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# Piercing the Corporate Veil: Personal Liability of a Corporate Officer for Intentional Interference with Contract: 9 to 5 Fashions, Inc. v. Spurney

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## NOTES

### Piercing the Corporate Veil: Personal Liability of a Corporate Officer for Intentional Interference with Contract: *9 to 5 Fashions, Inc. v. Spurney*

The Louisiana Supreme Court in *9 to 5 Fashions, Inc. v. Spurney*,<sup>1</sup> for the first time since its rejection in 1902, recognized the tort of intentional interference with a contract.<sup>2</sup> In an opinion written by Justice Dennis, the court did not hold this particular corporate officer liable, but in dicta recognized the cause of action given appropriate circumstances.<sup>3</sup>

A corporate officer now owes a duty to refrain from intentional acts that may cause problems to a third party in its performance of a contract.<sup>4</sup> This decision makes Louisiana the last state to espouse this tort.<sup>5</sup>

Although some criticism has been leveled at the supreme court's avoidance of the agency-principal issues presented, this note leaves that criticism in the hands of those critics.<sup>6</sup> Instead this note will examine the court's decision with the goal of illuminating the policies and pitfalls of the tort when applied to corporate officers, directors, and shareholders. The application of this cause of action in other jurisdictions also will be discussed. Since the opinion does not provide any insight into the outer limits of this newly reorganized tort, analyzing other states' approaches will help gain an understanding of how the Louisiana courts may apply the tort in the future.<sup>7</sup>

The facts and decision in *9 to 5 Fashions, Inc.*<sup>8</sup> are discussed first, followed by a brief general discussion of the new tort. The Note then examines important policy considerations that are likely to influence the application of the tort in the corporate environment. After discussing

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1. 538 So. 2d 228 (La. 1989).

2. *Id.* at 231. See also, *Kline v. Eubanks*, 109 La. 241, 33 So. 211 (1902), which has been the basis for the past rejection of the tort.

3. 538 So. 2d at 231, 234.

4. *Id.* at 231.

5. Robertson, *Recovery in Louisiana Tort Law for Intangible Economic Loss: Negligence Actions and the Tort of Intentional Interference with Contractual Relations*, 46 La. L. Rev. 737, 739 (1986).

6. Morris, *Business Associations*, 50 La. L. Rev. 211 (1989).

7. Since other jurisdictions have experience with the tort, their decisions will demonstrate the problems inherent in its application as well as provide guidance in its application.

8. 538 So. 2d 228 (La. 1989).

the policy considerations, the next section explores the application of the tort in other jurisdictions. The final sections analyze previous Louisiana court decisions and possible application of the new tort in the future.

#### FACTS

Petr L. Spurney was Chief Executive Officer (CEO) of the Louisiana World Exposition (LWE) from 1983 until the project's completion in January 1985, and was also chairman of the management committee, which approved all contract awards. Spurney's duties as CEO included executing contracts and assigning the task of monitoring contract compliance to the appropriate committees within the LWE organization.

The marketing division manager, Cynthia Houser, was responsible for securing suppliers for LWE.<sup>9</sup> In February 1983, Houser and LWE's art director met with potential uniform suppliers to request bids for custom-designed uniforms.<sup>10</sup> From six bidders, only 9 to 5 Fashions and Marlin Manufacturing met the necessary qualifications. Both submitted preliminary proposals in April 1983. Thereafter, Houser, Spurney, and their staff members met to prepare a proposal for the management committee, recommending that Marlin be awarded the contract to be the uniform supplier. The committee, however, deferred its final decision until more information was obtained, requesting that both companies submit amended proposals with firm prices.<sup>11</sup>

The committee sent additional bid specifications to both companies on August 18, 1983, stipulating a September 1, 1983, deadline. Marlin resubmitted its previous bid.<sup>12</sup> Because of a time extension granted to 9 to 5 Fashions, it did not submit its bid by September 1. Notwithstanding the extension, Spurney advised the concessions committee chairman on September 2, 1983, that the LWE staff would recommend Marlin as the uniform supplier because their bid was lower than 9 to 5's.

One week later, 9 to 5 Fashions, without knowledge of Spurney's recommendation, submitted a bid containing a joint proposal with Marlin Manufacturing. Marlin, by correspondence, informed Houser that its previous bid was withdrawn and that it had agreed to be a consultant

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9. The goal of the supplier program was to obtain products and services at little or no cost to LWE in exchange for the use of LWE logos by the respective supplier.

10. LWE officials estimated that it would take ten to twelve months to produce the uniforms.

11. However, Houser allowed Marlin to submit "OOOA Standard" prices (an acronym for Out-Of-Our-Ass—a wild guess). *9 to 5 Fashions, Inc. v. Spurney*, 520 So. 2d 1276, 1280 (La. App. 5th Cir. 1988). This is evidence that the management of LWE favored Marlin.

12. *Id.* at 1280.

for 9 to 5 Fashions. The LWE staff, however, still recommended Marlin; the committee agreed on Marlin.

On October 12, 1983, 9 to 5 Fashions filed suit against LWE, Houser, and Marlin, alleging restraint of trade. 9 to 5 Fashions dropped the suit when it was awarded the supplier contract, and Marlin became their consultant. Spurney did not approve of this arrangement and continuously expressed his dissatisfaction, even as late as November 7, 1983. Nevertheless, the management committee approved 9 to 5 Fashions as the uniform supplier on November 16, 1983, although no final written contract was executed until May 8, 1984, which was only four days before the fair opened.

