

CHAPTER ELEVEN

CORPORATION'S LIABILITY TO THIRD PARTIES

Section 11.01 Liability of Corporation for Acts of Promoter

As a general rule, a corporation is not liable for the pre-incorporation acts of its promoters unless the corporation affirms the promoter's acts or knowingly accepts the benefits of those acts. See Section 2.05 herein for a discussion of promoter liability.

This is true for contractual liability. *Eustis v. Park-O-Lator Corp.*, 249 Or 194, 435 P2d 802, 437 P2d 734 (1968); *Huson v. Portland & Southeastern Railway Co.*, 107 Or 187, 211 P 897, 213 P 408 (1923); *Newsrack Supply, Inc. v. Heinle*, 127 Ga App 843, 195 SE2d 193 (1973); *Bash v. Culver Gold Mining Co.*, 7 Wash 122, 34 P 462 (1893).

It is also true for tort liability. *Fisk v. Leith*, 137 Or 459, 467, 3 P2d 535 (1931); *Arch Aluminum & Glass Co., Inc. v. Haney*, 964 So2d 228 (Fla App 2007); *Burns v. Veritas Oil Co.*, 230 SW 440 (Tex Ct Civ App 1921).

A promoter is not the alter ego of the corporation to be formed. A promoter does not have any inherent power of agency.

The general rule obtains at law that corporations cannot be bound by acts done or promises made in their behalf before they came into existence. Until organized a corporation has no being, franchises, or faculties. Its promoters, or those engaged in bringing it into being, are in no sense identical with the corporation, nor do they represent it in any relation of agency, and they have no authority to enter into preliminary contracts binding the corporation, unless so authorized by the charter. (citations omitted) *Huson v. Portland & Southeastern Railway Co.*, 107 Or 187, 220, 211 P 897, 907, 213 P 408 (1923).

After incorporation, a corporation can become bound by the pre-incorporation acts of its promoters. It can do so either by expressly ratifying the promoter's acts or by accepting the benefits of those acts. *Schreyer v. Turner Flouring Co.*, 29 Or 1, 43 P 719 (1896); *In re Vortex Fishing Systems, Inc.*, 277 F3d 1057 (9th Cir 2002); *French v. Gabriel*, 57 Wash App 217, 788 P2d 569 (1990).

A corporation is bound by a contract made on its behalf by its promoters or agents before its incorporation, if after it is organized, and with full knowledge of all the facts, it assumes the contract and agrees to pay the consideration, or accepts and retains the benefits of the contract, provided the contract is one which the corporation itself

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might have made in the first instance. (citation omitted) *Scandinavian-American Bank v. Wentworth Lumber Co.*, 101 Or 151, 157, 199 P 624, 626 (1921).

While courts often speak in terms of a corporation "ratifying" a promoter's act, one court has pointed out that this terminology is incorrect and that the proper terminology is that the promoter's act was "assumed" by the corporation.

It may be said, at the outset, that if the acceptance of the accessory purchase order and the issuance of the sequence allotment binds the corporation, it is because of an implied assumption of the Kraft contract, and not because of an implied ratification or adoption of such contract. Ratification presupposes a principal existing at the time of the agent's action.

Both ratification and adoption presuppose that the acts ratified or adopted were performed by one who purported to act on account of another.

When Spencer entered into the original contract with Kraft, and when he accepted the first two payments, the corporation was not in existence, and he was acting for himself individually. Hence his contract with Kraft was not capable of ratification or adoption by the corporation thereafter organized. It was, however, capable of being expressly or impliedly assumed by the corporation. (citations omitted) *Kraft v. Spencer Tucker Sales, Inc.*, 39 Wash 2d 943, 239 P2d 563, 568-9 (1952).

A deed made out in the name of a corporation yet to be formed is valid once the corporation comes into existence and accepts its benefits. *Heartland v. Mcintosh Racing Stable*, 632 SE2d 296 (W Va 2006); *John Davis & Co. v. Cedar Glen No. Four, Inc.*, 75 Wash2d 214, 450 P2d 166 (1969).

If after incorporation, a corporation repudiates its promoter's contract, the corporation is not liable. *Skandinavia, Inc. v. Cormier*, 514 A2d 1250 (NH 1986); *Mootz v. Spokane Racing & Fair Ass'n., Inc.*, 189 Wash 225, 64 P2d 516 (1937).

If a corporation assumes the promoter's contract, the corporation may bring a lawsuit to enforce its rights under that contract. *CMG Realty v. Colonnade One Ltd.*, 653 A2d 207 (Conn App 1995). It may do so by filing a lawsuit in its own name – without including the promoter as a party plaintiff. *Huson v. Portland & Southeastern Railway Co.*, 107 Or 187, 220, 211 P 897, 907, 213 P 408 (1923); *Speedway Realty Co. v. Grasshoff Realty Corp.*, 248 Ind 6, 216 NE2d 845 (1966).

Even if a corporation becomes liable for its promoter's act by assuming liability for that act, the promoter will usually continue to be liable as well. *Illinois Controls, Inc. v. Langham*, 70 Ohio St 3d 512, 639 NE2d 771 (1994); *Talaria Waste Management, Inc. v. Laidlaw Waste Systems, Inc.*, 827 F Supp 843, 846 n 7 (D Mass 1993); *Shea v. State Farm Fire & Casualty Co.*, 198 Ga App 790, 403 SE2d 81 (1991); *Tolliver v. Mathas*, 538 NE2d 971 (Ind App 1989); *Clinton Investors Co. v. Watkins*, 146 AD2d 861, 536 NYS2d 270 (1989); *Goodman v. Darden, Doman & Stafford Associates*, 100 Wash 2d 476, 670 P2d 648 (1983); *K & J Clayton Holding Corp. v. Keuffel & Esser Co.*, 113 NJ Super 50, 272 A2d 565 (1971).

The rules governing promoter liability are well settled. Ordinarily, a corporate

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promoter is personally liable on any contracts he or she makes for the benefit of a corporation not yet in existence. The subsequent organization of the corporation does not discharge the promoter from liability, unless the parties agree that his or her liability should cease at that time. Similarly, absent agreement of the parties, a promoter will not be discharged from contractual liability if the corporation subsequently adopts or ratifies his contract. A plaintiff can ordinarily, therefore, look to both the promoter and the corporation for compensation for a breach of the preincorporation contract. (footnote & citations omitted) *American Seamount Corp. v. Science and Engineering Associate, Inc.*, 61 Wash App 793, 798, 812 P2d 505, 508-9 (1991).

There are exceptions. A promoter is not liable if – at the time of execution – the contacting party knew the corporation did not exist but nevertheless agreed to look only to the corporation for payment. *Sherwood & Roberts-Oregon, Inc. v. Alexander*, 269 Or 389, 525 P2d 135 (1974); *Coopers & Lybrand v. Fox*, 758 P2d 683, 685 (Colo App 1988). The promoter would also have no liability if the third party expressly agrees to look only to the corporation through a novation agreement or otherwise.

But a promoter's liability will depend upon the terms of the contract and the intent of the parties. *Company Stores Development Corp. v. Pottery Warehouse, Inc.*, 733 SW2d 886 (Tenn App 1987). "There is a strong inference that a person intends to make a contract with an existing entity, rather than the to-be-formed corporation." (citations omitted) *Molander v. Raugust-Mathwig, Inc.*, 44 Wash App 53, 58, 722 P2d 103, 107 (1986).

Section 11.02 Contract Liability

A. Corporations may enter into contracts.

Every corporation has the power to enter into contracts, unless its articles provide otherwise. ORS 60.077(2)(g); *Hansen v. Columbia Breweries, Inc.*, 21 Wash 2d 53, 149 P2d 823 (1942). The power to contract "inheres in every corporation and is coextensive with its corporate powers." *The Portland Lumbering & Manufacturing Co. v. The City of East Portland*, 18 Or 21, 34, 22 P 536, 540 (1889).

A corporation may sue, or be sued, with respect to such contracts. ORS 60.077(2)(a). *Schulz v. Visionary Props., Inc.*, Case No: 3:14-cv-01129-AC (D Or Dec 1, 2015). A corporation may also be held liable under a theory of implied contract. *Simpson v. "U" District Office Building Corp.*, 70 Wash 2d 35, 422 P2d 1 (1967); *Hailey v. King County*, 21 Wash 2d 53, 149 P2d 823 (1944).

