance, if a mandatary exceeds his authority, then he stands as a gestor to the extent of these excessive acts because they were carried out without the principal's authorization.⁶⁸ Additionally, if the actor manages the affairs of the principal in accordance with orders given by a third party, then the actor may choose between a cause of action in mandate against the third party and an action in *negotiorum gestio* against the principal.⁶⁹ Again, as between the actor and the principal, *negotiorum gestio* applies because the former acted without the order of the latter.⁷⁰

As to the second requirement—that the gestor act without the principal's knowledge—Pothier is in accord with the views of Planiol and Leslie.⁷¹ That is, if the principal knowingly allows the gestor to manage

59. *Id.*

60. *Id.*

61. Leslie, *Negotiorum Gestio in Scots Law: The Claim of the Privileged Gestor*, 28 *Jurid. Rev. N.S.* 12 (1983).

62. *Negotiorum gestio's* requirement of absence or incapacity as developed in the Roman law "has been received into Scots law" *Id.* at 33.

63. *Id.* at 34.

64. *Id.* at 18.

65. R. Pothier, *Traité Du Contrat de Mandat* § 167, at 96 (B. Rogers trans. 1979) (emphasis added).

66. *Id.* §§ 175-84, at 100-04.

67. *Id.* § 175, at 100.

68. *Id.* § 177, at 100-01.

69. *Id.* § 179, at 101; see also Lorenzen, *The Negotiorum Gestio In Roman and Modern Civil Law*, 13 *Cornell L.Q.* 190, 193 (1928).

70. *Id.*

71. See *supra* notes 56-64 and accompanying text.

his affairs then the principal has granted a tacit mandate.⁷² He held the opinion that anytime a party knew another was acting on his behalf and did not object then that party should be deemed to have consented to this action, thereby giving a mandate to the actor:⁷³

The contract of mandate can even be contracted tacitly, without the intervention of any declaration whatsoever of the parties' desire and willingness; for, on any occasion when, to the complete knowledge of that person, I carry out any one of his business affairs, then there is presumed, by this fact alone, to have been contracted between us a contract of mandate, by virtue of which he gives me responsibility for the business I am carrying out. This is in full conformity with the law.⁷⁴

In contrast, if the principal knows of the actor's proposed conduct but objects to it, and, despite this prohibition, the actor carries out his intentions, then there is no quasi contract of *negotiorum gestio*.⁷⁵ Although the actor would be liable to the principal, the reverse would not be true.⁷⁶ Nevertheless, the actor may have other equitable means of relief.⁷⁷

Finally, as regards this knowledge distinction, the redactors of the Civil Code of Spain have adhered to this test⁷⁸ and have expressed lack of knowledge as a prerequisite in certain instances.⁷⁹ Thus, *negotiorum gestio*'s requirement that the principal be unaware of the actor's conduct continues to be of significance in the civil law.

B. Ratification

The previous subsection considered the effect of the principal's knowledge of the actor's conduct as of the time the action is undertaken. This section considers the effect of the principal's knowledge after the action has been completed.

Ratification is the act by which one party gives his consent to a previously committed act that was incurred on his behalf without authority.⁸⁰ Ratification may be express or tacit.⁸¹ Moreover, it is the equivalent of prior authority, which places the parties' legal relationship

72. Pothier, *supra* note 65, § 180, at 102.

73. *Id.* § 29, at 16-17.

74. *Id.*

75. *Id.* § 181, at 102.

76. *Id.*

77. *Id.* § 182, at 103-04; see also La. Civ. Code arts. 4, 2055.

78. Civil Code of Spain arts. 1887, 1888 (1930) and annotations thereunder.

79. Civil Code of Spain art. 1894.

80. See La. Civ. Code art. 1843.

81. *Id.*

under the law of mandate and precludes an application of the law of negotiorum gestio.⁸² Given these considerations, the issue appears to be whether ratification by the principal of previously unauthorized acts changes the legal relationship between the principal and actor from one of negotiorum gestio to one in contract.

The debate among commentators, originating in the Roman law, has yet to be settled.⁸³ In his text on Roman law, Buckland commented that upon ratification, the gestor could elect to consider the relationship as one in mandate; however, there was no automatic conversion to mandate.⁸⁴ Moreover, ratification would not modify the gestor's responsibilities to the extent that they were affected by the principal's death.⁸⁵

Modern civilian jurisdictions have spoken to the consequences of ratification. In Germany, for example, if the principal ratifies the act then the gestor may recover from the principal that to which an agent would be entitled.⁸⁶ Italian Civil Code article 2032 states that ratification "produces the same effects" as mandate. Article 1892 of the Spanish Civil Code is in accord. Moreover, the Swiss Federal Code of Obligations article 424 (1928) states: "If the acts of the other party are thereafter ratified by the principal, the provisions governing the mandate shall apply." These codal authorities indicate that ratification of a previously unauthorized act will substitute mandate for negotiorum gestio as the law governing the rights and obligations between the parties in question.

Planiol, as Leslie, would appear to agree that ratification gives rise to mandate. The former concisely stated that "[r]atification is equivalent to a mandate."⁸⁷ Similarly, but with less clarity, Leslie noted: "If there is authority to act, express or implied, there can be no unauthorized administration. Ratification is possible."⁸⁸

Thus, there is substantial authority for the proposition that ratification of a previously conducted, unauthorized act will convert the principal and gestor's relationship from one of negotiorum gestio to one in contract. As will be seen,⁸⁹ a principal's knowledge of the act and his acceptance of its benefits can imply ratification. Arguably then, knowledge and acceptance of benefits will effect a post hoc conversion

82. *Acadian Prod. Corp. v. Savanna Corp.* 222 La. 617, 624, 63 So. 2d 141, 143 (1953).

