Toward Coherence in Civil Conspiracy Law: A Proposal to Abolish the Agent's Immunity Rule

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I. INTRODUCTION

Theories of secondary liability, such as conspiracy and aiding and abetting, have gained renewed prominence in light of the recent rash of corporate financial fraud. The collapse of Enron is a prominent example. Enron ranked seventh on the Fortune 500 list of America's largest corporations in 2001, and was, by all appearances, an immensely successful and profitable company. But in December of 2001, Enron filed for bankruptcy, whereupon it was revealed that the company was hiding tens of billions of dollars in debt through the use of “off balance sheet” partnerships and other accounting irregularities. Enron's bankruptcy filing stayed most claims against it, and its assets were insufficient to satisfy its creditors and shareholders in any event. So Enron's victims looked for solvent defendants—such as Enron's accountants, bankers, and lawyers—to sue on the theory that they knew of and participated in Enron's fraud.

2. See id. at 10–11.
4. For example, a class action lawsuit led by the Regents of the University of California was brought by Enron shareholders seeking at least $1.3 billion against Enron's auditors, Arthur Andersen; nine Wall Street banks who had lent money to or structured deals with Enron, including J.P. Morgan Chase, Citigroup, Mer-
Whenever a tortfeasor is bankrupt or otherwise judgment-proof (and even when it is not), resourceful plaintiffs will consider suing agents and employees on conspiracy or related theories to increase their chances of recovery. But suits against agents or employees for participating in the wrongful acts of their principal or employer involve an inherent tension. The nature of an agency relationship is that the agent has a duty to act in a manner that furthers the principal's goals. If it is the agent's job to assist the principal or employer, when is it appropriate to impose liability on the agent for doing just that?

A number of courts have restricted the liability of agents and employees by means of the "agent's immunity rule"—a rule that provides that, as a matter of law, duly acting agents are incapable of conspiring with their principal or employer. The rule applies only where the agent is acting on behalf of the principal and not for his or her own personal gain. Courts have applied this rule to bar claims against agents for conspiracies to commit a variety of common law civil torts, such as fraud, intentional infliction of emotional distress, interference with prospective economic advantage, and malicious prosecution. This Article argues that neither precedent nor policy justifies the application of such a broad-based defense to civil conspiracy claims.

A trace of the historical roots of the agent's immunity rule reveals that the rule is based on two distinct but related rationales. First, an agent is privileged to induce a breach of, or interfere with, his or her employer's contract. Second, and more commonly, when agents act

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5. See RESTATEMENT (SECOND) OF AGENCY § 13 (1958) ("An agent is a fiduciary with respect to matters within the scope of his agency."); Rianda v. San Benito Title Guar. Co., 217 P.2d 25, 27 (Cal. 1950) ("It is the duty of an agent to obey the instructions of his principal . . . .").

6. See infra notes 93–96 and accompanying text.

7. See infra note 94.


9. See infra notes 108–39 and accompanying text. The causes of action for inducement of breach of contract and interference with contract are closely related, but distinct. Inducement of breach requires that the third party actually bring about
on behalf of the corporation, the corporation is deemed to be the sole legal actor; thus, there can be no conspiracy because the corporation cannot "agree" with itself.\(^\text{10}\) Neither of these rationales supports a rule that immunizes agents against civil conspiracy claims generally.

The agent's privilege to induce a breach of the principal's contract is justified by economic considerations that are unique to that cause of action, which lies at the intersection of tort and contract. Courts do not impose tort damages on contracting parties who breach to avoid deterring the "efficient" breach—one where the breaching party can make the non-breaching party "whole" by paying expectancy damages, yet still come out ahead.\(^\text{11}\) If tort liability via civil conspiracy were imposed upon duly acting agents for effecting or recommending a breach, contracting parties might internalize the cost through indemnification or by chilling the agent's conduct. The agent's privilege to induce a breach thus helps preserve the contracting party's own "privilege" to breach and pay only expectancy damages. Agents are likewise privileged to conspire to induce a breach under the rationale that someone immune from the underlying tort cannot be liable for conspiring to commit it—a notion referred to herein as the "underlying duty requirement."

However, where the object of the alleged conspiracy is not a breach of contract, but a tort such as fraud, these same considerations do not apply. The principal is not "privileged" to commit fraud, so the agent is not privileged to induce the principal to commit fraud, and likewise should not be immune from conspiring with the principal to commit it.

Similarly, the single legal actor theory—the fiction that the agent's acts are those of the principal, and thus that the "plurality" element of conspiracy is absent—arose where policy considerations regarding the underlying offense supported its application. The fiction is accepted in the antitrust context, on the rationale that proscribing certain intra-corporate combinations that restrain trade could chill legitimate business conduct. However, the same fiction is rejected in the context of criminal conspiracy, on the rationale that the increased danger aris-

\(^{10}\) See infra notes 140-45 and accompanying text.

\(^{11}\) See infra notes 69-75 and accompanying text.
ing from a group of criminal actors that justifies punishing conspiracy generally exists even where the conspirators are all agents and employees of a single entity.

Whether the single legal actor theory is applied to bar common law civil conspiracy claims against agents should depend on the policies of the underlying tort. Using a policy-based analysis, the result should be the same as that reached when applying the agent's privilege theory: the agent should not be immune from conspiracy to commit most torts. The fiction of an agent as an arm of the principal is entertained so principals (especially corporate principals, who cannot act but through agents) can conduct business, not so they can harm others. Thus, where the agent "conspires" to induce a breach of the principal's contract, the principal is seen under the efficient breach theory as merely "doing business," and so the fiction of the single legal actor should be respected. But where the object of the conspiracy is fraud, battery, or any other intentional tort, no policy is furthered by immunizing anyone who intentionally encourages or participates in the tort, even agents who do so on behalf of their principals.

The impetus for courts to apply the agent's immunity rule to protect agents who act on behalf of the principal, but not those who act for their own personal gain, is understandable. Courts may be reluctant to impose liability on someone who did not actually commit a tort based on something as ephemeral as an "agreement" (which itself may be proved by circumstantial evidence). That reluctance is likely magnified where the defendant is an agent of the tortfeasor—the fact that the agent worked in concert with his principal is not necessarily circumstantial evidence of anything sinister. Where an agent is merely acting on behalf of the principal, he is likely not the "bad guy" who deserves punishment, but rather an unwitting pawn in the principal's scheme. Conversely, where the agent acts not on the principal's behalf, but for his own personal gain, there is an inference that he knew about and intended to achieve the wrongful result of the conspiracy. However, if an inference of scienter is what courts are driving at when they apply the agent's immunity rule and the personal gain exception, they should focus on conspiracy's intent element explicitly.

Part II of this Article provides some background on the doctrine of civil conspiracy. Specifically, it examines the tendency in the civil context to subordinate conspiracy-specific policies to tort-based policies. Part III takes up the agent's immunity rule, and discusses how the two doctrines from which it derives—the agent's privilege theory and the single legal actor theory—likewise developed to promote the policies of specific underlying torts. The Article submits that, to the ex-

tent that courts apply the agent’s immunity rule to shield agents from civil conspiracy liability generally, they are impairing conspiracy policy without furthering underlying tort policies, and are thus reaching the wrong result. Part IV explores the factors that may be driving courts to apply the agent’s immunity rule. Part V concludes by suggesting a policy-based analytical framework that avoids the problems of the agent’s immunity rule.

II. THE NATURE OF CIVIL CONSPIRACY

A. Civil Conspiracy Distinguished from Criminal Conspiracy

The concept of conspiracy developed in English common law in the late thirteenth and early fourteenth centuries. Initially, the concept focused on combinations to obstruct justice or falsely indict or acquit an accused, and only later matured into the modern doctrine that generally proscribes combinations to commit unlawful acts.13 As the law of conspiracy developed in America, it borrowed heavily from English law.14 The criminal charge of conspiracy developed rapidly at early common law, but the concept of civil conspiracy was not widely accepted until the eighteenth century.15 In trying to understand civil conspiracy, it is useful to compare it to the criminal counterpart from which it derived.