Attempting to timely complete their contractual obligations, 9 to 5 Fashions met with LWE staff in December to obtain uniform specifications. The company ordered fabric based on this meeting. Unbeknownst to 9 to 5 Fashions, these staff members had no authorization to provide these specifications. When LWE failed to pay for the excess fabric,<sup>13</sup> 9 to 5 Fashions sought payment from Spurney based on his impropriety in handling the contract between LWE and 9 to 5. The district court found Spurney liable for these damages. The court of appeal affirmed the district court but reduced the award.<sup>14</sup> The Louisiana Supreme Court reversed on the liability issue, handing down an advisory opinion on the new cause of action of intentional interference with contract.<sup>15</sup>

#### GENERAL APPLICATION OF THE TORT

Although the elements of the tort of intentional interference with contract vary from state to state, most states derive them from the Restatement (Second) of Torts,<sup>16</sup> which defines the tort as follows:

One who intentionally and improperly interferes with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.<sup>17</sup>

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13. The insolvency of LWE provided an impetus for the action against Spurney. *Id.* at 1282.

14. *Id.* at 1286.

15. *9 to 5 Fashions, Inc. v. Spurney*, 538 So. 2d 228, 234 (La. 1989).

16. Restatement (Second) of Torts §§ 766-774A (1979).

17. *Id.* § 766.

The tort possesses two burdens of proof.<sup>18</sup> The plaintiff must first prove that the offending party acted intentionally.<sup>19</sup> The burden then shifts to the defendant to prove that his actions were justified and therefore privileged.<sup>20</sup> Justified actions are exemplified when a corporate actor advises the corporation to discharge an employee for inadequate performance<sup>21</sup> or a corporate actor encourages the corporation to breach an unprofitable financing agreement.<sup>22</sup>

#### THE LOUISIANA APPROACH

Louisiana Civil Code article 2315 is the foundation of a cause of action for a corporate actor's intentional interference with contract.<sup>23</sup> In *9 to 5 Fashions, Inc.*, the court provided five requirements for this cause of action:

- (1) The existence of a contract or a legally protected interest between the plaintiff and corporation;
- (2) the corporate officer's knowledge of the contract;
- (3) the officer's intentional inducement or causation of the corporation to breach the contract or his intentional rendition of its performance impossible or more burdensome;
- (4) absence of justification on the part of the officer; and
- (5) causation of damages to the plaintiff by the breach of

18. See *infra* text at note 20.

19. This is typically expressed as a desire to bring about the harm or knowledge that the result was substantially certain to result from his actions. See generally *Breland v. Schilling*, 550 So. 2d 609, 611-12 (La. 1989) (defining intent). *Bazley v. Tortorich*, 397 So. 2d 475, 481 (La. 1985) (defining intent).

20. Most states place the burden of proving justification on the defendant. See, e.g., *Alyeska Pipeline Service Co. v. Aurora Air Service, Inc.*, 604 P.2d 1090, 1095 (Alaska 1979); *Herron v. State Farm Mutual Ins. Co.*, 56 Cal.2d 202, 207, 363 P.2d 310, 312, 14 Cal. Rptr. 294, 296 (1961); *Barlow v. International Harvester Co.*, 95 Idaho 881, 893, 522 P.2d 1102, 1114 (Idaho 1974); *Wilkinson v. Powe*, 300 Mich. 275, 1 N.W.2d 539, 542 (1942). Some states place the burden on the plaintiff to prove that the defendant's conduct was unjustified or malicious. *HPI Health Care Serv., Inc. v. Mt. Vernon Hospital*, 131 Ill. 2d 145, 545 N.E.2d 672, 677 (1989); *Top Service Body Shop, Inc. v. Allstate Insurance Co.*, 283 Or. 201, 209, 582 P.2d 1365, 1371 (1978); *Glenn v. Point Park College*, 441 Pa. 474, 479-482, 272 A.2d 895, 898-900 (Pa. 1971). However, the latter approach seems illogical. The evidence to prove justification is more easily accessible to the defendant. Furthermore, justification is in the nature of a defense. The burden should be on the defendant to prove justification.

21. *Martin v. Platt*, 179 Ind. App. 688, 386 N.E.2d 1026 (1979); *Phillips v. Montana Education Association*, 610 P.2d 154 (Mont. 1980).

22. *Stratford Group, Ltd. v. Interstate Bakeries Corp.*, 590 F. Supp. 859 (S.D.N.Y. 1984); See also Restatement (Second) of Torts § 767 comments a-g (1977).

23. *9 to 5 Fashions, Inc. v. Spurney*, 538 So. 2d 228, 234 (La. 1989).

contract or difficulty of its performance brought about by the officer.<sup>24</sup>

Other jurisdictions extend application of the tort to different types of human relationships.<sup>25</sup> For example, some jurisdictions have recognized the tort as a cause of action where a doctor advises other doctors not to work at a certain clinic.<sup>26</sup>

*Corporate Actor's Liability Under 9 to 5 Fashions, Inc.*

In Louisiana, third persons injured by breaches of contract due to the encouragement of others have historically been unable to obtain damages from the instigating wrongdoers. These persons, however, have occasionally found relief under agency-principal concepts rather than under traditional tort theories of negligence.<sup>27</sup> The court of appeal adopted this view when it held Spurney liable for his conduct. Spurney, in that court's opinion, had a duty to exercise due care in his relationship with 9 to 5 Fashions. By failing to diligently perform the contractual obligations, Spurney was liable for injury the plaintiff suffered.<sup>28</sup> The court held that an employee cannot shield himself behind the corporate veil when he is the officer responsible for the corporation's harmful actions.

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24. *Id.* at 231; these elements follow closely those stated in the Restatement (Second) of Torts §§ 766-774A (1979), and also the elements used in other jurisdictions when applying the tort. See, e.g., *HPI Health Care Serv., Inc. v. Mt. Vernon Hosp., Inc.*, 131 Ill. 2d 145, 545 N.E.2d 672 (1989); *Phillips v. Montana Education Ass'n*, 610 P.2d 154, 157 (Mont. 1980); *Schroders, Inc. v. Hogan Systems, Inc.*, 137 Misc. 2d 738, 522 N.Y.S.2d 404 (N.Y. Sup. Ct. 1987); *Sakowitz, Inc. v. Steck*, 669 S.W.2d 105 (Tex. 1984); Under Montana law, the cause of action requires proof of: "(1) a contract, (2) refusal of performance, (3) refusal induced by the unlawful and malicious acts of the defendant, and (4) damages. See *Phillips v. Montana Education Association*, 610 P.2d 154 (Mont. 1980); under Michigan law, the elements of the tort are (1) the defendant's knowledge of the contract, (2) the defendant's unjustified inducement of the breach or otherwise rendering performance impossible, (3) subsequent breach or other such act, and (4) damage to plaintiff." See also *Seven D. Enterprises v. Fonzi*, 438 F. Supp. 161 (E.D. Mich 1977) (interpreting Michigan law).