83. See Comment, *supra* note 55, at 126.

84. W. Buckland, *A Text-Book of Roman Law from Augustus to Justinian* § 185, at 538 (1932).

85. *Id.* at 537-38.

86. *Bürgerliches Gesetzbuch [BGB] §§ 683, 684 (W. Ger.)* (1907).

87. 2 Planiol, *supra* note 3, pt. 2, No. 2281, at 313.

88. Leslie, *supra* note 61, at 14.

89. See *infra* text accompanying notes 123-43.

from the legal relationship of negotiorum gestio to that of mandate.

C. *Other Criteria*

1. *Capacity of the Principal*

Thus far, authority has been presented for the proposition that if the principal becomes aware of the actor's conduct, then tacit mandate rather than negotiorum gestio will be applied.⁹⁰ One exception to this notion is where the principal is incapable of giving consent.⁹¹ In this situation, the legal relationship between the actor and the knowing, but incapable, principal would seem to be governed by the rules of negotiorum gestio rather than mandate. This proposition has been accepted by several commentators.

Planiol commented that even though the principal is aware of the gestor's conduct, negotiorum gestio may still apply: "[I]t suffices to assume that the [principal] is incapable of giving a mandate."⁹² Leslie noted that a party lacking full capacity may be the principal of a gestor.⁹³ Furthermore, his view of the Roman law, which formed the Scots law of negotiorum gestio,⁹⁴ was that for negotiorum gestio to be applied the principal was required to be "absent or at least incapable of expressing his wishes."⁹⁵ Incapacity could be either legal or factual. The former category referred to individuals such as pupils, while the latter included parties such as unconscious victims.⁹⁶ Furthermore, he opined that consent would not be implied on the part of a principal who, although aware of the act and possessing the requisite capacity, did not have an opportunity to communicate.⁹⁷ Salvat stated that his theory for distinguishing between tacit mandate and negotiorum gestio⁹⁸ did not apply where the principal lacked the capacity needed to consent to a contract of mandate.⁹⁹

This idea that negotiorum gestio applies in situations where the principal is aware of the act but incapable of giving his consent also resolves a conflict in Louisiana law. That is, it reconciles article 2295 of the Louisiana Civil Code with the general theory that knowledge

90. See supra text accompanying notes 63-79.

91. See 2 Planiol, supra note 3, pt. 2, No. 2273, at 309.

92. Id.

93. Leslie, supra note 61, at 34.

94. Id. at 19, 33-34.

95. Id. at 18 (quoting Nicholas, *An Introduction to Roman Law* 228 (1962)).

96. Id. at 34.

97. Id.

98. See supra text accompanying notes 55-60.

99. 3 Salvat, supra note 58, § 2582, at 597.

implies mandate. That article states that a party may act as a gestor by managing another's affairs "whether the owner be *acquainted with the undertaking* or ignorant of it" ¹⁰⁰ It has been seen that if the principal knew of the actor's conduct, then the applicable law is mandate, not *negotiorum gestio*. ¹⁰¹ This rule of law initially appears to conflict directly with article 2295. By adopting the notion that this particular language in article 2295 applies only to incapable parties, the courts could prevent an irreconcilable conflict between tacit mandate and *negotiorum gestio* while preserving the integrity of the express language of the Civil Code. Moreover, this notion draws support from article 2300 of the Louisiana Civil Code, which is to be read *in pari materia* with Louisiana Civil Code article 2295. ¹⁰² It is submitted that this is the correct interpretation.

2. Actor's Intent or Belief as to His Own Status

Professor Lorenzen implies that a mandatary is not a gestor because he does not intend to be one, just as an official carrying out his duties does not intend to enter the second role of gestor. ¹⁰³ On the other hand, where a person acts for another, believing, but not certain, that there is a contractual relationship, then that person intends to be a gestor. ¹⁰⁴ The implicit thesis asserted by these observations is that a person is a gestor if he intends to be one. Thus, the determining factor, according to Lorenzen, seems to be the actor's belief as to his own status.

It is suggested that the actor's intent does not necessarily dictate the nature of the relationship. By definition, *negotiorum gestio* is the unauthorized ¹⁰⁵ management of another's affairs. It would seem that "authorization" is better determined by reference to the knowledge and consent of the principal rather than the intentions of the actor.

III. PROPOSED ANALYSIS FOR DISTINGUISHING BETWEEN NEGOTIORUM GESTIO AND MANDATE AS DRAWN FROM THE CRITERIA ESTABLISHED IN CIVILIAN JURISDICTIONS

In considering both the knowledge of the principal and ratification, the central issue is whether the principal was aware of the actor's

100. La. Civ. Code art. 2295 (emphasis added).

101. See *supra* text accompanying notes 63-79.

102. La. Civ. Code art. 2300 states:

All persons, such even as are incapable of consent, may, by the quasi contract, resulting from the act of a third person, become either the object or the subject of an obligation; because the use of reason, although necessary on the part of the person whose act forms the quasi contract, is not requisite in those by whom, or in whose favor, the obligations resulting from the act, are contracted.

103. Lorenzen, *supra* note 69, at 208.

104. *Id.*

105. See La. Civ. Code art. 2295; BGB § 677; Civil Code of Spain art. 1888.

conduct. Whether the principal objected to the actions upon learning of them is also relevant.¹⁰⁶ From the above discussion, rules may be extracted that can effectively resolve any issue as to whether negotiorum gestio or contract applies. First, if the principal with capacity knew of the actor's conduct and had the opportunity to object, but failed to do so, then an implied mandate should be found to exist. Second, if the principal knew of the action after its performance and accepted its benefits or failed to object, then ratification—which would provide the effects of mandate if not the actual mandate itself—should be implied. Third, if the principal was not aware of the action at any time, or lacked capacity, or was unable to communicate with the actor, then negotiorum gestio should be applied. Fourth, if the principal objects to the actor's management, then the principal should not be liable under contract or negotiorum gestio. Proper application of these rules and authorities will result in preferred resolutions to the problem of distinguishing between contract and quasi contract.