At common law, a criminal conspiracy existed if there were: (1) two or more persons; (2) an unlawful object or a lawful object to be accomplished by unlawful means; and (3) an agreement or meeting of the minds on the object or course of action.16 This last element requires both that the parties intend to enter into an agreement and intend to accomplish the object of the conspiracy.17 Many jurisdictions now require, in addition to the above elements, an overt act in furtherance of the conspiracy by at least one of the co-conspirators.18 However, the

15. Cooper, supra note 13, at 305.
16. See Cooper, supra note 13, at 305 n.16 (citing 15A C.J.S. Conspiracy § 35(1) (1967); Pinkerton v. United States, 145 F.2d 252, 254 (5th Cir. 1944)).
17. See People v. Backus, 590 P.2d 837, 855 (Cal. 1979) (“Conspiracy is a specific intent crime, with the intent divided into two elements: (a) the intent to agree or conspire, and (b) the intent to commit the offense which is the object of the conspiracy.”); see also United States v. Scarbrough, 990 F.2d 296, 299 (7th Cir. 1993) (noting that the general federal conspiracy statute, 18 U.S.C. § 371, requires intent to commit the substantive offense that is object of conspiracy).
overt act requirement is a low hurdle:19 it need not be committed by the defendant;20 it need not be a criminal offense or even the “substantial step” required for an attempt;21 and it can be a wholly innocent act in and of itself.22

Criminal conspiracy is an inchoate offense23 that is punished independently of the underlying offense and regardless of whether that underlying offense is ever committed.24 One could thus be convicted of conspiracy even if neither he nor any of his co-conspirators were convicted of—or even indicted for—the underlying offense that was the object of the conspiracy.25 Accordingly, in the criminal context, it is said that it is the combination itself—the very act of agreement—that constitutes the offense.26

By contrast, a civil conspiracy is not independently actionable. A civil cause of action for conspiracy will not arise unless and until a tort has been committed pursuant to the combination and damage results from that tort.27 Thus, the elements of a claim for civil conspiracy

19. See Benjamin F. Pollack, Common Law Conspiracy, 35 GEO. L.J. 328, 338 (1947) (“The courts somehow discover an overt act in the slightest action on the part of the conspirators.”).
20. See Braverman v. United States, 317 U.S. 49, 53 (1942); see also MODEL PENAL CODE § 5.03(5) (1985) (“No person may be convicted of conspiracy to commit a crime . . . unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired.”) (emphasis added).
21. See United States v. Harper, 33 F.3d 1143, 1148 (9th Cir. 1994) (“[T]he overt act required as an element of conspiracy need not have as immediate a connection to the intended crime as the 'substantial step' required for an attempt. It is enough that the overt act is ‘taken to implement the agreement.’”) (citation omitted); In re Cheri T., 83 Cal. Rptr. 2d 397, 402 (Cal. Ct. App. 1999) (“In the law of conspiracy, there is no requirement that the overt act itself be criminal, or even be an attempt to commit the crime.”).
22. United States v. Masiello, 491 F. Supp. 1154, 1164 (D. S.C. 1980). For example, in a conspiracy to commit murder by poisoning the victim, the purchasing of postage stamps for the purpose of sending the poison through the mail can satisfy the overt act requirement. People v. Corica, 130 P.2d 164, 167 (Cal. Ct. App. 1942).
23. E.g., United States v. Alvarez, 610 F.2d 1250, 1254 n.3 (5th Cir. 1980); MODEL PENAL CODE § 5.03 cmt. 1 (1985).
24. United States v. Romeros, 600 F.2d 1104, 1105 (5th Cir. 1979); People v. Morante, 975 P.2d 1071, 1079–80 (Cal. 1999).
25. Romeros, 600 F.2d at 1105. Where all possible co-conspirators are tried together, and all but one are acquitted, the conviction of the remaining co-conspirator cannot stand. United States v. Sangmeister, 685 F.2d 1124, 1126–27 (9th Cir. 1982). However, where the prosecution tries one co-conspirator separately, or does not indict all or any of the the other conspirators, the conspiracy conviction may stand. Id.
may be generally stated as: (1) two or more persons; (2) an unlawful object or a lawful object to be accomplished by unlawful means; (3) an agreement or meeting of the minds on the object or course of action; (4) one or more wrongful acts; and (5) damage resulting therefrom.28

Moreover, just as in the criminal context, the defendant must not only intend to enter into an agreement, but also know of and intend to aid in accomplishing the underlying objective.29

The difference between criminal and civil conspiracy has been summarized as follows: "The gist of the crime of conspiracy is the agreement to commit the unlawful act whereas the gist of the tort is the damage resulting to the plaintiff from an overt act or acts committed pursuant to the common design."30 This statement, albeit pithy, is technically inaccurate: although there is a "crime of conspiracy," in most jurisdictions there is no corresponding "tort" of conspiracy.31

P.2d 233, 239 (Kan. 1950) ("The words fraud and conspiracy alone, no matter how often repeated in a pleading, cannot make a case for the interference of a court of equity until connected with some specific act for which one person is in law responsible to another; they have no more effect than other words of unpleasant signification.").


People v. Beaumont Inv., Ltd., 3 Cal. Rptr. 3d 429, 457 (Cal. Ct. App. 2003) (citing Wyatt v. Union Mortgage Co., 598 P.2d 45, 51 (Cal. 1979)); see also Kidron v. Movie Acquisition Corp., 47 Cal. Rptr. 2d 752, 758 (Cal. Ct. App. 1995) ("The conspiring defendants must also have actual knowledge that a tort is planned and concur in the tortious scheme with knowledge of its unlawful purpose."); Triplex Communications, Inc. v. Riley, 900 S.W.2d 716, 719 (Tex. 1995) ("[C]ivil conspiracy requires specific intent. For a civil conspiracy to arise, the parties must be aware of the harm or wrongful conduct at the inception of the combination or agreement.").

Michael R. v. Jeffrey B., 205 Cal. Rptr. 312, 320 (Cal. Ct. App. 1984); see 15A C.J.S. Conspiracy § 100 (2004) ("The difference between civil and criminal conspiracy is that in a criminal conspiracy the agreement is the gravamen of the offense, whereas in a civil action the gravamen of the tort is the damage resulting to a plaintiff from an overt act done pursuant to a common design.").

Doctors' Co., 775 P.2d at 510 ("A civil conspiracy however atrocious, does not per se give rise to a cause of action unless a civil wrong has been committed resulting in damage.") (quoting Unruh v. Truck Ins. Exch., 498 P.2d 1063, 1074 (Cal. 1972)). A minority of jurisdictions have recognized the so-called "true conspiracy," also known as the "force of numbers" exception, i.e., the combination itself makes unlawful a course of conduct that would not be unlawful if carried out by an individual. E.g., Fleming v. Dane, 22 N.E.2d 609, 611 (Mass. 1939); see also Leach, supra note 13, at 10 n.64 (citing at least eight states that recognize this exception); Cooper, supra note 13, at 308 n.28 (discussing the exception). It has been suggested that the "true conspiracy" category exists because courts have overstated the rule in saying that conspiracy creates no liability absent an independent tort; rather, the rule should be merely that civil conspiracy is not actionable without damage, whether that damage be caused by the conspiracy itself or some other act. Thus, in cases where the agreement itself causes harm, as with
B. The "Non-Tort" of Civil Conspiracy

If civil conspiracy is not a tort, a question naturally arises: what is it? Essentially, it is a theory of vicarious liability that renders each participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from the wrong, irrespective of whether or not he or she was a direct actor and regardless of the degree of his or her activity. The acts of any one co-conspirator are deemed the acts of all, so anyone who merely agrees to the plan or design may be held liable for the acts of the others even if they committed no overt act and gained no benefit therefrom. Thus, the benefit to the plaintiff in joining co-conspirators is that it increases the pool of defendants from which the plaintiff may recover. As noted above, where the primary tortfeasor is bankrupt, this can indeed be a useful tool.