A corporation – being an artificial person – can only act through its officers and agents. *Gritzbaugh Main Street Prop. v. Greyhound*, 205 Or App 640, 135 P3d 345 (2006); *Doe v. Oregon Conference of Seventh-Day Adventists*, 199 Or App 319, 328, 111 P3d 791 (2005); *State v. Oregon City Elks Lodge No. 1189, BPO Elks*, 17 Or App 124, 520 P2d 900 (1974); *Guthridge v. Pen-Mod, Inc.*, 239 A2d 709 (Del

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Supr 1967).

Being a creation of the law - an artificial person - it can only act by agents who are its limbs or instrumentalities to effect the purpose for which it was organized, and to act for it, their act being the act of the corporation, exactly as the act of an individual in his act. *Killingsworth v. Portland Trust Co.*, 18 Or 351, 355, 23 P 66, 68 (1890).

To be bound by a contract, principles of agency require:

(1) that the person signing the instrument be an officer or agent of the corporation executing it, (2) that it be the free and voluntary act and deed of the corporation, and (3) that the person executing the instrument be authorized to execute it on behalf of the corporation. *Bradley Distributing Co. v. Seattle-First Nat. Bank*, 34 Wash 2d 63, 67, 208 P2d 141, 143 (1949).

An officer or other corporate agent may enter into an authorized contract on behalf of the corporation – his/her principal. Agency principles apply. *Synectic Ventures I, LLC v. EVI Corp.*, 241 Or App 550, 251 P3d 216 (2011). The authority of the agent may be express, implied, apparent or inherent. See Sections 6.06 and 6.07 of this book.

A corporation may use a corporate seal, but use of a seal is no longer required. ORS 60.077(2)(b); *Thayer v. Nehalem Mill Co.*, 31 Or 437, 51 P 202 (1897). Use of a corporate seal has become uncommon. See Section 3.12 of this book.

B. Ultra vires contracts.

Even if a corporation exceeds its corporate powers in entering a contract, the corporation may not evade its obligations under the contract. ORS 60.084(1). There are three exceptions to this general rule, exceptions which are set out in ORS 60.084:

- (2) A corporation's power to act may be challenged:
 - (a) In a proceeding by a shareholder against the corporation to enjoin the act;
 - (b) In a proceeding by the corporation, directly, derivatively, or through a receiver, trustee or other legal representative against an incumbent or former director, officer, employee or agent of the corporation; or
 - (c) In a proceeding by the Attorney General under ORS 60.661.

Illegal acts differ from *ultra vires* acts. Illegal acts are void. *Field v. Hauptert*, 58 Or App 117, 647 P2d 952 (1982)(it was illegal – not *ultra vires* – for a corporation to repurchase its stock while insolvent).

Even if the corporation does not observe all corporate formalities, a contract will be enforceable against it if the other party relied thereon or if the corporation retained the benefits of the transaction. *Twisp Mining & Smelting Co. v. Chelan Mining Co.*, 16 Wash 2d 264, 133 P2d 300 (1943).

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Like natural persons, corporations must be held to the observance of the recognized principles of common honesty and good faith, and these principles render the doctrine of *ultra vires* unavailing when its application would accomplish an unjust end, or result in the perpetration of a legal fraud. After a corporation has received the fruits which grow out of the performance of an act *ultra vires*, and the mischief has all been accomplished, it comes with an ill grace then to assert its want of power to do the act or make the contract, in order to escape the performance of an obligation it has assumed. *Wright v. Hughes*, 119 Ind 324, 21 NE 907, 909 (1889).

Even if a corporation lacks the power to enter into a contract, the corporation may be liable to the other contracting party under a theory of implied contract or quantum meruit. *Gateway Cable T.V., Inc. v. Vikoa Construction Corp.*, 253 So2d 461 (Fla App 1971); *Simpson v. "U" District Office Building Corp.*, 70 Wash 2d 35, 422 P2d 1 (1967); *Dawn Memorial Park, Inc. v. Southern Cemetery Consultants of Georgia, Inc.*, 115 Ga App 180, 154 SE2d 258 (1967).

Section 11.03 Tort Liability, Generally

Like any other person, a corporation is liable for its own tortious acts and for the tortious acts of its agents acting within the scope of their agency. *Oregon Natural Resources Council, Inc.*, 659 F Supp 1441, 1449 (D Or 1987), *affirmed in part, vacated in part, reversed in part*, 834 F2d 842 (9th Cir 1987); *Velten v. Regis B. Lippert, Intercat, Inc.*, 985 F2d 1515 (11th Cir 1993).

The defendant is a railroad corporation as its name imports and necessarily conducts its business through agents and servants. So that, upon whomsoever it devolved any of its personal duties as master, such as furnishing appliances, selection of competent servants, or of providing reasonable regulations for the safety of those in its service, or at the places in which they work, was an agent or representative of the company, and for any dereliction in the performance of such duties resulting in injury, the defendant is liable. *Wild v. Oregon Short Line, Ry. Co.*, 21 Or 159, 161, 27 P 954, 955 (1891).

Principles of agency generally apply to the relationship between a corporation and its officers, directors and agents. *Rae v. Heilig Theatre Co.*, 94 Or 408, 185 P 909 (1919); *Paynesville Farmers Union Oil Co. v. Ever Ready Oil Co., Inc.*, 379 NW2d 186, 188 (Minn App 1985); *Buxton v. Diversified Resources Corp.*, 634 F2d 1313 (10th Cir 1980)(interpreting Utah law); *Sons of Norway v. Boomer*, 10 Wash App 618, 519 P2d 28 (1974).

The liability of an officer of a corporation for his own tort committed within the scope of his official duties is the same as the liability for tort of any other agent or servant. That the agent acts for his principal neither adds to nor subtracts from his liability.

* * *

Where the officer performs an act or a series of acts which would amount to conversion if he acted for himself alone, he is personally liable even though the acts were performed for the benefit of his principal and without profit to himself personally. (citations omitted) *Dodson v. Economy Equipment Co.*, 188 Wash 340, 343, 62 P2d 708, 709 (1936).

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Unlike natural persons, a corporation is an artificial being which can only act through its officers, employees and agents. *Doe v. Oregon Conference of Seventh-Day Adventists*, 199 Or App 319, 328, 111 P3d 791 (2005); *State v. Oregon City Elks Lodge No. 1189, BPO Elks*, 17 Or App 124, 520 P2d 900 (1974); *Jeffers v. Weinger*, 132 Ill App 3d 877, 477 NE2d 1270 (1985); *Brimbau v. Ausdale Equipment Rental Corp.*, 440 A2d 1292 (RI 1982); *Guthridge v. Pen-Mod, Inc.*, 239 A2d 709 (Del Supr 1967); *Opportunity Christian Church v. Washington Water Power Co.*, 136 Wash 2d 116, 238 P2d 641 (1925).

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

A corporation is liable for the acts of both its individual agents and its corporate agents. *Mueller v. Seaboard Commercial Corp.*, 5 NJ 28, 73 A2d 905 (1950). When a subsidiary corporation is acting as an agent to its parent corporation, the parent is liable for its subsidiary's tortious conduct. *Amfac Foods, Inc. v. International Systems & Controls Corp.*, 294 Or 94, 654 P2d 1092 (1982); *Elvalsons v. Industrial Covers, Inc.*, 269 Or 441, 525 P2d 105 (1974); *Satellite Cable Services, Inc. v. Northern Electric Co-op., Inc.*, 581 NW2d 478 (SD 1998); *United States v. Reading Co*, 253 US 26 (1917).

A. Master/servant & principal/agent distinguished.

Principles of master and servant and principles of principal and agent apply to corporations – just as they do to natural persons. Whether or not a corporation is liable for the acts of an agent will sometimes depend on whether principles of master/servant or principles of principal/agent apply.

Generally, whether the relationship is one of master/servant (employer/employee) or one of principal/independent contractor will turn on the issue of control.