IV. LOUISIANA JURISPRUDENCE

As noted in the previous section, commentators have proposed various "rules" for distinguishing between negotiorum gestio and mandate. These rules focus on (1) the principal's knowledge of the actor's conduct, (2) the principal's ratification thereof, (3) lack of knowledge and ratification, or incapacity of the principal and (4) objection by the principal to the action. Together, they form a method of analysis that is useful in making this distinction in most situations. Furthermore, they are not a departure from the established Louisiana jurisprudence; indeed, they can be drawn from it.

A. *Knowledge as Implying Consent to Mandate*

*Hewes v. Baxter*¹⁰⁷ is one of several cases that illustrates how the court may rely on the principal's knowledge of the actor's conduct to imply an agency relationship. In this case, Hewes, Milmo, and Stokoe had formed a business partnership. After the death of both Milmo and Stokoe, the partnership was dissolved; however, Hewes and the succession representative of Stokoe could not agree on certain aspects of the liquidation. For this reason, the defendant Baxter, Milmo's executor, assumed the task of liquidation without the aid of the others. Subsequently, Hewes, Stokoe's representative, and the heirs of Milmo sued Baxter, alleging that he was liable as an intermeddler.

106. See supra text accompanying notes 75-77.

107. 48 La. Ann. 1303, 20 So. 701 (1896).

The Louisiana Supreme Court held that the defendant was not liable to the plaintiffs. He was not a negotiorum gestor since he had acted pursuant to his obligations as executor of the estate and as tutor of the minor children; hence, his actions were not “‘of his own accord.’”¹⁰⁸ Moreover, the defendant was not liable as an agent. Arguably, the court noted, an agency relationship arose when the plaintiffs failed to object after acquiring knowledge of Baxter’s actions.¹⁰⁹ The court stated its position as follows:

Still less can he be made subject to a liability because acting for the interest of all, with an agency that might be deemed implied by full knowledge of his course on the part of Hewes and Stokoe, with no effort on the part of either to take control from him, or any action on their part evincing any concern in the business.¹¹⁰

The same reasoning was relied upon in *Long v. Dickerson*.¹¹¹ In that case, the husband and wife executed a \$4500 note and mortgage, due on January 1, 1890. When the husband died in 1889, the wife immediately qualified as administratrix. As such, she paid the interest on the note. The widow and children decided to close the succession in 1897, after all children had reached the age of majority. At this time, the widow was recognized as owner of one-half of the community property, including one-half of the property subject to the mortgage, as well as usufructuary of the other one-half. The children were declared to be the naked owners of the other one-half. The children became primarily liable for one-half the debt represented by the note and mortgage. The widow continued to make annual interest payments on the note until the creditor foreclosed on the property. The children then brought suit for an injunction, claiming that the widow’s payments were not imputable to them; hence, the debt had prescribed.

The Louisiana Supreme Court held that the debt, note, and mortgage were viable and therefore the injunction should be denied.¹¹² This holding rested on a finding that the widow was the mandatary of the children.¹¹³ In reaching this conclusion, the court reasoned:

[The children] knew, therefore, that when their co-owner and codebtor, their mother, the usufructuary, obtained time on their half of the debt by making the yearly payments of interest, she was thus obtaining time on a debt which was not hers, but

108. Id. at 1305, 20 So. at 702 (citing La. Civ. Code art. 2295).

109. Id.

110. Id.

111. 127 La. 341, 53 So. 598 (1909).

112. Id. at 348, 53 So. at 600.

113. Id. at 346, 53 So. at 600.

was solely and exclusively theirs. She did it with their knowledge, and necessarily with their consent, either express or tacit—it makes no difference which.¹¹⁴

In the court's view, the children, knowing of the actions of the widow, consented to those actions;¹¹⁵ therefore, the acknowledgment of the debt by this agent interrupted prescription.¹¹⁶

In 1955, the second circuit held in *Busby v. Walker*¹¹⁷ that the principal (finance company) tacitly established an agency relationship between it and a used car company (the mandatary) so that note payments received by the car company discharged the buyer's obligation on the note. The finance company knew of and failed to object to the car lot's acceptance of note payments after it had negotiated the notes to the company.

Finding that an agency relationship had been established, Judge Ayres, writing for the court, stated:

The consent to the establishment of such agency may be either express or implied. . . . [A]n implied agency is also an actual agency. It is a fact which is to be proved by deductions or conclusions from other facts and circumstances. Such an agency is often established from the words and conduct of the parties and the circumstances of the particular case.¹¹⁸

Similarly, in *Ouachita Equipment Rental Co. v. Trainer*,¹¹⁹ Rivers' Ford, Inc. and Ouachita Equipment Rental Company (O.E.R.), the plaintiff-lessor, were closely associated entities. Whittington, Rivers' Ford's sales manager, negotiated a truck lease on behalf of O.E.R. with the defendant-lessees. Furthermore, he received O.E.R.'s credit application from the defendants and, generally, solicited business for O.E.R. Given these facts and the finding that O.E.R. knew of Whittington's efforts and took advantage of them, the court found that "conduct by OER established an implied agency."¹²⁰

These cases illustrate that a principal's knowledge of ongoing action on his behalf will give rise to a tacit mandate; provided that he does not object to such action.¹²¹

114. Id.

115. Id.

116. Id. at 347, 53 So. at 600.

117. 84 So. 2d 304 (La. App. 2d Cir. 1955).

118. Id. at 307.

119. 408 So. 2d 930 (La. App. 2d Cir. 1981).