25. *Certified Laboratories of Texas, Inc. v. Rubinson*, 303 F. Supp. 1014 (E.D. Pa. 1969) (intentional interference with a contract applied to a non-competition agreement); *Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 728 P.2d 1177, 232 Cal. Rptr. 542 (1986) (defamation applied to intentional interference with possible economic advantage); *Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E.2d 282 (1976) (liability for interference with employment contract).

26. *Feminist Women's Health Center, Inc. v. Mohammad*, 586 F.2d 530 (5th Cir. 1978), cert. denied, 444 U.S. 924, 100 S. Ct. 262 (1979).

27. See, e.g., *Fryar v. Westside Habilitation Center*, 479 So. 2d 883 (La. 1985); *H. B. "Buster" Hughes, Inc. v. Bernard*, 318 So. 2d 9 (La. 1975); *Canter v. Koehring Co.*, 283 So. 2d 716 (La. 1973); *Miller v. Upjohn Co.*, 465 So. 2d 42 (La. App. 1st Cir. 1985).

28. *9 to 5 Fashions, Inc. v. Spurney*, 520 So. 2d 1276, 1283 (La. App. 5th Cir. 1988)

The Louisiana Supreme Court reversed, holding that Spurney was not liable for interfering with the contract between 9 to 5 Fashions and LWE because his actions as CEO of LWE were justified.<sup>29</sup> The court concluded that the plaintiff proved that Spurney knew of the contract and that he was negligent in delaying its performance. The evidence, however, established that "Spurney's delay in appointing a uniform coordinator was not unusual or inconsistent" with procedure normally followed in contracts with other suppliers.<sup>30</sup> The court found that the plaintiff failed to prove Spurney acted outside the scope of his authority or in a manner he knew to be detrimental to LWE's interests.<sup>31</sup> The evidence failed to prove that Spurney circumvented the management committee decision or delayed administration of the contract. The court further found Spurney's delay in appointing a uniform coordinator was due to normal bureaucratic procedures designed to choose the coordinator.

For the action of a corporate officer to be justified and thereby entitle him to immunity, the officer must act "within the scope of his corporate authority and in a reasonable belief that his action was for the benefit of the corporation."<sup>32</sup> In granting immunity to Spurney, the court held:

[A]n officer is privileged to induce the corporation to violate a contractual relation, or make its performance more burdensome, provided that the officer does not exceed the scope of his authority or knowingly commit acts that are adverse to the interests of the corporation. Where officers knowingly and intentionally act against the best interest of the corporation or outside the scope of their authority, they can be held liable by the party whose contract right has been damaged.<sup>33</sup>

This holding indicates that the court does not intend to give the officer[s] an absolute privilege. The privilege should be invoked only in situations where it is necessary to allow the officer to perform his fiduciary duty as authorized by the corporation.<sup>34</sup>

The supreme court did pronounce that in recognizing the tort it nevertheless did not intend to adopt "the fully expanded common law doctrine" of the tort.<sup>35</sup> The justification for this statement lies in the common law's use of the tort to constantly delve into the motives of

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29. 9 to 5 Fashions, Inc. v. Spurney, 538 So. 2d 228, 231 (La. 1989).

30. *Id.* at 234.

31. *Id.* at 235.

32. *Id.* at 231.

33. *Id.*

34. *Id.* at 232.

35. *Id.* at 234.

the corporate actor, which are often ambiguous and undefined.<sup>36</sup> The supreme court has now recognized a tort and established its elements, but did not offer any insight into its application. If the common law applications are not to be adopted, where are lower courts to look for guidance in applying the tort?

#### PREVAILING SOCIETAL CONCERNS

The corporate entity has provided investors and business operators a mechanism for shielding themselves from liability.<sup>37</sup> The purpose of this shield has been thought to encourage commercial growth through investment. Since the landmark decision of *Lumley v. Gye*,<sup>38</sup> however, courts have used various theories to destroy this shield, a process called "piercing the corporate veil."

Since corporate officers and directors make the decisions to terminate contracts, plaintiffs now seek relief by piercing the corporate veil to hold the officers and directors personally liable. Many problems have surfaced concerning important societal interests associated with the piercing of the corporate structure.<sup>39</sup> The liability shield is an integral part of corporate existence.<sup>40</sup> It insulates officers and directors from the pressures created by the possibility of personal liability. Therefore, public policy dictates that corporate officers and directors should possess immunity for interfering with a contract between the corporation and a third party when they act or believe their actions are in the best interests of the corporation.<sup>41</sup> Largely due to these considerations, piercing the corporate veil should be, and generally is, exercised with extreme caution.

The size of the corporate entity raises different considerations. Analysis of particular conduct should be made in light of the decision-making structure in the two prevalent types of corporations—publicly-held and closely-held.

#### *Publicly-Held Corporations*

Publicly-held corporations typically consist of thousands, sometimes millions, of shareholders. Because of this vast corporate ownership,

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36. *Id.*

37. Restatement (Second) of Torts §§ 766-774A (1979).

38. 2 El & Bl. 216, 118 Eng. Rep. 749 (Q. B. 1853). (In *Lumley*, Gye induced an opera singer to sing at his opera house through a higher fee offer than she was being paid by Lumley. The Queen's Bench held that interference with a commercial relationship can be actionable in tort.)