It is well settled in this state that the ultimate test to be employed in determining whether a relationship is that of employer and employee or that of principal and independent contractor is to inquire whether or not the employer retained the right, or had the right under the contract, to control the manner of doing the work and the means by which the result was to be accomplished. *Fardig v. Reynolds*, 55 Wash 2d 540, 544, 348 P2d 661, 663 (1960).

See also *Norris v. Sackett*, 63 Or App 762, 764-5, 665 P2d 1262, 1263 (1983); *Phillips v. Kaiser Aluminum*, 74 Wash App 741, 875 P2d 1228 (1994).

B. Corporate liability for act of employee.

"An employer is generally vicariously liable for the negligent acts of an

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employee conducted within the scope of employment." *Gilliam v. Department of Social & Health Services*, 89 Wash App 569, 584, 950 P2d 20, 28 (1998). Thus, if principles of master/servant apply – that is, if the corporate agent is an employee – then the corporation will be held vicariously liable for the tortious acts of its employees acting within the scope of their employment, even if the corporation's own conduct is not tortious. *Walters v. Gossett*, 148 Or App 548, 941 P2d 575 (1997).

Three requirements must be met to conclude that an employee was acting within the scope of employment. These requirements traditionally have been stated as: (1) whether the act occurred substantially within the time and space limits authorized by the employment; (2) whether the employee was motivated, at least partially, by a purpose to serve the employer; and (3) whether the act is of a kind which the employee was hired to perform. (citations omitted) *Chesterman v. Barmon*, 305 Or 439, 442, 753 P2d 404, 406 (1988).

See also *Harkness v. Platten*, 359 Or 715, 375 P3d 521 (2016); *Dr. Erik Natkin, DO PC v. Am. Osteopathic Ass'n*, Case No. 3:16-cv-01494-SB (D Or Jan 17, 2018).

Chesterman went on to say that although the intentional act (sexual assault) was outside the scope of employment the “focus should be on the act on which vicarious liability is based and not on when the act results in injury.” *Id* at 443.

In *Fearing v. Bucher*, 328 Or 367, 977 P2d 1163 (1999), the Court noted that “an employee's intentional tort rarely, if ever, will have been authorized expressly by the employer. In that context, then, it virtually always will be necessary to look to the acts that led to the injury to determine if those acts were within the scope of employment.” *Id* at 373-74 n 4.

See also *Schmidt v. Archdiocese Of Portland In Oregon*, 235 Or App 516, 234 P3d 990 (2010); *Coney v. Fagan*, 195 Or App 282, 97 P3d 1252 (2004); *Bray v. American Property Management Corp.*, 156 Or App 356, 965 P2d 426 (1998).

Of course, if an employee/agent is acting outside the scope of the agent's authority or employment, the corporation is no more liable than would be a natural person. *Insurance Company of North America v. Hewitt-Robbins, Inc.*, 13 Ill App 3d 534, 301 NE2d 78 (1973).

C. Corporate liability for act of non-employee agent.

"Generally, a principal is not vicariously liable for the acts of an independent contractor." *Phillips v. Kaiser Aluminum*, 74 Wash App 741, 749, 875 P2d 1228, 1234 (1994). If the relationship is not one of master and employee/servant – but merely one of principal and agent – then the corporation will be liable for the agent's tortious only if the corporation exercised the requisite degree of control over the actions of the agent.

Plaintiff argues that the trial judge erred in taking the question of Housing's liability for the actions of its director, Sackett, from the jury. The trial judge apparently based

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his ruling on what he construed to be a lack of evidence of Housing's "right to control" the specific manner in which Sackett carried out her activities on behalf of Housing. See, e.g., *Soderback v. Townsend*, 57 Or App 366, 644 P2d 640 (1982). We agree.

Plaintiff makes no claim that the relationship between Housing and Sackett was that of master and servant; it is conceded that the relationship was one of principal and agent. Concerning the distinction between these two relationships, we said in *Stein v. Beta Rho Alumni Ass'n.*, 49 Or App 965, 972-73, 621 P2d 632 (1980):

"The distinction between principal and agent and master and servant is drawn in *Kowaleski v. Kowaleski*, 235 Or 454, 385 P2d 611 (1963), at 457:

* * * All servants are agents and all masters, principals. However, all principals and agents are not also masters and servants. The Comment to Section 250, 1 Restatement 2d 549-550, Agency, states the distinction as follows:

`A principal employing another to achieve a result but not controlling or having the right to control the details of his physical movements is not responsible for incidental negligence while such person is conducting the authorized transaction. Thus, the principal is not liable for the negligent physical conduct of an attorney, a broker, a factor, or a rental agent, as such. In their movements and their control of physical forces, they are in the relation of independent contractors to the principal. It is only when to the relation of principal and agent there is added that right to control physical details as to the manner of performance which is characteristic of the relation of master and servant that the person in whose service the act is done becomes subject to liability for the physical conduct of the actor.
* * *"

"Thus the plaintiff must prove not only that an agency relationship existed between the defendant and the [agent], but also that the defendant had a right to control the physical details of the [agent's] actions as in the relationship of master and servant."

Applying the foregoing to the present case, plaintiff cannot establish Housing's liability merely by showing that Sackett was one of Housing's directors. That proves agency only; there must also exist a right to control. (emphasis omitted) *Norris v. Sackett*, 63 Or App 762, 764-5, 665 P2d 1262, 1263 (1983).

See also RESTATEMENT (SECOND) OF AGENCY § 250, Comment a; *Powell v. Tanner*, 59 P3d 246 (Alaska 2002).

In contrast, control is not an important issue in the employer-employee context. *Smith v. Hawks*, 182 Ga App 379, 384, 355 SE2d 669, 675 (1987), *cert denied, appeal after remand, Abbott v. Gill*, 197 Ga App 245, 398 SE2d 225 (1990).

Although earlier authorities sought to justify the *respondeat superior* doctrine on such theories as "control" by the master of the servant, the master's "privilege" in being permitted to employ another, the third party's innocence in comparison to the master's selection of the servant, or the master's "deep pocket" to pay for the loss, "the modern justification for vicarious liability is a rule of policy, a deliberate allocation of risk. The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon that enterprise itself, as a required cost of doing business. They are placed upon the employer because, having engaged in an enterprise which will, on the basis of past experience, involve harm to others through the torts of employees, and sought to profit by it, it is just that he, rather than the innocent injured plaintiff, should bear

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them; and because he is better able to absorb them, and to distribute them, through prices, rates or liability insurance, to the public, and so to shift them to society, to the community at large."

* * *

Similarly, California cases have long recognized that the employer's responsibility for the torts of his employee extends beyond his actual or possible control of the servant to injuries which are "risks of the enterprise." *Hinton v. Westinghouse Electric Co.*, 2 Cal 3d 956, 88 Cal Rptr 188, 471 P2d 988, 990 (1970).

"Apparent authority is an exception to the general rule that the torts of independent contractors are not imputed to their 'employer.'" *Luciano v. Am. Gen. Life Ins. Co.*, 2006 US Dist LEXIS 12615 (D Or 2006) (citing *Jennison v. Providence St. Vincent Med. Center*, 174 Or App 219, 229, 25 P3d 358 (2001)).

D. Knowledge of agent imputed to corporation.

The knowledge of an agent, acting within the scope of that agency, will generally be imputed to the corporation.

It is well settled in Oregon that "[a]n agent's knowledge acquired within the scope of the agency is imputed to the principal, regardless of whether the agent actually communicates that knowledge to the principal." *Benson v. State*, 196 Or. App. 211, 217 [100 P.3d 1097] (2004), citing *Hogan v. Alum. Lock Shingle Corp.*, 214 Or. 218, 228 [329 P.2d 271] (1958). However, the Oregon courts further recognize an "adverse interest" exception to that general rule, whereby a principal is not charged with its agent's knowledge if "the agent's relations to the subject matter are so adverse as to practically destroy the relationship, as when the agent is acting in his own interest and adversely to that of his principal, or is secretly engaged in attempting to accomplish a fraud which would be defeated by a disclosure to his principal." *CRM Collateral II Inc. v. Tri-county Metro. Transp. District of Oregon*, 715 F Supp 2d 1143, 1158 (D Or 2010) (quoting *FDIC v. Smith*, 328 Or 420, 429, 980 P2d 141 (1999)).