120. Id. at 935.

121. See also *Sales Purchase Corp. v. Puckett*, 417 So. 2d 137 (La. App. 2d Cir. 1982).

B. Ratification

The Louisiana jurisprudence supports the idea developed in the previous sections¹²² that knowledge of an act, acquired after its performance, and silent retention of its benefits result in a tacit ratification, which, in turn, creates a contractual relationship between the principal and actor. Louisiana Civil Code article 1843 is to the same effect.¹²³ Absent this ratification the relationship would be quasi contractual.

The court in *Groves v. Harvey*¹²⁴ supports the idea that ratification by a principal converts an unauthorized act of a negotiorum gestor into an authorized act. The court stated: "It is true, as a general rule, that a subsequent ratification gives validity to an unauthorized act of a negotiorum gestor It has, when fairly made, the same effect as an original authority to bind the principal"¹²⁵

An obvious extension of the idea that ratification of a gestor's actions has the same effect as original authority is that the legal relationship between the gestor and principal is no longer governed by negotiorum gestio but rather by mandate. This is, of course, the view asserted in previous sections.¹²⁶ Other cases in the similar context of ratification of an *agent's* unauthorized acts implicitly support this view by approving of the notion that ratification has the effect of prior authority.

In *Readco Industries, Inc. v. Myrmax Specialties, Inc.*,¹²⁷ the defendant Rosenfield, a former employee of the plaintiff, was authorized by the plaintiff to allow the codefendant-distributor to pay for a promotional affair on behalf of the plaintiff. There was evidence that the expenses were to be limited to \$2500; however, the distributor spent \$3,000. When the plaintiff sued the distributor in a separation action, a claim for \$3,000 was asserted in defense. The plaintiff argued that if the distributor was entitled to a setoff then it should recover this amount from the former employee.

The first circuit held that the plaintiff ratified the \$3,000 expenditure; therefore, the distributor could set off the entire \$3,000, and the former

122. See supra text accompanying notes 80-89 and 106.

123. La. Civ. Code art. 1843 states:

Ratification is a declaration whereby a person gives his consent to an obligation incurred on his behalf by another without authority.

An express act of ratification must evidence the intention to be bound by the ratified obligation.

Tacit ratification results when a person, with knowledge of an obligation incurred on his behalf by another, accepts the benefit of that obligation.

124. 12 Rob. 221 (La. 1845).

125. *Id.* at 225 (emphasis deleted).

126. See supra text accompanying notes 81-90 and 107.

127. 236 So. 2d 573 (La. App. 1st Cir. 1970).

employee was not liable for the amount spent in excess of authority.¹²⁸ In reaching this conclusion the court recognized several principles. First, ratification of an unauthorized act occurs if the principal knows of the act and acquiesces in it.¹²⁹ Second, ratification may be either express or implied.¹³⁰ Third, and most importantly, "such ratification is retroactive in effect and equivalent to prior authority."¹³¹ Since the plaintiff knew that the \$3,000 was paid on its behalf, the plaintiff ratified this payment as well as the former employee's representations to the distributor.¹³²

From the statement "ratification is retroactive in effect and equivalent to prior authority," the court seems to say that ratification is the authorization of an otherwise unauthorized act. If this is true, then it follows that ratification as retroactive consent can create contractual rights and obligations, supplanting a previously existing quasi contractual relationship. This is in accord with the commentators and civil codes of other jurisdictions.¹³³

The court in *Spence v. Webster Parish School Board*¹³⁴ relied on an application of ratification similar to that used in *Readco*. The defendant's representative entered into a contract with the plaintiff, Spence, whereby Spence would operate a school bus. The issue of the representative's authority, said the court, was irrelevant because the defendant had ratified the contract through knowledge of the agreement and acceptance of its benefits.¹³⁵ In reaching this conclusion, the court said:

Ratification is the adoption or affirmance by a principal of the acts of his agent On the part of the principal, there must be knowledge of the facts, consent, and either express or implied intent to ratify the contract One who accepts the benefits of an agent's action is held to have accepted it.¹³⁶

In addition, the court stated, "Ratification causes the contract to be adopted by the principal as if it were originally authorized."¹³⁷

In *Ledoux v. Old Republic Life Insurance Co.*,¹³⁸ the Basile State Bank was authorized by the defendant-insurer to issue credit life policies on the lives of borrowers for an amount not to exceed \$10,000 per life.

128. *Id.* at 576.

129. *Id.* at 575.

130. *Id.*

131. *Id.*

132. *Id.*

133. See *supra* text accompanying notes 83-88. See also La. Civ. Code art. 1843, reproduced *supra* note 123.

134. 499 So. 2d 217 (La. App. 2d Cir. 1986).

135. *Id.* at 219-20.

136. *Id.* at 219.

137. *Id.* at 220.

138. 233 So. 2d 731 (La. App. 3d Cir. 1970).

The decedent, Ledoux, had several loans with the bank, and, as a result, the total life insurance coverage he had at his death was \$16,800. The insurer offered to pay only \$10,000, and a law suit followed.

The court found that the insurer had actual knowledge of the overinsurance, that the insurer knew within sufficient time to object to the excess coverage, and that the insurer failed to object. In fact, noted the court, the insurer had accepted and retained the benefits of these unauthorized insurance agreements. Under these circumstances, the court held that the defendant had ratified the coverage.¹³⁹

The court also found that this ratification meant that the agent was not liable to the principal.¹⁴⁰ The court reasoned:

The general theory of ratification of the unauthorized acts of an agent is that the principal, with full knowledge of the facts, consents to the unauthorized actions and adopts the contract as if it had been previously authorized There are a number of Louisiana cases holding that where the principal ratifies the unauthorized acts of its agent, such ratification discharges the agent from personal responsibility.¹⁴¹

Thus, where the relationship between the principal and actor was once based upon an unauthorized act, ratification altered that relationship to mandate by providing authorization.