Alleging a civil conspiracy offers other potential benefits to a plaintiff, as well. First, it provides an exception to the hearsay rule: an admission of any co-conspirator is admissible against each of the others. Second, it may allow a plaintiff to support the court's exercise of long-arm jurisdiction over non-resident alleged co-conspirators, so long as the court has personal jurisdiction over at least one co-conspirator. Third, it may toll the applicable statute of limitations, which in many jurisdictions begins to accrue from the last overt act in furtherance of the conspiracy, rather than from the act that actually caused the plaintiff's injury.

boycotts or concerted refusals to deal, the agreement itself can be a basis for tort liability. Id.


The evidentiary, jurisdictional, and limitations tolling benefits may be characterized as the procedural features of civil conspiracy. By contrast, the ability of a plaintiff to hold co-conspirators jointly liable for all damage caused by the primary tortfeasor may be called the substantive feature of civil conspiracy, in that it goes directly to the fundamental question of when one party should bear responsibility for the damage caused by another party's tortious acts. It is this substantive feature of civil conspiracy that is the focus of this Article.

C. The Reason for the Non-Tort Character of Civil Conspiracy

To understand why conspiracy is not an independent tort, we first look to why conspiracy is an independent crime. In the criminal context, two related reasons are given for making conspiracy a separately punishable offense. The first is that conspiracy allows police intervention at an earlier point than is permitted under the law of attempt. But early intervention alone would not explain why conspiracy does not merge into the underlying offense even where that offense has been completed, while attempt charges do merge. This leads to the second reason for punishing conspiracy separately, which is the "group danger" rationale: "two people united to commit a crime are more dangerous than one or both of them separately planning to commit the same offense." The co-conspirators acting in concert are thought to enjoy increased efficiency and division of labor, to share knowledge, to exert pressure on each other not to withdraw, and to provide mutual encouragement and support; moreover, their combination makes possible the execution of more complex criminal acts than

(holding plaintiff's claim would not be time-barred if he could show overt acts in furtherance of the conspiracy within the limitations period, but plaintiff's allegations did not state a claim for conspiracy). Some scholars have suggested that a plaintiff should also be able to use civil conspiracy allegations as a means of persuading the jury of the outrageous nature of the defendants' conduct. See generally Leach, supra note 13.

38. Model Penal Code § 5.03 cmt. 1 (1965); People v. Morante, 975 P.2d 1071, 1080 (Cal. 1999).

39. See Commonwealth v. Cook, 411 N.E.2d 1326, 1332 n.6 (Mass. App. Ct. 1980) ("It is established law that conspiracy to commit an offense and the subsequent commission of the crime normally do not merge into a single punishable act. The necessity of proving a separate agreement underlies the merger rule . . . .") (citations omitted); see also Sarah N. Welling, Intracorporate Plurality in Criminal Conspiracy Law, 33 Hastings L.J. 1155, 1180 (1982) (citing Pinkerton v. United States, 328 U.S. 640 (1946)).

40. Joshua Dressler, Understanding Criminal Law § 29.02(B) at 425 (3d ed. 2001); Morante, 975 P.2d at 1080 n.5.
might otherwise occur, and makes more likely the commission of crimes unrelated to conspiracy's original purpose.41

Based on the twin rationales of early prevention and group danger, it is clear that the touchstone of criminal conspiracy is the increased risk of social harm resulting from the combination of actors. But there is also an increased risk of harm where the object of the conspiracy is a tort rather than a crime. Given that the tort system seeks to deter socially undesirable conduct, this suggests that the tort system should also proscribe conspiracy independently of the underlying tort.42

The difference in treatment between the criminal and civil systems derives from tort's focus on compensation for harm suffered. Unlike the criminal system, which prohibits acts that endanger the general safety and welfare,43 the civil tort system does not operate to deter socially dangerous conduct generally. Rather, it promotes deterrence only when it simultaneously promotes compensation to an identifiable individual.44 Indeed, the deterrent effect of the tort system is not "activated" until a plaintiff has been injured and chooses to avail him or herself of its remedies. Because the tort system does not proscribe "attempted" torts that do not result in harm,45 a fortiori it would not proscribe the agreement to make the attempt, which is at an earlier stage of development of the tort than the attempt itself.

41. Callanan v. United States, 364 U.S. 587, 593–94 (1961); Welling, supra note 39, at 1180–81. It should be noted that the justifications for the group danger rationale for punishing conspiracy criminally "have never been proved empirically, and there is substantial disagreement regarding their validity." Id. at 1181.

42. See generally Leach, supra note 13 (arguing that in certain circumstances, conspiracy doctrine should be used to target inchoate torts).


44. Crum v. City of Stockton, 157 Cal. Rptr. 823, 824 n.3 (Cal. Ct. App. 1979) (noting that "damages [are] an essential element of any tort"); Leach, supra note 13, at 4 ("[T]raditional tort suits cannot prevent the initial damage, but only, by means of the imposition of substantial compensatory and punitive damages, warn the tortfeasor of the potential costs of such tortious actions in the future."); see also RESTATEMENT (SECOND) OF TORTS § 901 (1979) ("[T]he purposes for which actions of tort are maintainable [are]: (a) to give compensation, indemnity or restitution for harms; (b) to determine rights; (c) to punish wrongdoers and deter wrongful conduct; and (d) to vindicate parties and deter retaliation or violent and unlawful self-help."); Simeon M. Kriesberg, Decisionmaking Models and the Control of Corporate Crime, 85 YALE L.J. 1091, 1096 (1976) ("Although both criminal and civil law are concerned with deterring undesirable conduct, only the latter is also concerned with compensating injured parties.").

45. Of course, an attempt to commit one tort could constitute another tort. As an obvious example, if one attempts a battery upon another but no physical touching ensues, the defendant could still be liable for assault if the victim was put in apprehension of immediate harm. E.g., Bergman by Harre v. Anderson, 226 Neb. 333, 339, 411 N.W.2d 336, 336 (1987). This is not a relaxation of the damage requirement; it is merely a recognition that being put in fear of immediate bodily harm is itself a compensable form of injury.
Thus, civil conspiracy is not an independent tort because considerations that are specific to conspiracy, i.e., early prevention and group danger, have been subordinated to general tort norms, i.e., the requirement of damages and focus on compensation of specific victims.

D. Consequences of the Non-Tort Character of Civil Conspiracy: The Underlying Duty Requirement

This subordination of conspiracy doctrine in the tort context has further manifested itself in the oft-stated rule that a plaintiff cannot use conspiracy allegations to hold a defendant liable for a tort he or she would otherwise be legally incapable of committing.46 One way in which a defendant would be legally incapable of committing a tort is if he or she does not owe the duty upon which the violation of the tort is premised.47 For example, if the defendant does not owe the plaintiff a fiduciary duty, the defendant cannot be held liable for conspiring with a third party to breach that party's fiduciary duty to the plaintiff.48 This limitation on civil conspiracy liability is referred to herein as the “underlying duty requirement.”

1. Criticism of the Underlying Duty Requirement

Not all courts apply the underlying duty requirement to civil conspiracy claims,49 and the requirement is not without its criticisms. Although the underlying duty requirement is articulated as a corollary of the rule that civil conspiracy is not an independent tort,50 the one does not necessarily follow from the other. The reason that civil conspiracy is not an independent tort is that conspiracy-specific consider-

47. See Applied Equip. Corp. v. Litton Saudi Arabia Ltd., 869 P.2d 454, 457 (Cal. 1994) (“By its nature, tort liability arising from conspiracy presupposes that the coconspirator is legally capable of committing the tort., i.e., that he or she owes a duty to plaintiff recognized by law and is potentially subject to liability for breach of that duty.”).
49. E.g., DeBoer Structures, Inc. v. Shaffer Tent & Awning Co., 233 F. Supp. 2d 934, 945–46 (S.D. Ohio 2002) (holding non-fiduciary liable for conspiracy to breach fiduciary duty, the court said “[t]he civil conspiracy claim does not ... require the existence of a duty on the part of the alleged co-conspirator”). Cf. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 530 (1992) (holding that claim for conspiracy to misrepresent or conceal facts concerning smoking hazards was not preempted by the Public Health Cigarette Smoking Act of 1969, 15 U.S.C.A. § 1334, because the “predicate duty underlying this claim is a duty not to conspire to commit fraud”) (emphasis added).
50. See, e.g., Applied Equip. 869 P.2d at 459 (“Conspiracy is not an independent tort; it cannot create a duty or abrogate an immunity.”).
ations (group danger) have been subordinated to the general priorities of civil tort law (compensation). But the civil tort system's focus on compensation cannot alone justify the underlying duty requirement. The systemic insistence that there be harm to an identifiable plaintiff explains why a completed tort must exist before liability can be imposed upon co-conspirators. It does not explain why the co-conspirators need to have been legally capable of committing that tort.51

Courts holding that a conspiracy defendant must owe the duty violated by the underlying tort are implicitly deciding that there is no general tort duty to avoid conspiring.52 But the question is, should there be a duty not to conspire? The normal rule in tort law is that liability follows fault.53 The concept of "fault" can refer to a culpable state of mind, to causation of injury, or to both.54 Holding co-conspirators civilly liable is justified, if at all, only if they are culpable and/or have contributed to the harm that results from acts taken pursuant to the conspiracy.