E. Act of promoters.

A corporation is generally not liable for the pre-incorporation torts of its promoters, unless the corporation subsequently ratifies (or assumes) the promoter's acts or accepts the benefit of those acts. *Fisk v. Leith*, 137 Or 459, 299 P 1013, 3 P2d 535 (1931); *Burns v. Veritas Oil Co.*, 230 SW 440 (Tex Ct Civ App 1921).

Absent novation, a promoter remains liable on the contract even though the corporation agrees to become liable thereon. *Talaria Waste Management, Inc. v. Laidlaw Waste Systems, Inc.*, 827 F Supp 843, 846 n 7 (D Mass 1993).

If after its formation either the corporation expressly assumes the contract or the corporation ratifies the promoter's act and accepts the full benefits of the contract, both the corporation and its promoter will become liable on the contract and the plaintiff may file suit against one or both. *Crown Controls, Inc. v. Smiley*, 110 Wash 2d 695, 756 P2d 717 (1988); *Malisewski v. Singer*, 123 Ariz 195, 598 P2d 1014 (1979).

See Section 11.01 herein.

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F. Punitive damages.

A corporation may be liable for punitive damages even though its liability is based solely on a theory of vicarious liability. *Walters v. Gossett*, 148 Or App 548, 555 n 5, 941 P2d 575, 579 (1997); *Andor v. United Air Lines*, 79 Or App 311, 719 P2d 492 (1986), *reversed on other grounds*, 303 Or 505, 739 P2d 18 (1987). A corporation may be liable for punitive damages if its employee was acting within the scope of his/her employment, regardless of whether the employee is a manager or a menial employee. *Stroud v. Denny's Restaurant, Inc.*, 271 Or 430, 532 P2d 790 (1975); *Equitable Life & Casualty Insurance Co. v. Lee*, 310 F2d 262 (9th Cir 1962); *Bingham v. Lipman*, 40 Or 363, 67 P 98 (1901). *But see Pelton v. General Motors Acceptance Corp.*, 139 Or 198, 7 P2d 263, 9 P2d 128 (1932)(a corporation is not liable for punitive damages for the wrongful acts of its menial agents, unless the act was authorized or ratified by the corporation.)

Section 11.04 Intentional Acts of Agents

As a general rule, a corporation is liable for the intentional acts of its officers and agents only when it is shown that such acts occurred in furtherance of the corporation's business or within the scope of an officer's authority. *Wheeler v. Green*, 286 Or 99, 593 P2d 777 (1979); *Bazal v. Belford Trucking Co., Inc.*, 442 F Supp 1089 (SD Fla 1977). Under Oregon law:

[A] corporation can be directly liable for intentional torts where: (1) the tort is committed by a person or persons wielding "the whole executive power of the corporation"; and (2) the tortious acts were committed "in behalf of the corporation." *Walters v. Gossett*, 148 Or App 548, 556, 941 P2d 575, 580 (1997).

Thus, a corporation is liable for the battery of an employee if the employee – or the person directing the conduct of the employee – had authority to remove a customer by force. *Paur v. Rose City Dodge, Inc.*, 249 Or 385, 438 P2d 994 (1968). *See also American Automobile Auction, Inc. v. Titsworth*, 292 Ark 452, 730 SW2d 499 (1987).

As we before observed, where the use of force at times is a part of the duty of the servant, the master is not excused from liability when the servant uses excessive, or even unjustifiable, force in the performance of his duty, and even though in so doing the servant disobeys positive instructions of the master. *Barry v. Oregon Trunk Railway*, 197 Or 246, 261, 253 P2d 260, 266-7 (1953).

A corporation may be vicariously liable for the fraudulent statements of its employees – even though the corporation did not authorize the specific misrepresentation – provided that the "subject matters of those representations were of the sort which could reasonably be expected to be made." *Criqui v. Pearl Music Co., Inc.*, 41 Or App 511, 515, 599 P2d 1177, 1179 (1979). *See also Woodbury v. United States*, 232 F Supp 49 (D Or 1964), *affirmed in part, reversed in part*, 359

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F2d 370 (9th Cir 1965).

In a case alleging that the sole shareholder of a corporation engaged in sexual abuse of a medical patient, the court found the sexual abuse benefitted only the doctor/shareholder – it did not benefit the corporation. *Walters v. Gossett*, 148 Or App 548, 941 P2d 575 (1997).

Other sexual abuse cases have found liability – or at least held that the scope of employment issue is a jury question. The test is:

Three requirements must be met to conclude that an employee was acting within the scope of employment. These requirements traditionally have been stated as: (1) whether the act occurred substantially within the time and space limits authorized by the employment; (2) whether the employee was motivated, at least partially, by a purpose to serve the employer; and (3) whether the act is of a kind which the employee was hired to perform. (citations omitted) *Chesterman v. Barmon*, 305 Or 439, 442, 753 P2d 404, 406 (1988).

See also *Harkness v. Platten*, 359 Or 715, 375 P3d 521 (2016); *Dr. Erik Natkin, DO PC v. Am. Osteopathic Ass'n*, Case No. 3:16-cv-01494-SB (D Or Jan 17, 2018).

The Court went on to say that although the intentional act (sexual assault) was outside the scope of employment the “focus should be on the act on which vicarious liability is based and not on when the act results in injury.” *Id* at 443.

However, in *Fearing v. Bucher*, 328 Or 367, 977 P2d 1163 (1999), the Court noted that “an employee's intentional tort rarely, if ever, will have been authorized expressly by the employer. In that context, then, it virtually always will be necessary to look to the acts that led to the injury to determine if those acts were within the scope of employment.” *Id* at 373-74 n 4.

See also *Schmidt v. Archdiocese Of Portland In Oregon*, 235 Or App 516, 234 P3d 990 (2010).

A corporation may be held vicariously liable for the malicious acts of its officers – acts such as defamation. *Wright v. ICOA Life Insurance Co.*, 250 Or 349, 442 P2d 614 (1968).

See also Section 9.06 of this book.

Section 11.05 Liability after Acquisition of Assets – Successor Liability

A. General rule – purchasing corporation not liable for selling corporation's debts.

“Under Oregon law, when a corporation purchases the assets of another corporation, the purchasing corporation generally does not assume the debts and liabilities of the selling corporation.” *Century Indem. Co. v. Marine Grp., LLC*, 848 F Supp2d 1238 (D Or 2012). See also *Dahlke v. Cascade Acoustics, Inc.*, 216 Or App

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27, 36, 171 P3d 992 (2007); *Giant Mfg. Co., Ltd. v. Bikee Corp.*, WL 1698056 (D Or 2004); *Alicki v. Intratec USA, Inc.*, 769 F Supp 336 (D Or 1991); *Schmoll v. ACandS, Inc.*, 703 F Supp 868, 872 (D Or 1988), *affirmed*, 977 F2d 499 (9th Cir 1992); *Estey & Associates, Inc. v. McCulloch Corp.*, 663 F Supp 167 (D Or 1986); *Peterson v. Harville*, 445 F Supp 16, 24 (D Or 1977); *Cambridge Townhomes v. Pacific Star Roofing*, 166 Wash 2d 475, 209 P3d 863 (2009).

“If one corporation purchases the assets of another and pays a fair consideration therefor, no liability for the debts of the selling corporation exists in the absence of fraud or agreement to assume the debts. The liability of a purchasing corporation is very similar to that of an individual. The corporation does not, merely by reason of the purchase, become liable for the debts of the selling corporation. There is no lien on the assets of a corporation in favor of creditors which will continue against bona fide purchasers of such assets for a valuable consideration. The purchasing corporation is not bound to see that the consideration passing is applied to the payment of debts of the selling corporation.” *State ex rel Thompson v. City of Greencastle*, 111 Ind App 640, 40 NE2d 388, 394 (1942)(quoting 13 Am Jur Corporations, § 1238).

If a corporation acquires another corporation's assets together with its liabilities, the purchaser becomes liable for the liabilities acquired. *McGowen v. Pillsbury Co.*, 723 F Supp 530 (WD Wash 1989). If a corporation purchases all of the assets but only *some* of a corporation's liabilities, the purchaser usually becomes liable only for the liabilities specifically acquired. *Howard v. Apac-Georgia, Inc.*, 192 Ga App 49, 383 SE2d 617 (1989).