These cases support the proposition that if the act of a negotiorum gestor is ratified then that act has been subsequently but retroactively authorized. As such, ratification establishes rights and obligations between the principal and actor that are consistent with authorized management rather than unauthorized management. That is, ratification should result in rights and obligations founded upon consent, rather than by operation of law, and upon contract rather than quasi contract. The Louisiana Civil Code¹⁴² supports this view.

To summarize the effect of ratification, if a party without authority or consent of another acts for that other party then their legal relationship would be governed by negotiorum gestio, provided that the other had not ratified the action. If, on the other hand, the other party does ratify the action, then the legal relationship is controlled by the law of mandate. This is because ratification has the effect of prior authority.

139. *Id.* at 736.

140. *Id.* at 737.

141. *Id.*

142. See La. Civ. Code art. 1843, reproduced supra at note 123.

C. *Lack of Knowledge or Incapacity of the Principal and Ratification*

In contrast to cases in which knowledge and acceptance of benefits imply consent to a contract or ratification, the following cases will illustrate how lack of knowledge or incapacity may lead to a proper application of negotiorum gestio.

The case of *Ligon v. Angus*¹⁴³ involved three children who, after their mother's death, decided to sell her house including three fixtures. A contract to sell was signed by the buyer and the three children. Later one of the children, the defendant, and the buyer agreed that the fixtures would not be included in the sale. The defendant then removed these items. Subsequently, the other two children, the plaintiffs, discovered these actions and, as a result, filed suit for a partition of the items. The defendant argued that the plaintiffs divested themselves of all interest in the items when they entered into the contract to sell.

The second circuit was apparently unpersuaded by the defendant's argument. Finding that the defendant acted without the plaintiffs' knowledge, the court believed that the case was "governed by LSA-C.C. art. 2295."¹⁴⁴ The defendant held the property as a gestor for the owners in indivision; hence, partition was proper.¹⁴⁵

The court in *Ligon* found the principles of negotiorum gestio applicable because the gestor acted without the knowledge of the principal.¹⁴⁶ The same idea may be gleaned from *Thompson v. Louisiana Central Lumber Co.*¹⁴⁷ In that case, the plaintiff-employee, a minor, was seriously injured in a work-related accident. He needed treatment in excess of what the worker's compensation laws required the defendant-employer to pay. The defendant, believing that it had an agreement whereby the excess medical payments would be deducted from future compensation benefits, funded the necessary medical care. The evidence proved that the plaintiff did not consent to this agreement. The plaintiff was in dire physical straits, and indeed was unconscious part of the time. He did not understand why he was not receiving the full amount of his compensation. Nevertheless, the court held him liable for the extra medical benefits he received.¹⁴⁸

A close analysis of *Thompson* reveals two grounds for the application of negotiorum gestio. First, this worker did not consent to an agreement whereby his future benefits would be offset by present medical coverage.

143. 485 So. 2d 142 (La. App. 2d Cir. 1986).

144. *Id.* at 145.

145. *Id.*

146. *Id.*

147. 2 La. App. 200 (2d Cir. 1925).

148. *Id.* at 205-06.

Thus, no contract could have arisen. Moreover, his objection to the deducted benefits prevented ratification after he learned the facts of his situation. Nevertheless, the defendant had provided medical coverage for the plaintiff's benefit. Here is, as the court recognized, a proper situation for negotiorum gestio. Second, even if the plaintiff did consent to this agreement, the consent was invalid since he was a minor; hence, no enforceable contract arose due to the plaintiff's incapacity. Here again, negotiorum gestio can be properly applied.¹⁴⁹

*Weber v. Coussy*¹⁵⁰ provides further support for this theory that lack of knowledge on the part of the principal establishes negotiorum gestio. Therein, the defendant was evicted by the plaintiff in a petitory action. The defendant had paid the property taxes prior to his eviction. The court held that the defendant was entitled to be reimbursed for the taxes since he was the negotiorum gestor of the plaintiff.¹⁵¹

In *Weber*, the defendant was probably not a gestor from his own perspective. Since he believed that he was paying the taxes for his benefit, he lacked the intent to manage another's affairs. However, for present purposes, this case illustrates that a principal who unknowingly¹⁵² receives benefits conferred by an unauthorized actor may be indebted to the actor under negotiorum gestio.

As alluded to in *Thompson*,¹⁵³ a principal's relationship with the actor may be one in negotiorum gestio rather than in contract even if the principal consented to an agreement, provided that the principal lacked capacity. Express or implied consent is relatively null if the consenting party lacks capacity.¹⁵⁴ Thus, it seems that a valid contractual relationship would not arise in circumstances where an incapable principal knew of but failed to act with respect to the gestor's management. This is what commentators have concluded.¹⁵⁵ The better alternative would seem to be to apply negotiorum gestio. Moreover, the court in *Eby v. McLain*¹⁵⁶ stated that, as between a minor and an undertutor, the latter will be held to the obligations of a negotiorum gestor.¹⁵⁷ Presumably, this close relationship would be known to the minor.

The same "rule" should apply to issues of ratification. Louisiana Civil Code article 1843 declares that ratification is the giving of consent.

149. The effect of knowledge on the part of an incapable principal is considered herein. See supra text accompanying notes 90-102; infra text accompanying notes 153-58.

150. 12 La. Ann. 534 (1857).

151. Id. at 535-36.

152. It is presumed that the plaintiff-owner did not knowingly allow the defendant to challenge his title by paying the property taxes.

153. 2 La. App. 200 (2d Cir. 1925).

154. See La. Civ. Code art. 1919.

155. See supra text accompanying notes 91-101.

156. 123 La. 138, 48 So. 772 (1909).