Neither a co-conspirator's culpability nor the increased risk of harm caused by his or her entering into a combination is related to whether the co-conspirator owes the underlying duty. Take the example of a non-fiduciary who conspires with a fiduciary to breach the latter's fiduciary duty. The non-fiduciary co-conspirator is no less culpable because the duty he agrees to help someone else violate is a fiduciary one (as opposed to a duty that everyone owes). Indeed, if anything, the co-conspirator may be more culpable in this situation because he knows he is helping the primary wrongdoer violate a position of trust, and not merely an obligation incurred at arm's length or vis-à-vis a total stranger.

There is also an increased risk of harm from the non-fiduciary's combination with a fiduciary. Although the risk that the non-fiduciary will breach his fiduciary duty to the third party is no greater than it would have been had the co-conspirators acted independently—it is

51. See, e.g., DeBoer Structures, 233 F. Supp. 2d at 945–46 (rejecting the underlying duty requirement, the court said "[t]here must simply be evidence of a common understanding or design to commit an unlawful act").
52. See Karl N. Llewellyn, Some Realism About Realism—Responding to Dean Pound, 44 Harv. L. Rev. 1222, 1239 (1931) (arguing that judges make, not find, the law). Cf. Cipollone, 505 U.S. at 530 (acknowledging a "duty not to conspire to commit fraud").
54. See, e.g., City of Chicago v. M/V Morgan, 248 F. Supp. 2d 759, 775 (N.D. Ill. 2003) (examining whether "the 'fault' that is to be apportioned or compared [is] culpability only or causation as well"); In re New York City Asbestos Litig., 660 N.Y.S.2d 803, 807 (N.Y. Sup. Ct. 1997) ("In CPLR § 1411, dealing with comparative fault, the statute refers to 'culpable conduct which caused the damages.'").
non-existent in either event, because the non-fiduciary is legally inca-

pable of breaching such a duty—that is not the only potential risk.
The influence that the non-fiduciary exerts on the fiduciary, in terms
of moral support, technical knowledge, or pressure against with-

drawal, could make it more likely that the fiduciary will breach his
or her duty, thus making the combination more dangerous than the
two acting independently.

One could even argue that the fact that conspiracy is not an inde-
pendent tort counsels against the underlying duty requirement, not in
favor of it. Because conspiracy is not an independent tort, a prerequi-
site to recovery by a plaintiff against co-conspirators is that the plain-
tiff prove each of the elements of a tort—typically, duty, breach,
causation, and damages—against at least one direct tortfeasor with
whom they conspired. The plaintiff is not required, however, to
prove that the co-conspirators breached a duty; nor is the plaintiff re-
quired to show that they caused the plaintiff's damages. All that need
be proven against the co-conspirator is that he entered into an agree-
ment to pursue the tort. But duty is not an element of an agreement,
so what does it have to do with conspiracy liability? To put it another
way, if breach, causation, and damage need not be established as to
co-conspirators, why does duty?

2. A Possible Defense of the Underlying Duty Requirement

Perhaps the underlying duty requirement exists precisely because
so little else needs to be proved against co-conspirators. After all, if
the defendant not only owes the duty but also breaches that duty, he
can be held liable directly in tort; under these circumstances, con-
spiracy doctrine becomes superfluous—at least as to that defendant,

55. See Welling, supra note 39, at 1180 (discussing mechanisms of increased group
danger of conspiracy).
Argument for a New Approach to Damages, 33 CUMB. L. REV. 15, 17 (2003) ("It is
widely understood that tort theory incorporates four main elements: 1) duty; 2)
breach of duty; 3) causation (both legal and factual); and 4) damages.").
57. E.g., Earp v. City of Detroit, 167 N.W.2d 841, 845 (Mich. Ct. App. 1969) ("There is
no civil action for conspiracy alone. It must be coupled with the commission of
acts which damaged the plaintiff. Recovery may be had from parties on the the-
ory of concerted action as long as the elements of the separate and actionable tort
are properly proved.").
directors and officers who directly order, authorize or participate in the corpora-
tion's tortious conduct ... may be held liable, as conspirators or otherwise, for
violation of their own duties towards persons injured by the corporate tort.") (em-
phasis added).
tions of conspiracy are mere surplusage in a case where the conspiracy itself is
unproved but there is evidence of actionable conduct on the part of one defendant.
Such conduct is actionable, regardless of the conspiracy . . . . ").
and at least for substantive purposes.\footnote{The plaintiff may nevertheless choose to allege a conspiracy for procedural reasons—such as to avoid the statute of limitations, to hold still other co-conspirators jointly and severally liable, or for jury appeal—see supra notes 35–37 and accompanying text—but the plaintiff does not substantively need conspiracy theory in order to hold the defendant liable for the damage caused by the tortfeasor.} A plaintiff only \textit{needs} conspiracy theory to hold a defendant liable either where the defendant has agreed to accomplish a tort \textit{without} providing any further assistance to the tortfeasor, or has provided assistance that is not itself independently tortious.\footnote{A plaintiff could also sue for aiding and abetting where the defendant knew of the primary wrongdoer's tortious conduct, and provided substantial assistance to the wrongdoer. \textit{E.g.}, Halberstam v. Welch, 705 F.2d 472, 477 (D.C. Cir. 1983). Technically, then, a plaintiff only \textit{needs} conspiracy allegations where he cannot show that the assistance given by the defendant amounted to "substantial assistance."} Agreeing to assist someone or providing non-tortious assistance to them is a low threshold of conduct, and the conduct of an innocent actor could resemble that of a culpable co-conspirator.\footnote{See Egan v. United States, 137 F.2d 369, 378 (8th Cir. 1943) ("The line that separates mere knowledge of and acquiescence in a conspiracy from participation and active cooperation is often vague and difficult to determine."); Jacqueline R. Mijuskovic, \textit{Applied Equipment Corp. v. Litton Saudi Arabia, Ltd.: Eliminating Tort Damages from Contract Actions}, 30 U.S.F. L. Rev. 561, 567 (1996) ("There is nothing inherently wrong with agreeing and planning to take a particular course of action.").} Accordingly, courts view conspiracy with a wary eye.\footnote{See Krulewitch v. United States 336 U.S. 440, 449 (1949) (Jackson, J., concurring) ("[T]he looseness and pliability of the doctrine present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of a particular case."); \textit{Developments in the Law—Criminal Conspiracy}, 72 Harv. L. Rev. 922 (1959) (noting that flexibility and formlessness of conspiracy law have evoked widespread criticism from judicial and academic commentators).}

It is, of course, the defendant's wrongful intent to achieve the object of the combination that distinguishes an unwitting accomplice from the knowing partner in crime (or, more accurately in the civil context, "partner in tort"). But every conspiracy defendant will declare his innocence, leaving the judge (or jury) to rely on circumstantial evidence of intent.\footnote{See Tompkins v. Cyr, 995 F. Supp. 664, 685 (N.D. Tex. 1998) (holding specific intent element of civil conspiracy may be proved by circumstantial evidence).} Perhaps courts, recognizing that lack of duty is a "cleaner" basis for denying civil conspiracy liability than lack of intent (in that it is more amenable to resolution as a matter of law), use the underlying duty requirement as a means of reining in what they see as a dangerously nebulous doctrine.\footnote{See United States v. Kaiser, 179 F. Supp. 545, 549 (S.D. Ill. 1960) ("It may be said that conspiracy is a nebulous offense but even nebulae must admit of some limitations. If the conspiracy statute is to be applied to cases of this nature, the application should be effected by congressional action, not by judicial legislation.").} In other words, perhaps they are more concerned with preventing false positives (non-culpable actors being held liable) than false negatives (culpable actors...
being immunized), so they apply a requirement that increases the likelihood of the latter in order to reduce the former.