The underlying basis for this rule is that a bona fide corporate purchaser receives the traditional protections of any purchaser of an asset. A traditional purchaser acquires an asset free from any third party claim as long as the purchaser pays adequate consideration and purchases free from notice of any adverse claims.

The basis of this traditional corporate law doctrine is that a sale of corporate assets transfers an interest separable from the corporate entity and does not result in a transfer of unbargained-for liabilities from the seller to the purchaser. Rather, the purchasing corporation receives the protection traditionally accorded any purchaser of property: the bona fide purchaser who gives adequate consideration and who lacks notice of prior claims against the property acquires no liability for those claims. (citations omitted) *Hall v. Armstrong Cork, Inc.*, 103 Wash 2d 258, 692 P2d 787, 790 (1984).

The general rule may apply even if the purchasing corporation voluntarily pays some of the old corporate debts. *Uni-Com Northwest, Ltd. v. Argus Publishing Co.*, 47 Wash App 787, 737 P2d 304 (1987).

NOTE: ORS 652.310(1) states: “Employer’ . . . includes any successor to the business of any employer, or any lessee or purchaser of any employer’s business property for the continuance of the same business. . .” This statute applies in the context of a Bureau of Labor & Industries claim for employee wages. The Court of Appeals has held that even though the common law on

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successor liability may provide important context for understanding this statute, the statute may reach a broader range of situations than provided under the common law rule. *Blachana, LLC v. BOLI*, 250 Or App 80, 89 n 9, 279 P3d 248 (2012).

B. Five exceptions.

There are five exceptions to the general rule, four of which are well-recognized.

To this general rule there are four well recognized exceptions, under which the purchasing corporation becomes liable for the debts and liabilities of the selling corporation. (1) Where the purchaser expressly or impliedly agrees to assume such debts; (2) where the transaction amounts to a consolidation or merger of the corporations; (3) where the purchasing corporation is merely a continuation of the selling corporation; and (4) where the transaction is entered into fraudulently in order to escape liability for such debts.

* * *

Where the entire consideration for the transfer is stock of the transferee corporation and the stock is delivered to the stockholders of the transferor, or it is contemplated that it will be distributed to them, leaving the transferor corporation without means to respond to its creditors, the transferee corporation is liable for the debts of the transferor. *Erickson v. Grande Ronde Lumber Co.*, 162 Or 556, 568, 92 P2d 170, 174(1939)(quoting from *West Texas Refining & D. Co. v. Commissioner of Int. Rev.*, 68 F2d 77 (10th Cir)).

See also *Dahlke v. Cascade Acoustics, Inc.*, 216 Or App 27, 171 P3d 992 (2007); *International Union of Elevator Constructors v. Total Access Elevator Co.*, 755 F Supp 930 (D Or 1991); *Western Helicopter Services, Inc. v. Rogerson Aircraft Corp.*, 728 F Supp 1506 (D Or 1990); *Cambridge Townhomes v. Pacific Star Roofing*, 166 Wash2d 475, 209 P3d 863 (2009).

The fifth exception – the “product line” exception – appears in the context of product liability litigation. As discussed below, it is not followed in Oregon and most other states (only California, Washington, New Jersey and Pennsylvania apply this exception).

If one of these five exceptions applies, liability may be imposed on the purchasing corporation regardless of the exact form of the asset transfer. *Eagle Pacific Insurance Co. v. Christensen Motor Yacht Corp.*, 135 Wash 2d 894, 959 P2d 1052 (1998); *Stoumos v. Kilimnik*, 988 F2d 949, 961 (9th Cir 1993) (applying Washington law). Under some circumstances, insurance coverage for such liability may transfer as well. *Unigard Insurance Co. v. Leven*, 97 Wash App 417, 983 P2d 1155 (1999).

Successor liability is an equitable doctrine.

Successor liability is an equitable doctrine to be decided by the Court. *UniCom N.W. v. Argus Pub. Co.*, 47 Wn. App. 787, 805 (1987). The successor liability doctrine is an equitable remedy and not a freestanding basis for relief. The doctrine is predicated on imputing an existing liability to another person or entity that, under

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equity, should be held liable. *Stalwart Capital LLC v. ICAP Pac. Nw. Opportunity & Income Fund, LLC*. Case No: C14-1128-TSZ (WD Wash Jan 22, 2016).

C. Express agreement exception.

The first exception is obvious. If an acquiring corporation agrees to be liable for a selling corporation's debts, the acquiring corporation is liable as agreed. *American Bank v. Port Orford Cedar Products Co.*, 140 Or 138, 12 P2d 1014 (1932); *Erickson v. Grande Ronde Lumber Co.*, 162 Or 556, 92 P2d 170, 174 (1939); *Creech v. Agco Corp.*, 133 Wash App 681, 138 P3d 623 (2006).

If the purchasing corporation agrees to assume all liabilities, it may also be assuming any punitive damages awarded as a result of the conduct of the selling corporation. See *Davis v. Celotex Corp.*, 187 W Va 566, 420 SE2d 557 (1992).

D. Defacto merger exception.

In a merger or consolidation, a surviving corporation is liable for the debts of the nonsurviving corporation. ORS 60.497(1)(c); *Nike, Inc. v. Spencer*, 75 Or App 362, 707 P2d 589 (1985); *Gaswint v. Case*, 265 Or 248, 509 P2d 19 (1973); *Schmidt v. Financial Resources Corp.*, 140 Ariz 135, 680 P2d 845 (1984); *Ladjevardian v. Laidlaw-Coggeshall, Inc.*, 431 F Supp 834 (SD NY1977); *Beals v. Washington International, Inc.*, 386 A2d 1156 (Del 1978); *Johnson v. Marshall & Huschart Machinery Co.*, 66 Ill App 3d 766, 384 NE2d 141 (1978); *Lamb v. Leroy Corp.*, 85 Nev 276, 454 P2d 24 (1969).

The surviving corporation also possesses all rights, privileges and franchises possessed by each of the merged corporations. *All Brand Importers, Inc. v. Department of Liquor Control*, 213 Conn 184, 567 A2d 1156 (1989); *Knightstown Lake Property Owners Association, Inc. v. Big Blue River Conservancy District*, 178 Ind App 463, 383 NE2d 361 (1978); *Diamond Parking, Inc. v. Seattle*, 78 Wash 2d 778, 479 P2d 47 (1971).

While in some cases a corporate transaction is not technically a merger, it so resembles a merger that a court will treat it as a *de facto* merger and make the surviving corporation liable for the debts of the nonsurviving corporation. A *de facto* merger is deemed to have occurred if:

- (1) There is a continuation of the enterprise of the seller corporation, so that there is a continuity of management, personnel, physical location, assets, and general business operations.
- (2) There is a continuity of shareholders which results from the purchasing corporation paying for the acquired assets with shares of its own stock, this stock ultimately coming to be held by the shareholders of the seller corporation so that they become a constituent part of the purchasing corporation.
- (3) The Seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible.
- (4) The purchasing corporation assumes those liabilities and obligations of the

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seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation. (citations and footnotes omitted) *Shannon v. Samuel Langston Co.*, 379 F Supp 797, 801 (WD Mich 1974).

See also *U.S. v. Sterling Centrecorp Inc.*, 960 F Supp2d 1025 (ED Cal 2013); *US v. General Battery Corp., Inc.*, 423 F3d 294 (3rd Cir 2005); *Bud Antle, Inc. v. Eastern Foods, Inc.*, 758 F2d 1451, 1457-8 (11th Cir 1985); *Keller v. Clark Equipment Co.*, 715 F2d 1280, 1291 (8th Cir 1983).

The Washington courts have held that for the *de facto* merger exception to apply in connection with the sale of assets, the selling corporation must receive shares of the purchasing corporation, rather than cash. *Fox v. Sunmaster Products, Inc.*, 63 Wash App 561, 821 P2d 502 (1991); *Cashar v. Redford*, 28 Wash App 394, 624 P2d 194 (1981). "The rationale behind imposing liability on the purchaser when shares rather than cash is given for the purchase is that the sellers stockholders retain an ownership interest in the continued business operations." *Payne v. Saberhagen Holdings, Inc.*, 147 Wash App 17, 190 P3d 102, 108 (2008). This may not be required in other states.