157. Id. at 159, 48 So. at 780.

If an incapable cannot directly consent to actions by another on his behalf, then it follows that he should not be able to give his consent after the fact in order to ratify the same act. This conclusion was reached by one writer when he stated: "Thus, an express ratification by the 'incapable' would not convert the act [of negotiorum gestio] to one of mandate because of the incapable's incapacity to obligate himself."¹⁵⁸

D. *Objection by the Principal to the Action*

Pothier concluded that a principal could not be liable to the actor under a theory of negotiorum gestio if the principal objected to the gestor's action.¹⁵⁹ A similar decision was reached in *Brooks v. Britnell*.¹⁶⁰ In that case, the defendant's air conditioning unit failed, and the plaintiff tendered an estimate. Then without receiving approval, and while the defendant was away, the plaintiff replaced the compressor. When first advised of plaintiff's demand, the defendant refused to pay.

Initially, the appellate court concluded that no contract had been formed due to the defendant's lack of consent.¹⁶¹ As to the issue of quasi contract, the court assumed that the defendant "not only initially refused to pay for the services, but that he continued to deny liability and remonstrate with plaintiff for having performed services for him without his authorization."¹⁶² The court concluded that the defendant had not enjoyed the benefits bestowed upon him by the plaintiff. Moreover, the fact that the compressor had remained on the premises was not significant since it was there despite the defendant's protests. In sum, the plaintiff failed to prove that the defendant was liable under a theory of quasi contract.¹⁶³

A different result is reached if the principal is trying to hold the actor liable as a gestor. For instance, in *Ligon v. Angus*,¹⁶⁴ the defendant had removed fixtures belonging to the defendant and the two plaintiffs in indivision. The plaintiffs were unaware of the defendant's actions at the time they were committed; however, upon learning of them, the plaintiffs filed suit for a partition. The court held that the defendant possessed the property as a gestor and that partition was proper.¹⁶⁵

158. Note, *The Application of the Institution of Negotiorum Gestio to the Confinement of the Mentally Ill*, 27 La. L. Rev. 815, 821 (1967).

159. See supra text accompanying notes 75-76.

160. 183 So. 2d 434 (La. App. 2d Cir. 1966).

161. Id. at 435.

162. Id. at 436.

163. Id.

164. 485 So. 2d 142 (La. App. 2d Cir. 1986), discussed supra at text accompanying notes 143-46.

165. Id. at 145.

Finally, in this discussion of a principal's objection, one writer has argued that the objection of an incapable is insufficient to defeat a finding of negotiorum gestio.¹⁶⁶

In sum, rules have precipitated out of the various efforts in civilian jurisdictions to distinguish negotiorum gestio from mandate. These same rules may be gleaned from this state's jurisprudence. This would seem to indicate that they are sound as both a theoretical and a practical matter. Having discovered this method by which to distinguish negotiorum gestio from mandate, as well as the significance of making the distinction, it is helpful to consider an application of this method in the context of one particular case.

V. APPLICATION OF RULES DISTINGUISHING CONTRACT AND NEGOTIORUM GESTIO

Thus far, the consequences of distinguishing mandate and negotiorum gestio, the civilian criteria for distinguishing the two and the derivation of the rules for distinction from the Louisiana jurisprudence have been discussed. This final section will present an application of these rules for distinguishing contract and negotiorum gestio enunciated earlier.¹⁶⁷ Negotiorum gestio cases appear rather infrequently in the Louisiana jurisprudence. However, a recent case decided by Louisiana's First Circuit Court of Appeal provides a superb factual situation to which these rules may be applied. From this application, the consequences of making such distinctions will readily be seen. Before such an application, a discussion of the case and the appellate court's opinion is necessary.

A. *Smith v. Hudson*

*Smith v. Hudson*¹⁶⁸ involved a dispute over an alleged gravel supply contract. The gravel was owned by Hudson's father-in-law and was located on land owned by Hudson's wife. Hudson asked Smith to use his contacts to sell the gravel to contractors working on a nearby highway project. Hudson instructed Smith that the price for the gravel was to be at least \$3.50 per cubic yard, excluding delivery costs. From this price, Smith was to receive a commission, the amount of which was in dispute. Smith claimed the commission was \$.50 per cubic yard, while Hudson claimed it was \$.25.¹⁶⁹ Smith was also instructed to invoice the

166. Note, *supra* note 158, at 821.

167. See *supra* section III.

168. 519 So. 2d 783 (La. App. 1st Cir. 1987).

169. The trial court found that Smith was entitled to \$.25 per cubic yard. The appellate court, finding this decision to be not clearly wrong, affirmed. *Id.* at 786.

contract under a name other than that of Hudson or his wife. This was done due to Hudson's impending bankruptcy proceedings.

Smith, negotiating as an agent of S & S Trucking, a business owned by Smith's brother, met with the contractor, who agreed to pay \$3.50 per cubic yard for the gravel. However, the contractor had certain requirements for the gravel, one of which was that the gravel be mixed to certain specifications. To accomplish this mixing, the use of heavy equipment (bulldozers and excavators) would be required. Smith rented the necessary equipment over a five-month period, incurring rental expenses of over \$18,000. The equipment was delivered to the land owned by Hudson's wife and remained there intermittently throughout the five-month period.

Smith claimed that Hudson approved of the mixing requirement and agreed that Smith would rent the needed equipment and be reimbursed from the proceeds of the contract. Hudson contended that he never agreed to mix the gravel "because it would not be cost effective."¹⁷⁰ Furthermore, Hudson argued that he did not need to rent the equipment since his brother-in-law could supply the equipment necessary to perform the contract.¹⁷¹ However, Hudson neither refused the contractor's mixing requirement nor suggested that Smith renegotiate the contract so as to exclude the requirement. Rather, Hudson allowed the equipment to be rented, "never telling Emmett Smith that he [Hudson] would not be responsible for the payment"¹⁷² In fact, Hudson personally used the rented equipment for removing stumps, digging a ditch and a pond, and executing three unrelated gravel contracts.