To be clear, this is an exercise in speculation: if limiting the use of the conspiracy doctrine in the civil context is the courts' motivation for applying the underlying duty requirement, they do not say so explicitly. Nor would this motivation justify applying the underlying duty requirement to civil conspiracy claims, as opposed to, for example, requiring civil conspiracy plaintiffs to meet a higher evidentiary threshold of intent.

3. A Better Defense of the Underlying Duty Requirement

Not surprisingly, the justification for the underlying duty requirement will not be found in the policies behind conspiracy doctrine, since the requirement directly undermines the conspiracy-based policy of deterring and punishing all culpable actors. Rather, the requirement is defensible on the ground that it prevents plaintiffs from circumventing the policies of other torts.

Applied Equipment Corp. v. Litton Saudi Arabia, Ltd.66 illustrates the point. In Applied Equipment, the California Supreme Court held that a breaching party could not be liable to the other contracting party for conspiring to interfere with its own contract.67 In considering this issue, the court first considered whether a party could be held liable in tort for interfering with its own contract. The court answered this preliminary question in the negative, relying heavily upon the theory of efficient breach.68

Under the efficient breach theory, if one party can breach its contract, compensate the other party, and still make a profit—for example, by contracting with a third party who can supply product to the breaching party at a sufficiently lower price—the breach is efficient69 and should not be deterred.70 An obligation to perform a contract is

67. Id. at 509.
69. "Efficiency" is used here to mean "Pareto superior." "One state is Pareto superior to a second state when at least one person is better off in the first state relative to the second state, and no one is worse off." Id. at 648 n.7. The implicit assumption, of course, is that expectancy damages make the obligee "whole," and thus that he is not made worse off by the breach than he would have been by performance. This assumption is not always taken for granted by scholars. Id. (arguing that there should be a limited and defined class of wrongful breaches, which would include situations wherein the plaintiff suffers detriment not compensated by traditional contract damages).
70. Mijuskovic, supra note 62, at 587.
thus seen as an option to perform or pay damages. But a contracting party must know how much it would pay in the event of a breach in order to efficiently decide whether to perform or breach and pay damages. As opposed to tort damages, which compensate the victim for all damages proximately caused by the tortfeasor's acts regardless of whether they were anticipated, contract damages are limited to those that are within the reasonable contemplation of the contracting parties at the time the contract is entered into. Moreover, because a breach of contract is not seen as a "wrong" to be deterred, the motive of a breaching party is irrelevant and has no impact on the scope of damages that the plaintiff may recover. In tort, however, motive does matter: a malicious intent in committing an act may give rise to punitive damages that otherwise would not have been available.

The Applied Equipment court noted that imposing tort liability on a contracting party for violating a contractual duty would "undermine[ ] the policies which have . . . limited contractual liability"—i.e., the policies that promote efficient breaches. The court thus held that a contracting party does not owe a tort duty not to interfere with its own contract. Accordingly, it also held that the plaintiff could not sue the breaching party for conspiracy to interfere with its contract, as

71. Remington, supra note 68, at 647; see Oliver Wendell Holmes, Jr., The Path of the Law, 10 Harv. L. Rev. 457, 462 (1897) ("The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else.").
72. See Mijuskovic, supra note 62, at 587 ("[T]he doctrine can only work if the breaching party is held liable solely for foreseeable damages. Otherwise, the breaching party would be unable to appraise the costs of its actions because of the threat of uncertain tort liability.").
74. See Mijuskovic, supra note 62, at 587 ("[A] rule of law is efficient when it reveals the full costs of a decision to the party who makes the decision.") (quoting Lewis A. Kornhauser, An Introduction to the Economic Analysis of Contract Remedies, 57 U. Colo. L. Rev. 683, 705 (1986)).
75. E.g., Battista v. Leb. Trotting Ass'n, 538 F.2d 111, 117 (6th Cir. 1976).
76. Applied Equip., 869 P.2d at 461. This distinction loomed large in Applied Equipment: at trial, the jury had assessed defendant Litton with $12.5 million in punitive damages on the conspiracy claim, although the alleged contract damages were about $100,000. Id. at 456.
77. Id. at 461 (quoting Cooper, supra note 13, at 328); see also id. ("In economic terms, the impact is identical—plaintiff has lost the benefit of a bargain and is entitled to recover compensation in the form of contract damages. In ethical terms, the mere entry of a stranger onto the scene does not render the contracting party's breach more socially or morally reprehensible"); id. at 463 ("[T]he grievance of the plaintiff is, in essence, breach of contract; and . . . to allow the plaintiff to sue under the tort theory of wrongful interference with contractual rights would not only be superfluous, but would also enable him to recover tort damages (e.g., punitive damages, damages for mental suffering) to which he is not entitled under California law.") (quoting Dryden v. Tri-Valley Growers, 135 Cal. Rptr. 720, 726 (Cal. Ct. App. 1977) (emphasis omitted)).
this would "accomplish an 'end run'" around limitations on contract liability.\(^7\) In other words, unless the scope of conspiracy liability tracked the scope of liability for the underlying tort of interference with contract, a plaintiff, by including a conspiracy claim in the complaint, could circumvent important restrictions on the underlying tort and upset the balance of economic incentives that had been struck.

Seen in this light, the underlying duty requirement is not an instrument of injustice denying plaintiffs the ability to pursue liability against culpable parties. Rather, it is an instrument of maintaining the status quo regarding whatever liability otherwise exists. For example, in *Younan v. Equifax, Inc.*,\(^7\) non-fiduciaries were held incapable of conspiring to commit fraudulent concealment, because only fiduciaries owe a duty of disclosure;\(^8\) but they could be liable for conspiracy to commit actual fraud, because everyone owes a duty not to injure another through affirmative misrepresentations.\(^8\) This distinction regarding the claims for which a co-conspirator can or cannot be held liable may seem artificial. But it is no more or less artificial than the line separating who can or cannot be sued directly for fraudulent concealment as opposed to actual fraud. The underlying duty requirement merely preserved the substantive policy that only those in a fiduciary or confidential relation to the plaintiff can be held liable for nondisclosure.\(^8\)

The underlying duty requirement should have limited applicability: the requirement only bars liability where the co-conspirator does not owe the duty violated by the primary wrongdoer's act. But people have a duty to refrain from committing many torts: "Every person is bound without contract to abstain from injuring the person or property of another, or infringing upon any of his rights."\(^8\)

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78. *Id.* at 463; see *Cal. Civ. Code* § 3294 (West 1997) (punitive damages not recoverable except in actions for breach of obligations "not arising from contract").


80. *Id.* at 489.

81. *Id.* at 486 ("A cause of action for conspiracy will lie against agents and employees of insurers even though the former are not parties to the agreement of insurance when they join the insurer in a conspiracy to defraud the insured."). Further, "[t]he law imposes the obligation that every person is bound without contract to abstain from injuring the person or property of another, or infringing upon any of his rights." *Id.*; see also *Cal. Civ. Code* § 1708 (West 1998) (same).

82. *E.g.*, Frye v. Am. Gen. Fin., 307 F. Supp. 2d 836, 842 (S.D. Miss. 2004) ("The plaintiffs' claims for fraudulent and negligent 'omissions' are . . . dependent on the existence of a fiduciary or other confidential relationship."); Debra A. Winiarski, *Defenses and Suits by Accountants*, CA66 A.L.I.-A.B.A. 167, 171-72 (1996) ("The defendant's silence is usually not deemed fraudulent, however, unless the relationship of the parties imposes a duty upon the defendant to make disclosure. This latter relationship might be imposed in certain accountant-client relationships, especially those in which a fiduciary duty exists.").