E. Continuation exception.

An acquiring corporation will be liable for the debts of a selling corporation if it is deemed to be a "continuation" of the selling corporation. This occurs if the two corporations are essentially the same entity. *Portland Section of the Council of Jewish Women v. Sisters of Charity of Providence in Oregon*, 266 Or 448, 513 P2d 1183 (1973); *Dairy Co-operative Ass'n v. Brandes Creamery*, 147 Or 488, 30 P2d 338 (1934); *Uni-Com Northwest, Ltd. v. Argus Publishing Co.*, 47 Wash App 787, 737 P2d 304 (1987).

Most courts traditionally have applied the mere continuation exception (also known as a *de facto* merger) contained in the general rule on successor liability only when there is commonality of ownership, *i.e.*, the predecessor and successor corporations have substantially the same officers, directors, or shareholders, and the business continues largely unchanged. *E.g. Taylor v. Atlas Safety Equip. Co.*, 808 F. Supp. 1246, 1251 (E.D.Va.1992) (applying Virginia law and stating that continuity of shareholders and management is key element of mere continuation exception); 15 Fletcher's Cyclopedia Corporations § 7123.20 (discussing expansion of mere continuation exception); 1 American Law of Products Liability 3d §§ 7:10, 7:14, 7:19 (same); Phillip I. Blumberg, *The Continuity of the Enterprise Doctrine: Corporate Successorship in the United States Law*, 10 Fla. J. Intl. L. 365, 371 (1996) (listing cases for proposition that mere continuation doctrine applies "only where the successor has the same stockholders as the predecessor and conducts the same business with the same management, facilities, employees, products, and trade names").

Simmons v. Mark Lift Industries, Inc., 366 SC 308, 622 SE2d 213, 217 (2005) (which itself declined to apply this rule, instead adopting the product line exception).

Another court has said:

[I]n determining whether a successor corporation is liable under the mere continuation exception, this court has consistently looked for a continuity of

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management and ownership. See *Nelson v. Pampered Beef-Midwest, Inc.*, 298 N.W.2d 281, 288 (Iowa 1980) (holding mere continuation exception did not apply where "marked difference existed between the transferor and transferees"); *Arthur Elev. Co. v. Grove*, 236 N.W.2d 383, 392-93 (Iowa 1975) (mere continuation applied where partners who incorporated partnership remained in control). We have never applied the mere continuation exception where the buying and selling corporations had different owners. *Oeltjenbrun v. CSA Investors, Inc.*, 3 F.Supp.2d 1024, 1048-49 (ND Iowa 1998).

Some courts apply four factors to determine when the acquiring corporation is deemed to be the continuation of the selling corporation:

To determine whether a de facto merger or a mere continuation has occurred, courts consider four factors: (i) continuity of ownership; (ii) cessation of ordinary business by, and dissolution of, the predecessor as soon as practicable; (iii) assumption by the successor of liabilities ordinarily necessary for the uninterrupted continuation of business; and (iv) continuity of management, personnel, physical location, and general business operation. All four factors need not be present for a court to find that a de facto merger has occurred.

The continuity-of-ownership factor helps courts identify situations where shareholders of a corporation unfairly attempt to retain assets that have been artificially cleansed of liability. (citations omitted) *Chicago Title v. Lexington & Concord*, 513 F Supp 2d 304, 315 (ED Pa 2007).

The Washington Court of Appeals has adopted two different tests for when the continuation exception applies. One division has adopted a two-out-of-three part test, saying:

The mere continuation theory is designed to prevent the corporation from escaping liability by merely changing hats. Washington courts have indicated that to prevail on the theory of "mere continuation", proof of at least two elements is required. The first element is a common identity of the officers, directors, and stockholders in the selling and purchasing companies. The second element is the sufficiency of the consideration running to the seller corporation in light of the assets being sold.

* * * *

[A] transfer of all or substantially all of the predecessor corporation's assets is an implied element of the mere continuation theory. (citations & internal quotation marks omitted) *Gall Landau Young Construction Co., Inc. v. Hedreen*, 63 Wash App 91, 96-7, 816 P2d 762, 765-6 (1991).

Another division of the Washington Court of Appeals has declined to follow the *Hedreen* test, stating:

[Defendant] contends that the proper test for determining whether the buyer is a mere continuation is the "two out of three elements" test from [*Hedreen*]. In *Hedreen*, another division of this court adopted an additional third element: whether the seller transferred substantially all of its assets. Under *Hedreen*, the buyer is a mere continuation when two of the three elements are satisfied.

We decline to adopt *Hedreen's* two out of three elements test for two reasons. First, the traditional two-factor test allows trial courts more discretion in applying the mere continuation exception. Second, whether the seller transferred substantially all of its assets is more properly considered under the fraudulent purpose exception discussed below. *Eagle Pacific Insurance Co. v. Christensen Motor Yacht Corp.*, 85 Wash App 695, 706 n 1, 934 P2d 715, 721 (1997), *affirmed in part, reversed in part on other grounds*, 135 Wash 2d 894, 959 P2d 1052 (1998).

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See also *Seipp v. Stetson Ross Machine Co.*, 32 Wash App 224, 227, 646 P2d 783, 785 (1982).

In 2009, the Washington Supreme Court “applied the traditional two-factor test without discussing a third factor.” *Bert Kutv Revocable Living Trust v. Gerry*, 175 Wash App 292, n 16, 306 P3d 994 (2013) (discussing *Cambridge Townhomes v. Pacific Star Roofing*, 166 Wash2d 475, 209 P3d 863 (2009)).

In determining whether or not a purchasing corporation is a continuation of a selling corporation, courts give weight to whether the owners and managers of the selling corporation are the same as the owners and managers of the acquiring corporation and to whether adequate consideration was paid for the assets. *Seipp v. Stetson Ross Machine Co.*, 32 Wash App 224, 646 P2d 783, 785 (1982). But this exception does not apply to every sale in which some of the managers of an acquiring corporation overlap with the managers in the selling corporation. *Trans-State, Inc. v. Barber*, 170 Ga App 372, 317 SE2d 242 (1984).

The Oregon Court of Appeals declined to find an acquiring corporation to be the continuation of the selling corporation where only some of the assets were sold and the selling corporation continued on in business for another 10 years. *Dahlke v. Cascade Acoustics, Inc.*, 216 Or App 27, 37,171 P3d 992 (2007).

The continuation exception may apply to transactions other than sale – such as the transfer upon the execution of a security interest. “Otherwise, unscrupulous business persons would be able to avoid successor liability and cheat creditors merely by changing the form of the transfer.” *Stoumbos v. Kilimnik*, 988 F2d 949, 961 (9th Cir 1993).

F. Fraud exception.

Successor liability may also be imposed where a corporation transfers its assets to another entity for the fraudulent purpose of escaping liability. *Hall v. Armstrong Cork, Inc.*, 103 Wash 2d 258, 692 P2d 787 (1984). The fraud exception may apply where the corporate assets are sold for inadequate consideration or where the transfer is fraudulent. *Eagle Pacific Insurance Co. v. Christensen Motor Yacht Corp.*, 135 Wash 2d 894, 959 P2d 1052 (1998). A bad faith transfer can be fraudulent even though the consideration paid for the assets is adequate.

The fraudulent transfer theory has always required consideration *and* good faith. . . Numerous factors may be relevant when determining good faith. The common ownership of the buying and selling corporations casts a suspicion on the transactions. . . A corporation's purchase of another corporation's assets is more likely to be an arm's-length transaction when there is no common identity between the corporations and individuals involved.

Good faith, or the lack thereof, ultimately rests upon the intent of the parties involved in the transaction. Transferring assets to another corporation to hinder or delay creditors is by definition a fraudulent transfer. *Eagle Pacific Insurance Co. v.*

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Christensen Motor Yacht Corp., 135 Wash 2d 894, 909-10, 959 P2d 1052, 1059 (1998).