Despite such evidence and testimony, the trial court held "that plaintiffs had failed to prove by a preponderance of the evidence that an agreement existed between the parties concerning rental of equipment and payment therefor."¹⁷³ The court of appeal agreed with the decision of the trial court, finding that an agreement for the rental of equipment had not been proven. However, the first circuit granted Smith "relief in quasi-contract since the equipment rental redounded to Carue Hudson's benefit."¹⁷⁴

First, the court held that Smith had established the essential elements of a quasi contract. These elements, according to the court, are "a benefit conferred on the defendant by the plaintiffs, an appreciation by the defendant of such benefits, and acceptance and retention by the

170. *Id.* at 785.

171. "[A]t trial, Mr. Rowe [Hudson's brother-in-law] stated that he and Mr. Hudson discussed using his equipment but that Mr. Hudson never requested the equipment when the project began." *Id.*

172. *Id.*

173. *Id.* at 786.

174. *Id.*

defendant of such benefits under circumstances such that it would be inequitable for him to retain the benefits without payment of the value therefor.'¹⁷⁵ According to the court, the defendant's "representations and voluntary actions (including his silence about payment or non-payment of the rental equipment) formed the basis of a quasi-contract with Mr. Smith for the rental of the equipment."¹⁷⁶ Hudson, who was a heavy equipment operator, "clearly benefited from the equipment rental and . . . must have appreciated the value and expense of such equipment being available for his use."¹⁷⁷ In the court's opinion, it would be inequitable to allow Hudson to benefit from his use of the equipment without contributing towards payment of the rental expenses.

After finding that a quasi contract did exist, the next step was to ascertain the amount of recovery to which Smith was entitled. The court noted that quantum meruit was often used in assessing quasi contractual damages and that various methods existed for calculating the reasonable value of services rendered. Although, "at first blush" Smith appeared to be entitled to recover the full cost of the rental equipment, the court was compelled to "consider not only the cost incurred by the plaintiffs but also the benefit which the defendants derived at the plaintiff's expense,"¹⁷⁸ since the plaintiff's recovery was based on the theory of quasi contract.

According to the court, " 'Once a quasi contract is formed, Civil Code Article 2298 gives the standard to which the negotiorum gestor is held in the management of the affairs of another.' "¹⁷⁹ Reviewing the record, the court found that Smith's attempts to supply heavy equipment to the defendants were less than prudent. "The bulldozers rented were too small to adequately perform the mixing requirements and were rented for more time than was actually needed."¹⁸⁰ After considering rental invoices, fuel usage amounts, and testimony regarding Hudson's personal use of the equipment, the court awarded Smith \$6,947.41, roughly one-third of the total rental cost.¹⁸¹

Smith v. Hudson provides an excellent factual situation to which the rules enunciated earlier may be applied. Courts, in an effort to obtain just results, sometimes apply law in a result-oriented manner. The realm of quasi contract, which includes negotiorum gestio, is an

175. *Id.* (quoting *Hobbs v. Central Equip. Rentals*, 382 So. 2d 238, 244 (La. App. 3d Cir.), writ denied, 385 So. 2d 785 (1980)).

176. 519 So. 2d at 787.

177. *Id.*

178. *Id.*

179. *Id.* at 786 (quoting *Hobbs*, 382 So. 2d at 244).

180. 519 So. 2d at 787.

181. *Id.* at 787-88.

area of law that is often used to obtain an equitable solution to a legal dispute. However, in seeking a fair or equitable solution, a court's application of quasi contract law will frequently result in overlooking other principles of law on which relief could and should be founded. Furthermore, such a result-oriented application often leads to an inconsistent and haphazard application of quasi contract law.

1. Knowledge as Implying Consent to Contract

Mr. Hudson asked Smith to use his contacts to sell Hudson's father-in-law's gravel. Hudson instructed Smith as to the price to be obtained, the name under which to negotiate, and the commission Smith was to receive. Clearly, an express agency relationship was formed; Hudson was the principal, and Smith was the undisclosed agent.¹⁸² Pursuant to the relationship, Smith rented heavy equipment needed to perform the contract. Arguably, Smith was only authorized to negotiate the contract and the rental of equipment to perform the contract was beyond the scope of his mandate. However, Hudson, knowing of the equipment rental, "never told Emmett Smith not to rent the equipment."¹⁸³ Hudson neither refused the mixing requirement nor suggested renegotiation of the contract. Furthermore, Hudson used the equipment for personal projects and also used the equipment for mixing gravel pursuant to the contract negotiated by Smith.¹⁸⁴ Hudson's failure to object after learning of the equipment rental, coupled with his use of the equipment to perform the contract could easily be construed as an implied consent to the equipment rental.

Although Smith was empowered only to negotiate the contract, Hudson's implied consent to the equipment rental would effectively broaden Smith's power as mandatary. As a mandatary, Smith would be entitled to recover the expenses and charges incurred in the execution of his mandate.¹⁸⁵ Thus, under the notion of implied consent or tacit mandate, Smith should be entitled to recover the expenses he incurred in renting the equipment. Hudson, however, could raise the objection that the rental of inadequate equipment constituted fault or neglect on the part of Smith sufficient to relieve his duty to compensate Smith for such expenses.¹⁸⁶

182. La. Civ. Code art. 2985.

183. 519 So. 2d at 785.