39. See generally, 3 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 1001 (Rev. Verm. ed. 1975); 2 Harper, James & Gray, *Law of Torts* §§ 6.5-6.10 (1986).

40. See generally Avins, *Liability for Inducing a Corporation to Breach its Contract*, 43 Cornell L.Q. 55 (1957).

41. *Id.*; W. Prosser and P. Keeton, *Law of Torts* § 129 (5th ed. 1984); 3 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 1001 (Rev. Perm. ed. 1975).



corporate shareholders are usually detached from day-to-day management, leaving officers and directors with the power to make corporate decisions. Corporate officers and directors have a fiduciary duty to act in the best interests of the shareholders and the corporation.<sup>42</sup> Included within this fiduciary duty is the implied power for officers and directors to breach contracts that further corporate goals, policies, and business interests.<sup>43</sup>

Officers and directors, however, must act within some constraints. Stability of contract is the backbone of a commercial economy; hence decision makers cannot freely abrogate any contractual relationship without undermining this stability.<sup>44</sup> Although a risk of entering a contract encompasses the possibility that the other party will breach, this risk should not include consideration that the breach will be induced or caused by someone not a party to the contract.<sup>45</sup> Thus, where officers or directors act maliciously,<sup>46</sup> or for personal interests and not in the best interests of the corporation,<sup>47</sup> they should be personally liable for their actions in causing the corporation to breach a contract. The premise underlying this personal liability is that such wrongful acts should not be immunized via the corporate shield.<sup>48</sup>

Arguably, shareholders could also face personal liability. Shareholders can influence corporate decision making in some circumstances. For example, if a group of shareholders joins together, they could form a controlling block in the corporation. With this control, they could force the corporation to breach contracts that benefit the shareholders' collective interests. Most courts, however, have been unwilling to extend liability to shareholders,<sup>49</sup> the theory being that since shareholders are owners of the corporation, they need not be held personally liable because

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42. La. R.S. 12:226 (1969); 3 W. Fletcher, *Cyclopedia of the Law of Corporations* § 1001 (Rev. Perm. ed. 1975); Avins, *Liability for Inducing a Corporation to Breach its Corporation*, 43 *Cornell L. Q.* 55 (1957).

43. 3 W. Fletcher, *Cyclopedia of the Law of Corporations* § 1001 (Rev. Perm. ed. 1975).

44. Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 *U. Chi. L. Rev.* 61 (1982); Sayre, *Inducing Breach of Contract*, 36 *Harv. L. Rev.* 663 (1923); Note, *Tortious Interference with Contract: A Reassertion of Society's Interest in Commercial Stability and Contractual Integrity*, 81 *Colum. L. Rev.* 1491 (1981); Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 *Stan. L. Rev.* 1513 (1985).

45. 3 W. Fletcher, *Cyclopedia of the Law of Private Corporations*, § 1001 (Rev. Perm. ed. 1975); W. Prosser and P. Keeton, *Law of Torts* § 129 (5th ed. 1984).

46. *Restatement (Second) of Torts* §§ 766-774A (1979).

47. *Id.* See *supra* note 42 and sources cited therein.

48. See *supra* note 42.

49. See *Rao v. Rao*, 718 F.2d 219 (7th Cir. 1983) (interpreting Illinois law); *Tye v. Finkelstein*, 160 F. Supp. 666 (D. Mass. 1958); see generally J. Dooley, *Modern Tort Law* § 44.07 (1984).

the corporation will be financially responsible for the breaches.<sup>50</sup> This theory obviously falls when the corporation is insolvent.<sup>51</sup>

### *Closely-Held Corporations*

Closely-held corporations consist of a few stockholders, who are usually the corporate officers and directors. If shareholders of closely-held corporations are set on equal footing as shareholders of publicly-held corporations, an injured third party would be without a remedy, not only against the shareholders, but also against the officers and directors since they are usually one in the same.<sup>52</sup>

In the case of closely-held corporations where shareholders are also the directors and officers of the corporation, it is important to exercise extreme care in deciding the issue of liability of the corporate directors and officers. It can be argued that since an individual cannot be liable for inducing himself to breach a contract, shareholders, directors, or officers cannot be liable for inducing the corporation to breach the contract when, in effect, they and the corporation are one.<sup>53</sup> If this reasoning is universally applied without reservation, then closely-held corporations provide a sanctuary through which individuals can act maliciously and unjustifiedly, causing injury to third persons without accountability. Corporate officers, directors and shareholders in close corporations should not be allowed to hide behind the corporate veil at the expense of third parties. Although the preservation of the corporate entity is important in a commercial economy, the corporate veil should not provide a shield to corporate actors who act for their own personal benefit or act maliciously in inducing a breach of contract with a third party.

### *Synopsis*

Corporate business decisions and investment are a fundamental part of the American economy. It is this significant role that corporations occupy that must be considered in determining the personal liability of corporate actors. Piercing the corporate veil should be treated somewhat differently when dealing with publicly-held corporations in comparison to closely-held corporations.

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50. 3 W. Fletcher, *Cyclopedia of the Law of Corporations* § 1001 (Rev. Perm. ed. 1975).

51. A court hopefully will recognize the defect in not holding the shareholders personally liable. In these situations, the court could resort to a corporate veil piercing theory.

52. 3 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 1001 (Rev. Perm. ed. 1975).

53. *Id.*

In publicly-held corporations the officers and directors serve the corporation and its shareholders in a fiduciary capacity. The corporate veil acts as a barrier to ensure that business judgment will not be hindered by the fear of personal liability. Thousands of shareholders rely on the business decisions of the officers and directors. But when officers, directors, or shareholders effectuate a breach of contract that cannot be justified as in the best interests of the corporation, the need to protect the corporate actor diminishes and personal liability should attach.