Thus, an acquiring corporation will be liable for the debts of a selling corporation if the transaction was entered into fraudulently in order to permit the selling corporation to defraud its creditors and to escape liability for its debts. *Allen v. Meinig*, 109 Or App 341, 819 P2d 744 (1991); *Peterson v. Harville*, 445 F Supp 16, 24 (D Or 1977).

For example, in *Schmoll v. ACandS, Inc.*, 703 F Supp 868, 872 (D Or 1988), *affirmed*, 977 F2d 499 (9th Cir 1992), the court imposed successor liability after finding the transaction "was designed for the improper purpose of escaping asbestos-related liabilities," holding that the corporation "should not be allowed to avoid liability by transferring its profitable assets leaving no more than a corporate shell unable to satisfy its asbestos-related obligations."

Another court has said:

To meet the fraud exception to successor liability, the general rule is that a successor must knowingly participate in a fraudulent asset transfer. *Walton v. Mazda of Rock Hill*, 376 SC 301, 657 SE2d 67, 70 (SC App 2007) (citing Richard L. Cupp, Jr., Redesigning Successor Liability, 1999 U Ill L Rev 845, 875-76 (1999)).

G. Product line exception.

There is a fifth exception to the general rule, one which is less well recognized and which has been rejected in Oregon. This exception – sometimes applied in product liability litigation to impose liability on an acquiring corporation – is known as the "product line" exception. This exception was first articulated in *Ray v. Alad Corp.*, 19 Cal 3d 22, 560 P2d 3, 136 Cal Rptr 574 (1977), which held that it:

requires three factors to be established in order to find liability. First, the transferee must acquire substantially all of the transferor's assets, leaving no more than a corporate shell remaining. Secondly, the transferee must hold itself out to the public as a continuation of the transferor, and must do so by producing the same product line under a similar name. Finally, the transferee corporation must benefit from the goodwill of the transferor. *George v. Parke-Davis*, 107 Wash 2d 584, 733 P2d 507, 510 (1987).

The product line exception requires that the purchasing corporation continue to manufacture the particular product for which liability is sought to be imposed. *George v. Parke-Davis*, 107 Wash 2d 584, 733 P2d 507 (1987).

Oregon has rejected the product line exception. *Gonzalez v. Standard Tools & Equipment Co.*, 270 Or App 394, 348 P3d 293 (2015).

Earlier, a federal district court found "that the Oregon Supreme Court is unlikely to adopt the product line exception, and would most probably hold to the traditional rule regarding successor liability." *Western Helicopter Services, Inc. v. Rogerson Aircraft Corp.*, 728 F Supp 1506 (D Or 1990). In another case, the Oregon Court of Appeals questioned in dicta whether the product line exception should apply

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to asbestos-related products, because that subject has been addressed by statute. See ORS 30.900 to 30.927. “If we were to expand successor liability in this particular area of the common law, we risk potential conflict with the policies expressed by the legislature in that regard.” *Dahlke v. Cascade Acoustics, Inc.*, 216 Or App 27, 38, 171 P3d 992 (2007).

“The overwhelming majority of state courts have expressly declined to endorse this theory of liability. The supreme courts of only three states have adopted it: California, Washington, and New Jersey.” *Altman v. Motion Water Sports Inc.*, 722 F Supp 2d 234, 245 (D Conn 2010). See *Lefever v. KP Hovnanian Enterprises, Inc.*, 160 NJ 307, 734 A2d 290 (1999); *Martin v. Abbott Laboratories*, 102 Wash 2d 581, 689 P2d 368 (1984); *Ray v. Alad Corp.*, 19 Cal 3d 22, 560 P2d 3, 136 Cal Rptr 574 (1977). In addition, the intermediate court in Pennsylvania has determined that the product line exception applies in that state. *Dawejko v. Jorgensen Steel Co.*, 290 Pa Super 15, 434 A2d 106 (1981); *Vicuna v. O.P. Schuman & Sons, Inc.*, 106 F Supp3d 286 (ED NY 2015). So too, South Carolina also appears to have adopted this exception. *Simmons v. Mark Lift Industries, Inc.*, 366 SC 308, 622 SE2d 213 (2005).

Even in states which have adopted the product line exception, absent collusion or some other factor, some courts have held that this exception does not apply when the product line is acquired through a bankruptcy sale, because the bankruptcy usually means that the successor did not cause – or at least contribute to – the plaintiff's inability to recover against the predecessor. *Hall v. Armstrong Cork, Inc.*, 103 Wash 2d 258, 692 P2d 787 (1984). *Stewart v. Telex Communications, Inc.*, 1 Cal App 4th 190, 1 Cal Rptr 2d 669, 675 (1991). Other courts have applied the product line exception even where the product line was obtained through a bankruptcy sale. *Lefever v. KP Hovnanian Enterprises, Inc.*, 160 NJ 307, 734 A2d 290 (1999).

Additional discussion of the product line exception is contained in *Lucas v. Dorsey Corp.*, 609 NE2d 1191 (Ind App 1993); Phillips, *Successor Corporation Products Liability: Six or More Characters in Search of an Author*, 67 WASH UNIV L Q 335 (1989); *Corporations - Products Liability – Expansion of Successor Corporation Liability Through the Continuity of Enterprise Theory*, 55 MISS L J 413 (1985); Lenard, *Product Liability of Successor Corporations: A Policy Analysis*, 58 IND L J 677 (1983); Note, *Successor Liability in Washington: Product Liability*, 6 U PUGET SOUND L REV 323 (1983).

H. Rights of creditor when exception applies.

If one of the five exceptions to the general rule applies, a creditor is entitled to judgment against both the selling corporation and the acquiring corporation on the debt, but is entitled to only one complete satisfaction. *Erickson v. Grande Ronde*

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Lumber Co., 162 Or 556, 92 P2d 170 (1939). See also *Crown Controls, Inc. v. Smiley*, 110 Wash 2d 695, 706, 756 P2d 717, 722 (1988) (discussing joint and several liability in the principal and agent context).

The courts are split on whether the amount of any such judgment against the purchasing corporation is limited by the value of the assets purchased, or whether the purchasing corporation may be required to pay an amount in excess of the value of those assets.

Clearly, if the purchasing corporation expressly agrees to be liable for all liabilities of the selling corporation, it is responsible for all such liabilities, regardless of whether such liabilities exceed the assets acquired.

The result is less clear, however, if the contract expressly states that the purchaser is not acquiring the seller's liabilities, but the court imposes liability anyway.

Some cases limit recovery to the value of the assets received. *Nelson v. Pampered Beef-Midwest, Inc.*, 298 NW2d 281 (Iowa 1980); *Kinsella v. Marquette-Easton Finance Corp.*, 28 SW2d 427 (Mo App 1930).

Others cases permit a recovery of the full amount of the debt. *Jackson v. Diamond T. Trucking Co.*, 100 NJ Super 186, 241 A2d 471 (1968). At least one court extended liability to punitive damages awarded due to the conduct of the selling corporation, even though the actual and punitive damages exceeded the value of the assets acquired. *Schmidt v. Financial Resources Corp.*, 140 Ariz 135, 680 P2d 845, 847 (Ariz. App 1984).

A discussion of this topic is contained in FLETCHER CYC CORP § 7129 (Perm Ed).

While there are no Oregon cases directly on point, in the context of a shareholder milking corporate assets, Oregon courts have held that creditors may recover an amount not to exceed the sum milked, not the full amount of corporate debts. *Klokke Corp. v. Classis Exposition, Inc.*, 139 Or App 399, 912 P2d 929 (1996); *Amfac Foods, Inc. v. International Systems & Controls Corp.*, 294 Or 94, 111, n 18, 654 P2d 1092, 1103 (1982). See Section 10.10 of this book.

I. Related issues – fraudulent conveyance & piercing corporate veil.

If the consideration given in exchange for a seller's assets is insufficient, the fraudulent transfer statutes may also apply. ORS 95.200 *et seq*; *Allen v. Meinig*, 109 Or App 341, 819 P2d 744 (1991); *Tacoma Association of Credit Men v. Lester*, 72 Wash 2d 453, 433 P2d 901 (1967).