184. The court found that Hudson and his son had operated the equipment to perform the mixing requirements of the contract. During this time, extended rainfall caused several delays and, after experiencing such setbacks, Hudson decided that mixing the gravel was no longer cost effective and broke off all relations with Smith. *Id.*

185. La. Civ. Code art. 3022.

186. La. Civ. Code art. 3003.

2. Ratification

The theory of ratification could be used effectively and would result in the same outcome as that reached through the application of implied consent. Assuming Smith was empowered only to negotiate the gravel contract, Hudson's knowledge, after the fact of the equipment rental, coupled with his use of the equipment and his failure to object should be construed as an implied ratification of Smith's unauthorized rental.¹⁸⁷ Such ratification would retroactively authorize the equipment rental.

It should be noted that Smith would have a better chance of recovering the entire rental expense under the theory of ratification than under the theory of implied consent. Under implied consent, Smith's authority to rent the equipment is considered always to have existed and Smith's exercise of such authority is required to meet the standards of "reasonably prudent" or "ordinary" care. Under ratification, the principal learns of an unauthorized act and, either expressly or by implication, acquiesces in it. A strong argument could be made that through ratification the principal not only authorized the act but approves of the method of performance as well. Thus, in the case at hand, Hudson's ratification could be said to authorize the equipment rental and to approve of the specific equipment rented.

3. *Negotiorum Gestio*

It is difficult to find the theory of *negotiorum gestio* applicable to *Smith v. Hudson*. For *negotiorum gestio* to apply, the acts of the gestor must be voluntary.¹⁸⁸ Smith rented the heavy equipment pursuant to a power that he thought he possessed under an express procuration. Thus, his act was not of his own accord. Depending upon the extent of Smith's procuration, the act would be either a valid exercise of an existing power, in which case Hudson would be liable for the rental,¹⁸⁹ or an unauthorized exercise of a non-existing power, in which case Smith would be liable for the rental.¹⁹⁰ Even as to Hudson's father-in-law (the owner of the gravel), who was not Smith's principal, Smith's actions could not be said to be voluntary since they were taken pursuant to the procuration from Hudson.

Another prerequisite for the application of *negotiorum gestio* is the absence of consent or authorization on the part of the principal. In *Smith v. Hudson*, the court did not find sufficient evidence of an agreement for the equipment rental. To grant the relief the court thought

187. La. Civ. Code art. 1843. See also *supra* text accompanying notes 123-33.

188. La. Civ. Code arts. 2293, 2295.

189. La. Civ. Code art. 3021.

190. La. Civ. Code art. 3010.

necessary, it applied the principles of quasi contract, incorporating the negotiorum gestio standard as the standard of care for the obligee of a quasi contract. It is submitted that this application of negotiorum gestio is incorrect. Negotiorum gestio should apply only in situations where the principal is either unaware of the act or where the principal is aware of the act but is not able to give his consent. No evidence was presented establishing that Hudson was unaware of the rental, unable to communicate with Smith, or incapable at the time the rental occurred. Absent such evidence, negotiorum gestio should not apply.¹⁹¹

4. *Objection by the Principal*

Finally, if Hudson was found to have objected to the rental, Smith would be unable to recover his expenses under either mandate or negotiorum gestio. However, if the equipment rental benefitted Hudson, Smith could seek recovery under the theory of unjust enrichment.

VI. CONCLUSION

The distinction between the contract of mandate and the quasi contract of negotiorum gestio has been unclear. It is submitted that the key determinant in distinguishing the two is the principal's knowledge of the actor's conduct. According to the rules set forth in section III, the following guidelines should be used to distinguish between contract and negotiorum gestio:

- (1) If the principal knew of the actor's conduct and with opportunity to object, failed to do so, an implied mandate should be found.
- (2) If the principal learned of the action when it was too late to prevent it, ratification, providing the effects of mandate, should be implied unless the principal objects.
- (3) If the principal was unaware of the action at any time, lacked capacity, or was unable to communicate, negotiorum gestio should apply.
- (4) If, after learning of the action, the principal objects, then he should not be liable under contract or negotiorum gestio. The actor may have recourse under the doctrine of unjust enrichment.

These rules are not a departure from established law, but rather can be synthesized from the Louisiana jurisprudence and the opinions of various commentators. The proper application of the rules will provide fair and uniform results. Although these rules would effectively provide

191. See *supra* text accompanying notes 97-102.

a contractual resolution for the majority of disputes and limit the application of negotiorum gestio, such a result can be supported.

First, the purposes for which negotiorum gestio originated are no longer prevalent in modern society. The need to manage a neighbor's affairs due to his absence and inattention has decreased with the advances in transportation and communications. In ancient Rome a person who journeyed from his home might have been gone for years, unable to communicate or to send message home. Today an individual can travel to almost any part of the world in a matter of days, and communicate with most parts of the world in a matter of minutes. Thus, the possibility of a person being "absent" from handling his affairs has been greatly diminished.

Second, although the civil law encourages a spirit of community and cooperation among men through the doctrine of negotiorum gestio, it should also encourage an individual to act responsibly by handling his own affairs when possible. Furthermore, it behooves a person to consensually arrange for the management of his affairs and thus be more assured of the outcome than to rely on a third person to voluntarily undertake the management.

Third, the Civil Code's regulation of contract and mandate is much more comprehensive and thorough than its regulation of negotiorum gestio. Louisiana courts also have more expertise and ability in deciding contract disputes than in resolving disputes involving negotiorum gestio.¹⁹² Although courts generally resolve quasi contractual cases in an "equitable" manner, the result-oriented application of quasi contract law has led to inconsistent and irreconcilable jurisprudence.

It is submitted that the proper application of these rules will result in a preferred allocation of dispute resolution as between contract and quasi contract. In the majority of cases, a contractual resolution will apply. However, the institution of negotiorum gestio will remain in existence and possibly gain new vitality through its limited and accurate application.

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192. For an example see *supra* text accompanying note 179.