Courts should also exercise caution when dealing with closely-held corporations. Unlike publicly-held corporations, total investment in closely-held corporations is usually in the hands of the officers and directors; so to hold an officer or director liable is to hold a shareholder liable. This creates a fiduciary duty less broad than that owed by publicly-held corporations because the duty is generally owed to oneself rather than unknown shareholders. Therefore, society's interests in protecting these corporate actors is not as strong. Thus, where a third party is injured because of a corporate actor's inducement of a breach, the corporate veil should be pierced more readily to find personal liability, unless the breach is in the best interests of the corporation.

#### THE TORT IN OTHER JURISDICTIONS

Since Louisiana has never recognized the cause of action for intentional interference with a contract, decisions from other jurisdictions can be used as a guide in an attempt to determine how Louisiana courts will apply the tort. All other United States jurisdictions have pierced the corporate veil to recognize personal liability of corporate officers, directors, and shareholders under the tort.<sup>54</sup>

In *Stratford Group, Ltd. v. Interstate Bakeries*,<sup>55</sup> the United States District Court held that under New York law a director of a corporation is immune from liability to a third party for inducing the corporation to breach a contract with that party unless it is shown that the director committed a tort independent of the alleged breach or acted for his own beneficial interest and not in the interest of the corporation.<sup>56</sup> In *Stratford Group, Ltd.*, a third party sought to hold a corporate officer

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54. See, e.g., *Harrell v. Reynolds Metals Co.*, 495 So. 2d 1381 (Ala. 1986); *Marin v. Jacuzzi*, 224 Cal. App. 2d 549, 36 Cal. Rptr. 880 (Ct. App. 1st Dist. 1964); *Georgia Power Co. v. Busbin*, 242 Ga. 612, 250 S.E.2d 442 (1978); *Kiyose v. Trustees of Indiana University*, 166 Ind. App. 34, 333 N.E.2d 886 (1975); *A. S. Rampell, Inc. v. Hyster Co.*, 3 N.Y.2d 369, 144 N.E.2d 371, 165 N.Y.S.2d 475 (1957). See generally, *Liability of Corporate Director, Officer, or Employee for Tortious Interference with Corporation's Contract With Another*, 72 A.L.R. 4th 492 (1989).

55. 590 F. Supp. 859 (S.D.N.Y. 1984) (interpreting New York law).

56. *Id.* at 865.

liable for intentionally encouraging the defendant corporation to breach a financing agreement. The corporate officer was not held personally liable because the plaintiff failed to prove that the officer had engaged in tortious conduct separate from his conduct as a director.<sup>57</sup> This decision illustrates one court's unwillingness to extend personal liability to a corporate officer when no malfeasance can be demonstrated. If a corporate officer believes, as was the case in *Stratford Group, Ltd.*, that it is in the best interests of the corporation to breach a contract, fear of personal liability should not hinder his business judgment. Parties enter contracts with the knowledge and acceptance of the risks a breach might entail.

In deciding the same issue, the Michigan Supreme Court held that:

Merely to persuade a person to break his contract may not be wrongful in law or fact; still, if the persuasion be used for the indirect purpose of injuring the plaintiff, or benefitting the defendant at the expense of the plaintiff, it is a malicious act, which, in law and in fact, is a wrongful act, and, therefore, an actionable act, if injury issues from it.<sup>58</sup>

What this decision demonstrates is that the motives of the corporate actor are determinative of personal liability, not the breach.

In *Swagger v. Couri*,<sup>59</sup> the Illinois Supreme Court stated that Illinois law recognizes a cause of action against corporate officers and shareholders for the malicious exercise of corporate decision-making authority to breach a legal obligation.<sup>60</sup> In *Swagger*, plaintiff sought recovery from corporate officers, directors, and shareholders for their decision to dissolve the corporation and thereby breach its contract with the plaintiff. The lower court found the corporate actors liable, but the Illinois Supreme Court affirmed the appellate court's reversal, recognizing a privilege for corporate officers and directors to use their business judgment and discretion on behalf of their corporations.<sup>61</sup> The rationale behind granting the privilege was that the duty of corporate officers and directors to their corporation's shareholders outweighs any duty they might owe to the corporation's contract creditors.<sup>62</sup>

In *HPI Health Care Services v. Mt. Vernon Hospital, Inc.*,<sup>63</sup> the Illinois Supreme Court reaffirmed Illinois law stating that a cause of

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57. *Id.*

58. *Morgan v. Andrews*, 107 Mich. 33, 39, 64 N.W. 871 (1895). See also *Seven D. Enterprises, Ltd. v. Fonzi*, 438 F. Supp 161, 163 (E.D. Mich. 1977).

59. 77 Ill. 2d 173, 395 N.E.2d 921, 927 (1979).

60. *Id.* at 190, 395 N.E.2d at 928.

61. *Id.* at 192, 395 N.E.2d at 928.

62. *Id.*

63. 131 Ill. 2d 145, 545 N.W.2d 672 (1989) (hospital management firm held to be in similar relationship to hospital as corporate directors and officers of corporations).

action exists against corporate directors, officers, and shareholders who interfere with a contract between the corporation and a third party for personal gain or for the purpose of injuring the third party.<sup>64</sup> The corporate actor's purpose must be in furtherance of the corporation's interests to be justified.<sup>65</sup>

In *Phillips v. Montana Education Association*,<sup>66</sup> the Montana Supreme Court stated that the fact there is an available action against the party who breaches the contract is no defense to the one who induces the breach since the two are joint wrongdoers, and each is liable for the loss. In *Phillips*, directors of the Montana Education Board (MEA) terminated Phillips' two-year contract of employment after six months. Phillips filed a complaint for breach of contract against the corporation and intentional interference with contract against the directors. The court deciding the issue stated that liability will turn upon the ultimate purpose or objective the defendant seeks to advance.<sup>67</sup> The Montana Supreme Court stated that "[t]o determine whether interference with contractual relations is justified, public policy considerations must be examined. Justification or privilege constitutes the primary defense to an action for interference."<sup>68</sup> One public policy consideration is that the shield of liability is needed in order to allow corporations to effectively function. An opposing policy consideration, however, is that corporate actors should not be allowed to commit torts at will, then escape accountability by hiding behind the corporate veil.<sup>69</sup>