83. *Younan*, 169 Cal. Rptr. at 486.
vacy, intentional infliction of emotional distress, battery, false imprisonment, trespass, and conversion. Indeed, in *Doctors' Co. v. Superior Court*, one of the earlier cases to articulate the underlying duty requirement, the court observed that the applicability of the underlying duty requirement would be "relatively narrow where the violated duty is other than contractual." The court in *Doctors' Co.*, in holding that agents and employees of an insurer could not be held liable for conspiring to violate the insurer's statutory duty to attempt a good faith settlement, noted that that statute in question was "somewhat unusual in that [its] application is expressly restricted to 'persons engaged in the business of insurance," and that most statutory duties are imposed upon "any person."

The duties which are imposed only on a limited class of persons include the following: the duty not to breach a contract, imposed only upon contracting parties who voluntarily assume such duties; the tort duty not to interfere with or induce a breach of a contract, imposed only upon non-contracting parties; certain statutory duties which expressly apply to specific classes of persons; and fiduciary duties, including the duty of disclosure, owed only by fiduciaries. One could surely think of other specific examples. The point, however, is that in each of these cases, a decision was made by private parties (in the case of contract duties), courts (in the case of common law duties), or the legislature (in the case of statutory duties) that only certain classes of persons would owe the particular duty. The underlying duty requirement in civil conspiracy law preserves those decisions.

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84. 775 P.2d 508 (Cal. 1989).
85. Id. at 514.
86. Id. (quoting CAL. INS. CODE § 790.01 (West 1993)).
87. Id. (quoting CAL. GOV'T CODE §§ 12940(f), 12955(g) (West 2004); CAL. HEALTH & SAFETY CODE §§ 25189, 25189.2 (West 1992) (each proscribing conduct by "any person").
88. This duty also includes the duty imposed by law upon all contracting parties to act in good faith in performance of the contract. See Gruenberg v. Aetna Ins. Co., 510 P.2d 1032, 1038–39 (Cal. 1973) ("[T]he non-insurer defendants were not parties to the agreements for insurance; therefore, they are not, as such, subject to an implied duty of good faith and fair dealing."). California is unusual in that violation of this duty may give rise to tort damages against a limited class of contracting parties, i.e., insurance companies. Foley v. Interactive Data Corp., 765 P.2d 373, 390 (Cal. 1988).
89. E.g., Applied Equip. Corp. v. Litton Saudi Arabia, Ltd., 869 P.2d 454, 459 (Cal. 1994) ("The tort duty not to interfere with the contract falls only on strangers—interlopers who have no legitimate interest in the scope or course of the contract's performance.").
90. E.g., CAL. INS. CODE § 790.01 (West 1993) (imposing duty to attempt good faith settlement only upon "persons engaged in the business of insurance"); CAL. CIV. CODE § 2943(a)(1) (West 1993) (imposing duty to provide payoff demand statement only upon a "beneficiary of a mortgage or deed of trust, or his or her assignees").
91. See supra note 82.
The fact that conspiracy is not an independent tort does not have great practical impact in most cases—most defendants can be sued for most torts, and so they can be sued for conspiring to commit most torts. Thus, although the underlying duty requirement undercuts the conspiracy policies of punishing culpable actors and deterring dangerous combinations, it does so only when these policies are in conflict with the policy of limiting the class of persons who can be sued for the underlying tort. Unfortunately, as will be seen in the next section, although the agent's immunity rule is derived from limitations on conspiracy doctrine that also promote underlying tort policies, the rule itself has gone adrift from its moorings.

III. THE AGENTS IMMUNITY RULE: AN OVERBROAD DEFENSE TO CIVIL CONSPIRACY

Conspiracy is a notoriously nebulous doctrine. Whatever concerns courts may have about a plaintiff using conspiracy allegations to snare innocent actors who unwittingly cooperated with a tortfeasor, those concerns are likely heightened when the alleged co-conspirator is an agent or employee of the tortfeasor. Conspiracy imposes liability upon people acting in concert—precisely what agents are supposed to do with their principals. When an agent combines with one or more persons to commit a tort while acting as an agent for a principal, how should courts determine whether the agent was a culpable actor or was instead simply doing his or her job?

One way that courts limit agents' exposure to tort liability is by holding that duly acting agents and employees are legally incapable of conspiring with their principals. The agent loses this immunity when he or she acts, not to benefit the principal, but for his or her own personal gain. Courts have also ruled that the gain must be more

92. See supra note 65.
93. See, e.g., Elliott v. Tilton, 89 F.3d 260, 265 (5th Cir. 1996) (holding duly acting agents legally incapable of conspiring with their corporation for civil conspiracy purposes); Applied Equip., 869 P.2d at 458 (same); Collins v. Union Fed. Sav. & Loan Ass'n, 662 P.2d 610, 622 (Ne. 1983) (same); see also Macke Laundry Serv. Ltd. P'ship v. Jetz Serv. Co., 931 S.W.2d 166, 171 (Mo. Ct. App. 1996) ("[T]he general rule [is] that wrongs which are attributed to an attorney as the client's agent do not support a conspiracy.").
94. See Elliott, 89 F.3d at 264–65 (upholding dismissal of claim for civil conspiracy to commit fraud and intentional infliction of emotional distress, where plaintiff proffered no evidence that the co-conspirators "were acting for their own personal financial gain rather than for the benefit of the corporation"); Macke Laundry, 931 S.W.2d at 176 ("[A]n agent can be liable for conspiracy with the principal if the agent acts out of a self-interest which goes beyond the agency relationship."); Collins, 662 P.2d at 622 ("Agents and employees of a corporation cannot conspire with their corporate principal or employer where they act in their official capacities on behalf of the corporation and not as individuals for their individual advantage.").
than the ordinary fees the agent or employee gets for rendering his or her services;\textsuperscript{95} otherwise, the exception would swallow the rule.\textsuperscript{96}

California courts refer to this principle of immunity as the "agent's immunity rule."\textsuperscript{97} A number of other jurisdictions apply this same doctrine, although they do not use the convenient label.\textsuperscript{98} Ironically, the term "agent's immunity rule" was first used in \textit{Applied Equipment}, an opinion that did not decide issues of agent liability at all. \textit{Applied Equipment} addressed whether contracting parties could be held liable in tort for conspiring to interfere with their own contracts.\textsuperscript{99} In holding that they could not, \textit{Applied Equipment} overruled an earlier lower court decision, \textit{Wise v. Southern Pacific Co.},\textsuperscript{100} to the extent that it held to the contrary.\textsuperscript{101} But in doing so, the California Supreme Court explained that \textit{Wise} was still good law to the extent it held that duly acting agents could not conspire with their principals.\textsuperscript{102} Because \textit{Wise} is the source from which the agent's immunity rule "emanates,"\textsuperscript{103} according to \textit{Applied Equipment}, it is worth a brief examination.

In \textit{Wise}, the plaintiff brought a claim for breach of employment agreement against his former employer, and a separate claim for conspiracy to cause the breach against the employer and various of its employees and agents.\textsuperscript{104} The court held that the employer could be held liable for conspiring with another entity to breach its own employment contract.\textsuperscript{105} However, the court sustained the demurrers of the agents and employees to the conspiracy claim, reasoning that:

\begin{itemize}
  \item \textsuperscript{95} See \textit{In re County of Orange}, 203 B.R. 983, 999–1000 (Bankr. C.D. Cal. 1996), rev'd on other grounds, 245 B.R. 138 (Bankr. C.D. Cal. 1997) ("[T]he gain must be more than the fees received from the fiduciary–defendant that the nonfiduciary is accused of conspiring with."); Cooper v. Equity Gen. Ins. Co., 268 Cal. Rptr. 692, 696–97 (Cal. Ct. App. 1990) (finding that contingency fee agreement did not constitute personal stake for purposes of exception to agent's immunity rule where plaintiff did not allege that "Seligson stood to gain anything more than a fee for his work as an attorney").
  \item \textsuperscript{96} See \textit{In re County of Orange}, 203 B.R. at 1000 n.19 (noting that allowing ordinary fees to satisfy the personal gain exception "would destroy [the agent's immunity rule] since virtually all agents or employees of a defendant–fiduciary who is being sued for breach of its fiduciary duty would have received some form of compensation from the fiduciary. The harmed party would always be able to assert the exception to find the agent or employee liable for conspiracy.").
  \item \textsuperscript{97} \textit{Applied Equip.}, 869 P.2d at 458.
  \item \textsuperscript{98} See, e.g., cases cited supra note 93.
  \item \textsuperscript{99} See supra notes 67–68, 77–78 and accompanying text.
  \item \textsuperscript{100} 35 Cal. Rptr. 652 (Cal. Ct. App. 1963).
  \item \textsuperscript{101} \textit{Applied Equip.}, 869 P.2d at 457.
  \item \textsuperscript{102} Id. at 458 & n.4.
  \item \textsuperscript{103} Id. at n.4.
  \item \textsuperscript{104} Wise, 35 Cal. Rptr. at 654 & n.2.
  \item \textsuperscript{105} Id. at 664–65. In addition to suing his employer, the Southern Pacific Company, and its agents and employees, the plaintiff also sued the Association of American Railroads and certain of its employees, agents, and representatives. See id. at
Agents and employees of a corporation cannot conspire with their corporate principal or employer where they act in their official capacities on behalf of the corporation and not as individuals for their individual advantage. This rule derives from the principle that ordinarily corporate agents and employees acting for and on behalf of the corporation cannot be held liable for inducing a breach of the corporation's contract since being in a confidential relationship to the corporation their action in this respect is privileged.\(^1\)

Applied Equipment relied on this language to support a monolithic "agent's immunity rule" that, as phrased, would apply to civil conspiracy claims for any tort: "duly acting agents and employees cannot be held liable for conspiring with their own principals (the 'agent's immunity rule')."\(^2\) But the holding in Wise actually encompasses two related but distinct principles—the agent's privilege theory and the single legal actor theory—neither of which supports a rule that immunizes agents from civil conspiracy claims generally.

A. The Agent’s Privilege Theory

1. Propriety of the Agent’s Privilege as a Defense to Interference Claims

The agent’s privilege theory developed, in California as elsewhere, in the context of claims against agents or employees for interfering with or inducing a breach of their principal's contract.\(^3\) All jurisdictions provide that an inducement of breach of another's contract achieved by unlawful means, such as slander, fraud, or physical violence, is unlawful.\(^4\) Where the means of inducing a breach of contract are not themselves unlawful, the general rule is that an action will nevertheless lie where the inducement is unjustified or unprivileged.\(^5\) Whether there is a privilege or justification may depend on, among other things, the relationship between the parties and a balancing of the defendant's interests in inducing the breach and the

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\(^{654}\) n.2. The court did not state whether there was a contractual employment relationship between plaintiff and the Association. (The employment agreement was a collective bargaining agreement, so the Association may have been in privity with the plaintiff and/or his union.) In holding that employees could not be held liable for conspiring with their corporate principals, the court did not address why an employee of the Association—which (as opposed to an employee of Southern Pacific itself) could be liable for conspiring with the Southern Pacific Company, see id. at 667—should be immune.

\(^{106}\) Wise, 35 Cal. Rptr. at 665 (citations omitted).

\(^{107}\) Applied Equip., 869 P.2d at 458.


\(^{109}\) Imperial Ice Co., 112 P.2d at 632.

\(^{110}\) E.g., Lawless v. Bhd. of Painters, Decorators and Paperhangers of Am., 300 P.2d 159, 162 (Cal. Ct. App. 1956); May, 370 P.2d at 395 ("While it is true that an action will lie for unjustifiably inducing a breach of contract by a party thereto, the inducement must be wrongful and not privileged.")
plaintiff's interest in maintaining his or her expectancy under the contract.\textsuperscript{111}

As stated in Wise, agents have a privilege to induce a breach of their principals' contracts under the rationale that "being in a confidential relationship to the corporation their action in this respect is privileged."\textsuperscript{112} Although Wise itself failed to define this "confidential relationship,"\textsuperscript{113} it was undoubtedly referring to the fact that an agent is a fiduciary of his or her principal.\textsuperscript{114} Assuming that giving advice or making a decision to breach a contract is within the scope of agency, the agent is duty-bound to give such advice or make such decision.\textsuperscript{115} In fact, for many agents and employees—including attorneys, business managers, or chief financial officers—advising the principal whether to enter or breach contracts is not only within the scope of their agency, it is the very raison d'être of their agency.

The duly acting agent's conduct in inducing a breach is "privileged" because the principal's purpose for having the agent would be frustrated if the agent–principal relationship was not valued more than the obligee's interest in the contract's performance. Under the efficient breach theory, the law promotes contracting parties making well-informed decisions about when and whether to breach by limiting

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  \item \textsuperscript{111} See \textit{Imperial Ice Co.}, 112 P.2d at 632; \textit{Restatement (First) of Torts} § 767 (1939) (listing among factors to consider in determining privilege to induce breach: "the relations between the parties"; "the interest sought to be advanced by the actor"; and "the social interests in protecting the expectancy on the one hand and the actor's freedom of action on the other hand").
  \item \textsuperscript{113} Wise cited three cases for this proposition—May, Lawless, and \textit{Imperial Ice Co.} See Wise, 35 Cal. Rptr. at 665. May merely restated the proposition that the "confidential relationship" created a "privilege," citing to Lawless. May, 370 P.2d at 395. Lawless, in turn, cited to \textit{Imperial Ice Co.} Loawless, 300 P.2d at 162. \textit{Imperial Ice Co.} referenced the supposed holding in \textit{Boyson v. Thorn}, 33 P. 492 (Cal. 1893), that "the confidential relationship [that] existed between the manager of the hotel and the owner justified the manager in advising the owner to violate his contract with plaintiffs." \textit{Imperial Ice Co.}, 112 P.2d at 634 (the phrase "confidential relationship" was \textit{Imperial Ice Co.}'s, not Boyson's). Although Boyson has been relied upon for the rule that a servant may induce his master to breach a contract with a third person (see Lawless, 300 P.2d at 162; see also May, 370 P.2d at 395 (citing Lawless); Mallard \textit{v. Boring}, 6 Cal. Rptr. 171, 173 (Cal. Ct. App. 1960) (same)), it considered only whether the contractual relationship that was disrupted was one between master and servant, not whether the third party disrupting it was privileged to do so because he was a servant of a contracting party. Boyson, 33 P. at 493. Wise thus leads one to a precedential dead end.
  \item \textsuperscript{114} See Gerhardt \textit{v. Weiss}, 55 Cal. Rptr. 425, 426 (Cal. Ct. App. 1966) ("An agent is classified by the law as a fiduciary and holds a confidential relationship to his principal."); see also supra note 5.
  \item \textsuperscript{115} \textit{E.g.}, Rianda \textit{v. San Benito Title Guar. Co.}, 217 P.2d 25, 27 (Cal. 1950) ("It is the duty of an agent to obey the instructions of his principal . . . .").
\end{itemize}
damages for a breach to expectancy damages.\textsuperscript{116} Agents help contracting parties gather information and make such decisions. Thus, although the agent’s privilege protects agents from liability for inducing a breach, its ultimate purpose is to protect the interests of the contracting party, i.e., the principal.\textsuperscript{117}

That the agent’s privilege serves to benefit the principal is demonstrated by considering the consequences of the absence of such a privilege: if agents were to absorb the cost of tort liability for inducing a breach of their principals’ contracts—or, more accurately, if they internalized the risk of such liability \textit{ex ante}—they might be deterred from giving candid advice (or, indeed, giving advice at all) regarding whether or not to breach. They might also be deterred from ultimately “pulling the trigger” in ordering or executing a breach. Indeed, particularly for corporate principals, which cannot act but through their agents,\textsuperscript{118} the individuals who would effectuate the corporation’s breach are the ones whose actions would be chilled. If, conversely, the principal internalizes the actual or potential cost of the tort liability imposed on the agents—and it is well known that employers often indemnify employees or agents for liability incurred for authorized acts undertaken in good faith—then such liability is tantamount to imposing tort liability on the contracting party itself. In either event, imposing tort liability on the agent impairs the contracting party’s