If just prior to, or after, insolvency, corporate assets are transferred to officers, directors or shareholders for inadequate consideration, a court may pierce the

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corporate veil and impose corporate liabilities on the person or persons receiving the assets. Piercing the corporate veil is discussed in Chapter Ten of this book.

Section 11.06 Liability after Mergers

In a merger, the surviving corporation becomes liable on all obligations of each corporation which is a party to the merger. *Nike, Inc. v. Spencer*, 75 Or App 362, 707 P2d 589 (1985); *Gaswint v. Case*, 265 Or 248, 509 P2d 19 (1973); *Schmidt v. Financial Resources Corp.*, 140 Ariz 135, 680 P2d 845 (1984); *Ladjevardian v. Laidlaw-Coggeshall, Inc.*, 431 F Supp 834 (SD NY1977); *Beals v. Washington International, Inc.*, 386 A2d 1156 (Del1978); *Johnson v. Marshall & Huschart Machinery Co.*, 66 Ill App 3d 766, 384 NE2d 141 (1978); *Lamb v. Leroy Corp.*, 85 Nev 276, 454 P2d 24 (1969).

ORS 60.497(1) provides:

When a merger involving a corporation takes effect:

(c) All obligations of each of the business entities that were parties to the merger, including, without limitation, contractual, tort, statutory and administrative obligations, are obligations of the surviving business entity.

The surviving corporation also possesses all rights, privileges and franchises possessed by each of the merged corporations. *All Brand Importers, Inc. v. Department of Liquor Control*, 213 Conn 184, 567 A2d 1156 (1989); *Knightstown Lake Property Owners Association, Inc. v. Big Blue River Conservancy District*, 178 Ind App 463, 383 NE2d 361 (1978); *Diamond Parking, Inc. v. Seattle*, 78 Wash 2d 778, 479 P2d 47 (1971).

An exception may exist, however, where a competing state statute requires state approval of the holder of a license. *State ex rel Don Williams Export, Inc. v. Timm*, 78 Wash 2d 520, 477 P2d 15 (1970) (transfer of common carrier permit to surviving corporation required state approval). But the same is not true where only a city ordinance requires approval. *Diamond Parking, Inc. v. Seattle*, 78 Wash 2d 778, 479 P2d 47 (1971).

If a transaction constitutes a *de facto* merger, the liabilities of the old corporation will also follow its assets into the acquiring corporation. A *de facto* merger occurs when:

(1) There is a continuation of the enterprise of the seller corporation, so that there is a continuity of management, personnel, physical location, assets, and general business operations.

(2) There is a continuity of shareholders which results from the purchasing corporation paying for the acquired assets with shares of its own stock, this stock ultimately coming to be held by the shareholders of the seller corporation so that they become a constituent part of the purchasing corporation.

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(3) The Seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible.

(4) The purchasing corporation assumes those liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation. (citations and footnotes omitted) *Shannon v. Samuel Langston Co.*, 379 F Supp 797, 801 (WD Mich 1974).

See also *Bud Antle, Inc. v. Eastern Foods, Inc.*, 758 F2d 1451, 1457-8 (11th Cir 1985); *Keller v. Clark Equipment Co.*, 715 F2d 1280, 1291 (8th Cir 1983).

A more detailed discussion of mergers is set out in Section 12.02 of this book.

Section 11.07 Criminal Responsibility

At common law, a corporation could not be prosecuted for a crime. *State v. Pacific Powder Co.*, 226 Or 502, 360 P2d 530 (1961); *Vaughan & Sons, Inc. v. State*, 737 SW2d 805 (Tex Cr App 1987); *State v. Adjustment Department Credit Bureau, Inc.*, 94 Idaho 156, 483 P2d 687 (1971); FLETCHER CYC CORP § 4942 (Perm Ed).

In Oregon and in most other states, courts have long held that a corporation is capable of committing a crime defined and made punishable by statute. *State v. Mason*, 26 Or 273, 38 P 130 (1894); *State v. Fraser*, 105 Or 589, 209 P 467 (1922); *Corporate Criminal Liability in Oregon: State v. Pacific Powder and the New Oregon Criminal Code*, 51 OR L REV 587 (1972); *Note*, 16 OR L REV 93 (1936); *State v. Truax*, 130 Wash 69, 226 P 259 (1924).

Some early cases held that a corporation could be prosecuted only if the legislature specifically so provided. *State v. Terre Haute Brewing Co.*, 186 Ind 248, 115 NE 772 (1917). Other early cases held a corporation could not be convicted of a crime carrying penalties of death or imprisonment, but could be convicted of a crime carrying the penalty of a fine.

At common law a corporation was not indictable for a felony or a misdemeanor, but this rule has been modified, and the general rule now is that a corporation cannot be indicted for a crime where the penalty imposed by statute is death or imprisonment, but where a fine may be imposed upon a corporation it is subject to criminal prosecution. Even where the penalty provided is fine or imprisonment, or both, in the discretion of the court, a corporation is not immune from criminal prosecution and may suffer the penalty of fine. (citations omitted) *People v. Strong*, 363 Ill 602, 2 NE2d 942, 944 (1936).

An early Oregon Attorney General opinion stated that while a corporation could be convicted of a crime, it could not be imprisoned. The opinion noted, however, that the corporation's officers and agents could be imprisoned. 10 *Op Or Atty Gen* 665 (1922). Today in some states, a court may even sentence a corporation to jail, but may suspend the sentence and instead impose a fine. *State v. Sheherd Construction Co., Inc.*, 248 Ga 3, 281 SE2d 151 (1981).

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As a general rule, a corporation may be held criminally liable for the acts of its employees only when those acts occur during the scope of the employee's authority and responsibility.

the quantum of proof necessary to sustain the conviction of a corporation for the acts of its agents is sufficiently met if it is shown that the corporation has placed the agent in a position where he has enough authority and responsibility to act for and in behalf of the corporation in handling the *particular* corporate business, operation or project in which he was engaged at the time he committed the criminal act. (emphasis in original). *Commonwealth v. Beneficial Finance Co.*, 360 Mass 188, 275 NE2d 33, 86 (1971).

But “a corporation can be convicted for actions of its agents even if it expressly instructed the agents not to engage in the criminal conduct.” *State v. Zeta Chi Fraternity*, 142 NH 16, 696 A2d 530, 535 (1997).

Congress may constitutionally enact a criminal statute under which a corporation may be convicted for the acts of its agent – even if that conduct was not “within the agent's actual authority, and even though it may have been contrary to express instructions.” *United States v. Hilton Hotels Corp.*, 467 F2d 1000, 1004 (9th Cir 1972); *United States v. Wilson*, 59 F2d 97 (WD Wa 1932). A statute may be enacted which makes a corporation criminally liable for acts of a “managerial official” of the corporation. *Military Circle Pet Center No. 94, Inc. v. State*, 181 Ga App 657, 353 SE2d 555 (1987).

If proof of a crime requires proof that the corporation had actual knowledge of some fact, knowledge of an officer or director may be imputed to the corporation. *J.M.S. Farms, Inc. v. Department of Wildlife*, 68 Wash App 150, 842 P2d 489 (1992).

Most states “have refused to extend corporate responsibility to crimes ‘involving personal violence and specifically, homicide or manslaughter,’” unless it is clear that the legislature intended such a result. *State v. Pacific Powder Co.*, 226 Or 502, 505, 360 P2d 530, 531 (1961).

In addition to the corporation, its officers may be held criminally responsible for an unlawful corporate act in which they were involved. *State v. Baker*, 48 Or App 999, 618 P2d 997 (1980); *Dodson v. Economy Equipment Co.*, 188 Wash 340, 62 P2d 708 (1936).

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

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This would not be true, however, if the criminal offense is such that only the corporation falls within its terms. *State v. Lyon*, 175 Wash 199, 27 P2d 131 (1933)(failure to report and pay excise tax).

A corporation may be convicted of a crime, even though the crime occurred before a change in ownership of that corporation. *United States v. Rogers*, 624 F2d 1303 (5th Cir 1980).

The prosecution of a corporation does not abate merely because the corporation dissolves. *People v. Pymm Thermometer Corp.*, 188 AD2d 560, 591 NYS2d 459 (1995).