In *Phillips*, the directors were not liable because their actions "were within the scope of their employment, designed without malice, and in the furtherance of corporate interests." Because Phillips was unable to prove that the directors acted contrary to corporate purposes and interests, the directors were extended the privilege of limited liability.<sup>70</sup>

The above decisions from other jurisdictions indicate a reluctance to hold corporate actor's liable even when their actions are not clearly justified. The decisions indicate that a corporate actor must act in the best interests of the corporation to be entitled to the protection of the corporate veil. This privilege of limited liability is extended to corporate actors who do not commit an independent tort, act maliciously, or act solely for personal benefit when encouraging the corporation to breach.

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64. *Id.*

65. *Id.*

66. 610 P.2d 154 (Mont. 1980).

67. *Id.* at 157.

68. *Id.*; See also Estes, *Expanding Horizons In the Law of Torts—Tortious Interference*, 23 Drake L. Rev. 341, 358 (1974).

69. 610 P.2d at 157-58.

70. *Id.* at 158.

Consideration of the public policy issue is a key element underlying the granting of the privilege. The main policy concerns are the fiduciary duty corporate actors owe to the corporation, the effect of personal liability on the corporate actor's decision-making process, and the parameters of accountability that should be levied against corporate actors. These policy considerations necessarily entail subjective evaluation of the corporate actor's individual decisions. This analysis must be done on a case-by-case basis—an approach which Louisiana courts should utilize when applying this cause of action.

#### DEVELOPMENT OF THE TORT IN LOUISIANA

In 1902, the Louisiana Supreme Court refused to recognize a cause of action for intentional interference with a contract in *Kline v. Eubanks*<sup>71</sup> and no Louisiana court recognized the tort since that time until the decision in *9 to 5 Fashions, Inc. v. Spurney*.<sup>72</sup> In the past decade, however, lower courts have increasingly expressed their willingness to recognize the tort. Perhaps with the decision in *9 to 5 Fashions, Inc.* these lower courts will be able to practice what they have preached.

#### *The Past*

In *Kline v. Eubanks*,<sup>73</sup> Kline entered into a contract with a laborer, requiring the laborer to farm a tract of land and pay rental to Kline from a portion of the harvest. Relying on the contract, Kline assisted the laborer with money and goods. The laborer left the farm to enter the employ of Eubanks before paying Kline the rent due. Kline sued Eubanks for knowingly enticing away the laborer and thereby causing the laborer to breach the contract with Kline.

The basis for Kline's claim was Louisiana Civil Code article 2315, which at that time stated in pertinent part:

[E]very act whatever of man that causes damage to another obliges him by whose fault it happened, to repair it.<sup>74</sup>

In denying relief to the plaintiff, the supreme court relied on treatises and cases from other jurisdictions, which did not recognize the tort.<sup>75</sup> These states, however, have long since recognized tortious interference with contract, while Louisiana prior to *9 to 5 Fashions, Inc.* failed to shift its stance.<sup>76</sup>

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71. 109 La. 241, 33 So. 211 (La. 1902).

72. 538 So. 2d 228 (La. 1989).

73. 109 La. 241, 33 So. 211 (La. 1902).

74. 109 La. at 246, 33 So. at 213.

75. *Id.*

76. 538 So. 2d 228 (La. 1989); Robertson, Recovery in Louisiana Tort Law for Intangible Economic Loss: Negligence Actions and the Tort of Intentional Interference with Contractual Relations, 46 La. L. Rev. 738 (1986).

Louisiana courts have adhered strictly to the supreme court mandate throughout the years.<sup>77</sup> The decision in *Kline*, however, came under fire in 1981 in *Moss v. Guarisco*,<sup>78</sup> where Moss sued for damage caused when Guarisco negotiated a sale of a car dealership, originally promised to Moss, with a third party. Moss claimed that Guarisco's actions caused General Motors to deny him a Pontiac dealership. Although Moss' claim was denied, the court of appeal stated that an action may be available against the third person who negotiated with Guarisco to buy the car dealership.

The first circuit in *Moss* criticized the supreme court's "unflinching adherence" to *Kline v. Eubanks*.<sup>79</sup> It encouraged an examination of the changing social and economic conditions of the twentieth century when deciding whether to recognize the action.<sup>80</sup> The court stressed the need for reevaluation of the Louisiana position.

Another criticism of adherence to the *Kline* decision came in a footnote and concurring opinion in *Sanborn v. Oceanic Contractors, Inc.*,<sup>81</sup> wherein Sanborn sought relief for Oceanic's failure to release him to the employ of another company. Even though Sanborn had left the employ of Oceanic for eight months, Oceanic would not release him. Sanborn did not allege intentional interference with a contract so the court did not decide the issue. In a footnote, however, the court stated that had Sanborn alleged and proven Oceanic intentionally interfered with the contract, he may have been entitled to relief.<sup>82</sup> Judge Lemmon in his concurrence said that the plaintiff stated a cause of action for intentional interference with contractual relations.<sup>83</sup>

These Louisiana decisions evidence a change in the attitude of the judiciary toward the tort. With the supreme court's recognition of the tort, even though in an advisory opinion, plaintiffs should be more confident when alleging the cause of action.

### *The Future*

In *9 to 5 Fashions, Inc.*, the court set out the elements of the new tort.<sup>84</sup> The perplexing element is the final one of justification. The

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77. See, e.g., *Sanborn v. Oceanic Contractors, Inc.*, 448 So. 2d 91 (La. 1984); *Glazer v. Comm'n of Ethics For Pub. Employees*, 431 So. 2d 752 (La. 1983); *H.B. "Buster" Hughes, Inc. v. Bernard*, 318 So. 2d 9 (La. 1975); *Miller v. Upjohn Co.*, 465 So. 2d 42 (La. App. 1st Cir. 1985); *Scariano Bros., Inc. v. Hammond Constr.*, 428 So. 2d 564 (La. App. 4th Cir. 1983); *Linzay v. Tangipahoa Parish Farm Bureau*, 387 So. 2d 1343 (La. App. 1st Cir. 1980).

78. 409 So. 2d 323 (La. App. 1st Cir. 1981).

79. *Id.* at 330.

80. *Id.*

81. 448 So. 2d 91 (La. 1984).

82. *Id.* at 95 n.5.

83. *Id.*

84. *9 to 5 Fashions, Inc. v. Spurney*, 538 So. 2d 228, 234 (La. 1989).

supreme court basically defined two criteria that need to be proven to establish justification. The corporate member's actions must be within the scope of his authority and must be in the best interest of the corporation.<sup>85</sup> The supreme court did not fully explain the burden of proving these two criteria of the justification element, but decisions from other jurisdictions on the issue may provide guidance for their future application by Louisiana courts.

In *Los Angeles Airways, Inc. v. Davis*,<sup>86</sup> the Ninth Circuit applying California law, provided a detailed discussion of the two elements of justification.<sup>87</sup> The court stated that "[t]he existence and scope of the privilege . . . must be determined with reference to the societal interests which it is designed to *protect*."<sup>88</sup> In determining such interests, the court said, the officer must have used lawful means in inducing the breach of contract and the interest must be of greater value than the stability of the contract.<sup>89</sup> The privilege is designed to protect the fiduciary relationship between an agent and his principal. Basically, the court stated that the officer, to act within the scope of his authority, must act the way any reasonable officer in a like position as a fiduciary for the corporation would act.

In deciding whether the corporate officer acted in the best interests of the corporation it is necessary to evaluate his intent in light of the societal interests the privilege is designed to *promote*.<sup>90</sup> To grant the privilege the intent must be "impersonal and disinterested."<sup>91</sup> If he induces the corporation to breach a contract to further his own economic or other personal gain, then the privilege will be denied. The officer must maintain fidelity, good faith, and his fiduciary responsibility toward the corporation.<sup>92</sup>

When the corporate actor acts with "mixed motives" the justification issue is more difficult. For example, an officer may gain personally by inducing the corporation to breach the contract, but also be acting in the best interest of the corporation. Because it is very difficult to distinguish which motive spurs the officer to act, the cases usually are

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85. Id. at 235.

86. 687 F.2d 321 (9th Cir. 1982).

87. 687 F.2d at 325; see also *Herron v. State Farm Mutual Ins. Co.*, 56 Cal.2d 202, 205, 363 P.2d 310, 312, 14 Cal. Rptr. 294, 296 (1961); *Imperial Ice Co. v. Rossier*, 18 Cal.2d 33, 112 P.2d 631 (1941); *Olivet v. Frischling*, 104 Cal. App. 3d 831, 840, 164 Cal. Rptr. 87, 91 (1980).

88. 687 F.2d at 325; See generally, Restatement (Second) of Torts § 767 c, d, e (1979).

89. 687 F.2d at 325.

90. Id. at 326.

91. Id.

92. Id.



decided in favor of granting the privilege to the corporate actor.<sup>93</sup> Although human nature generally gives some clues as to the corporate member's motives, granting the privilege when the motives are unclear fosters the fiduciary relationship of the officer and the corporation.<sup>94</sup>

In *Swager v. Couri*,<sup>95</sup> the Illinois Supreme Court stated that the corporate officer must act within the scope of his power, and not act for his personal benefit or with the intent of injuring the plaintiff when encouraging the corporation to breach the contract.<sup>96</sup> This process adds the intent to injure the third party as an extra consideration to the standard of acting in the best interests of the corporation. Thus, if the officer acted in the best interests of the corporation, but intended to injure the plaintiff, the privilege would not be extended to the officer.<sup>97</sup>

In *Southwestern States Oil and Gas Co. v. Sovereign Resources, Inc.*,<sup>98</sup> Texas law was applied and the court stated the privilege is extended to a corporate officer acting within the scope of his power or authority as long as he did not engage in fraud in inducing the breach.<sup>99</sup> The corporate actor also must act with proper motives in causing the breach.

This decision adds the element of fraud when evaluating the corporate actor's action. Obviously the fiduciary duty of a corporate actor does not encompass authority to act fraudulently. By acting with a fraudulent intent, the corporate actor goes outside the scope of his authority and would not be protected by the privilege.

The common thread found throughout the decisions is that the corporate officer must act with a "proper motive" to be granted the protection of the privilege. "Proper motive" encompasses the scope of authority provided to the corporate actor and the corporate actor's intent to act in the best interests of the corporation. The main policy consideration centers on protecting the fiduciary relationship between the corporate actor and the corporation, which fosters unpressured corporate decision-making. If the corporate actor's motives are for personal gain, are malicious, or are based on a fraudulent scheme, then the actor

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93. Avins, *Liability for Inducing a Corporation to Breach its Contract*, 43 Cornell L.Q. 55 (1957); 3 W. Fletcher, *Cyclopedia of the Law of Torts* § 129 (5th ed. 1984).

94. See also *Mellor v. Budget Advisors, Inc.*, 415 F.2d 1218 (7th Cir. 1969) (applying Illinois law); *Ong Hing v. Arizona Harness Raceway, Inc.*, 10 Ariz. App. 380, 459 P.2d 107 (Ct. App. 1969); *Wampler v. Palmerton*, 250 Or. 65, 439 P.2d 601 (1968).

95. 77 Ill. 2d 173, 395 N.E.2d 921 (1979).

96. *Id.*; See also *George A. Fuller Co. v. Chicago College of Osteopathic Medicine*, 719 F.2d 1326 (7th Cir. 1983) (interpreting Illinois law); *Kufalk v. Hart*, 610 F. Supp. 1178 (N.D. Ill. 1985) (interpreting Illinois law); *Loewenthal Securities Co. v. White Paving Co.*, 351 Ill. 285, 184 N.E. 310 (1932).

97. Accountability for intentionally inflicted injuries should not be circumvented by extending the privilege created by the corporate veil.

98. 365 S.W.2d 417 (Tex. Ct. App. 1963).

99. *Id.* at 422; See generally *Carlson Machine Tools, Inc. v. American Tool, Inc.*, 678 F.2d 1253 (5th Cir. 1982) (interpreting Texas law); *Raymond v. Yarrington*, 96 Tex. 443, 73 S.W. 800 (1903); *Gonzalez v. Gutierrez*, 694 S.W.2d 384 (Tex. Ct. App. 1985).

should not be protected. Granting the protection of the corporate veil would defeat the purpose of protecting this fiduciary relationship.

In the recent Louisiana decision of *Tallo v. Stroh Brewery Co.*,<sup>100</sup> the fourth circuit court of appeal held that the plaintiff did not state a cause of action for intentional interference with contract.<sup>101</sup> In *Tallo*, the plaintiff alleged that the defendant's actions induced a third party to breach the purchase agreement with the plaintiff.<sup>102</sup> In deciding the issue, the court cited *9 to 5 Fashions, Inc. v. Spurney*<sup>103</sup> and stated that the supreme court did not intend to expand the tort to the plaintiff's cause of action.<sup>104</sup> In the concurring opinion, Chief Judge Schott suggested that the tort should be expanded to encompass situations outside of the corporate setting. The judge asserted, however, that it is the function of the supreme court to expand the cause of action, not that of an intermediate appellate court.<sup>105</sup> Thus, one court apparently is not willing to expand the tort. Whether other courts follow its lead is yet to be seen. Other jurisdictions apply the tort to areas outside of the corporate setting.<sup>106</sup> But if the past is to be our guide, Louisiana courts will not expand the cause of action until the Louisiana Supreme Court mandates its expansion.

#### CONCLUSION

When applying the tort of intentional interference with contract to the corporate setting, the judiciary should require proof of (1) the existence of a contract, (2) the corporate officer's knowledge of the contract, (3) inducement by the officer to breach the contract, (4) absence of justification for the inducement, and (5) damages to the plaintiff.<sup>107</sup> The problem of determining whether to afford the corporate actor the privilege of the protection of the corporate veil turns on the element of justification.

Unfortunately for the Louisiana legal community, the supreme court's decision in *9 to 5 Fashions, Inc. v. Spurney*<sup>108</sup> provides little guidance for the tort's application. The court in dicta recognized the tort, then proceeded to hold that Spurney's actions were justified. Application of the tort in other jurisdictions, however, provides valuable guidance and should be utilized by Louisiana courts.

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100. 544 So. 2d 452 (La. App. 4th Cir. 1989).

101. *Id.* at 455.

102. *Id.* at 452-54.

103. 538 So. 2d 228 (La. 1989).

104. *Tallo v. Stroh Brewery Co.*, 544 So. 2d at 453-54.

105. *Id.* at 455.

106. See *supra* note 25.

107. *9 to 5 Fashions, Inc. v. Spurney*, 538 So. 2d 228 (La. 1989); See generally 3 W. Fletcher, *Cyclopedia of the Law of Private Corporations*, § 1001 (Rev. Perm. ed. 1975); *Restatement (Second) of Torts* §§ 766-774A (1979).

108. 538 So. 2d 228 (La. 1989).

Decisions from other jurisdictions indicate that the most problematic aspect of proving justification is determining the corporate actor's motives for inducing the corporation to breach the contract. The judiciary must ascertain whether the corporate actor acted maliciously or for personal gain in the inducement. Conversely, if the corporate actor acts for the benefit of the corporation, his actions are justified. Although public policy encourages the protection given by the corporate veil, malicious or other intentionally injurious acts should not be protected. The privilege of limited liability provided by the corporate veil is designed to foster the fiduciary relationship between the corporation and its agent. When deciding to grant the privilege, courts must keep in mind underlying policy considerations that encourage its application. If liability is allowed to extend to corporate directors, officers, or shareholders every time they encourage the corporation to breach a contract, the fear of personal liability could greatly stifle corporate decision-making. Furthermore, shareholders, knowing that the directors or officers could be influenced in their decision-making by fear of personal liability, may be deterred from corporate investments which could greatly effect the national economy.

When the corporate actor acts with mixed motives,<sup>109</sup> courts should carefully analyze the effect of the corporate actor's actions. Corporate officials must be protected from the pressures attributed to the prospect of personal liability in the corporate decision-making process. Any doubt or lack of proof as to the "good faith" of the corporate actor should be resolved in favor of protecting the corporate actor, provided that the actions were in the best interests of the corporation.

The courts must also look at the necessity of maintaining stability in contractual relations. A commercial economy is founded on the stability of contracts. Intermeddlers have never been looked upon favorably in the contract realm. The corporate veil should not be used to protect intermeddlers who lack justification for their interference.

Finally, lower courts should not wait for further instruction from the supreme court before recognizing and applying the cause of action. Although the supreme court chose to limit the action to the facts in *9 to 5 Fashions, Inc. v. Spurney*,<sup>110</sup> the court did recognize intentional interference with contract as a valid cause of action and overruled *Kline v. Eubanks*.<sup>111</sup> This indicates a willingness, albeit a reluctant willingness, of the supreme court to accept the tort. Lower courts should make the best of the inch given to them.

This note is not advocating unbridled application of the tort. But the tort has found its usefulness in other jurisdictions and Louisiana

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109. See *supra* note 91.

110. 538 So. 2d at 235.

111. 109 La. 241, 33 So. 211 (La. 1902).

courts should carefully and skillfully develop a proper place for the tort in the Louisiana legal system.

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