\textsuperscript{116}See supra notes 70–76 and accompanying text. This is where \textit{Applied Equipment} diverged from Wise. Wise held that the plaintiff’s employer could be held liable for conspiring to breach its own employment contract, based upon the principle that “all who are involved in the common scheme are jointly and severally responsible for the ensuing wrong.” Wise, 35 Cal. Rptr. at 664–65. This holding presupposes that the breach of employment contract was a “wrong” to be deterred or punished. But under the theory of efficient breach endorsed by \textit{Applied Equipment}, a breach of contract is not wrongful. At the same time, Wise held that the agents and employees of the Company could not be held liable for conspiracy, in part because their conduct in inducing the breach was privileged. \textit{Id.} at 665. (The conspiracy claim was upheld as between the employer and another entity, not as between the employer and its own agents and employees. See \textit{id.} at 666–67.) But the agent’s privilege exists to protect the principal’s right to breach its contract. See Kerry L. Macintosh, \textit{Gilmore Spoke Too Soon: Contract Rises from the Ashes of the Bad Faith Tort}, 27 \textit{Loy. L.A. L. Rev.} 483, 534 (1994) (“The reasonable expectations of a promisor include the right to substitute efficient breach for performance upon payment of expectation damages.”). Breaching a contract cannot be a wrong and a right at the same time. \textit{Wise} never addressed this contradiction. Nor did \textit{Wise} explain why, if “all who are involved in the common scheme” may be held liable, the employer’s agents did not fall within that rule.

\textsuperscript{117}See \textit{William Meade Fletcher, et al., Fletcher Cyclopedua of the Law of Private Corporations} § 434 (perm. ed., rev. vol. 1998) (“The primary object of a corporation in employing an agent is that the agent shall be enabled to accomplish the purposes of the agency . . . .”).

\textsuperscript{118}See \textit{id.} (“That a corporation can act only through [its] agents is too elementary a proposition to require the citation of authority.”).
ability to get necessary information and make the necessary decisions to accomplish efficient breaches. The agent's privilege to induce a breach of the contract is thus a necessary corollary to the contracting party's own "privilege" to breach and pay only expectancy damages.\textsuperscript{119}

This rationale for the agent's privilege also explains why agents enjoy only a qualified privilege that is lost if the agent is acting for his or her own personal gain and not for the benefit of the principal.\textsuperscript{120} The agent's privilege is based on the agent's value to the principal in accomplishing its legitimate business goals.\textsuperscript{121} As long as the agent is acting within the scope of his or her agency and for the benefit of the principal, the purpose is served, so the privilege to induce a breach is absolute. But if benefiting the principal is no longer the sole or primary purpose of the agent in inducing a breach, the social interest in the agent's inducement no longer outweighs the interest in upholding the contract, so the privilege is vitiates.\textsuperscript{122}

\begin{itemize}
\item \textsuperscript{119} Cf. Restatement (Second) of Agency § 343 (1958) ("An agent who does an act otherwise a tort is not relieved from liability by the fact that he acted at the command of the principal or on account of the principal, except where he is exercising a privilege of the principal, or a privilege held by him for the protection of the principal's interests . . . .") (emphasis added).
\item \textsuperscript{120} See Ettenson v. Burke, 17 P.3d 440, 446–47 (N.M. Ct. App. 2000) ("The majority of opinions recognize that a corporate officer is privileged to interfere with his corporation's contracts only when he acts in good faith and in the best interests of the corporation, as opposed to his own private interests.").
\item \textsuperscript{121} See Paula J. Dalley, All in a Day's Work: Employer's Vicarious Liability for Sexual Harassment, 104 W. Va. L. Rev. 517, 537 (2002) ("The principal also derives a business benefit from the act of employing agents generally, because without agency, her business would be limited to those activities she could personally undertake. In short, the use of agents makes business possible.").
\item \textsuperscript{122} See Imperial Ice Co. v. Rossier, 112 P.2d 631, 633 (Cal. 1941) ("[A] person is not justified in inducing a breach of contract simply because he is in competition with one of the parties to the contract and seeks to further his own economic advantage at the expense of the other. Whatever interest society has in encouraging free and open competition by means not in themselves unlawful, contractual stability is generally accepted as of greater importance than competitive freedom.") (citations omitted).
\end{itemize}

The very existence of a tort of inducement of breach is arguably at odds with the efficient breach theory: it makes tortious the persuading of another to do something that he or she is free to do on his or her own initiative—i.e., breach and pay damages. Remington, supra note 68, at 647. Although one could counter that efficiency is promoted as long as the contracting party itself is not exposed to tort damages for breaching the contract, even if third parties are, this does not take into account that, in order for a contracting party to make well-informed (i.e., efficient) breach decisions, it must have good information not only about the cost of breaching, but about the benefits of breaching as well. In other words, if I am to know whether I should break my existing deal to pursue a better one, I have to know that another deal is out there, and how much better it is. But third parties may be deterred from offering me the better deal in the first place if they know that doing so may expose them to tort liability.

Whether there should be a tort of inducement of breach at all is beyond the scope of this Article. Suffice it to say that, at least with regard to agents or em-
2. *Impropriety of the Agent's Privilege Outside the Interference Context*

Given that contractual interference is only tortious where the purpose of the party in interfering is unjustified (i.e., accorded little social value), and given the value of agents to principals in making efficient breach decisions, the agent's privilege is a logical defense to interference claims. But the policies underlying the agent's privilege do not support application of an agent's privilege to conspire with the principal to commit torts other than interference with or inducement of breach of contract.

Agents are privileged to induce a breach of the principals' contracts because the principals themselves are effectively privileged to do so. But principals are not "privileged" to commit torts in general, so there is no reason for a corollary agent's privilege to conspire with or induce a principal to commit such torts. Take fraud as an example—whereas the law promotes efficient breach of contract by limiting damages for breach to a foreseeable amount, there is no such thing as "efficient" fraud. Rather, the law seeks to deter fraud outright by subjecting the tortfeasor, not only to the possibility of punitive damages, but also to liability for all damages that result from the wrong regardless of whether they were foreseeable.\(^1^{23}\) Even if one were willing to countenance a balancing of interests in the fraud context to determine if there should be a privilege, there is no situation in which society would weigh one party's interest in injuring another by a false representation greater than another party's interest in being free from injury as a result thereof. Courts thus err when they shield an agent from liability for conspiracy to commit fraud or other intentional torts (other than interference with the principal's contract) based solely on

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\(^{123}\) E.g., Tew v. Chase Manhattan Bank, N.A., 728 F. Supp. 1551, 1568 (S.D. Fla. 1990) ("Of course, in tort, if there is proximate cause, there is no requirement that the particular type of damage be foreseeable."); Mijuskovic, *supra* note 62, at 563 ("Tort damages are designed to punish and deter socially reprehensible conduct in addition to compensating an aggrieved party. Consequently, tort remedies are not limited by the foreseeability ceiling and may include punitive damages."). Hence the celebrated "eggshell plaintiff" rule in tort. *See, e.g.*, Richard A. Wright, *The Grounds and Extent of Legal Responsibility*, 40 U. SAN DIEGO L. REV. 1425, 1491 (2003) ("[T]he universally recognized 'thin-skulled' or 'eggshell' plaintiff rule . . . states that the defendant must take the plaintiff and the plaintiff's property as the defendant finds them.").
the fact that the agent was acting on behalf of his principal or employer.\textsuperscript{124}

\textit{Collins v. Union Federal Savings and Loan Ass'n}\textsuperscript{125} illustrates the improper extension of the agent's privilege. In \textit{Collins}, the plaintiff hotel owner took out a mortgage with the defendant Union Federal. The plaintiff's hotel was unsuccessful, and after he was unable to dispose of the property by sale or lease, Union Federal foreclosed. Union Federal submitted the only bid at the foreclosure sale, and subsequently resold the property.\textsuperscript{126} The plaintiff alleged that Union Federal and two of its officers conspired to induce prospective purchasers not to purchase the hotel from plaintiff, but instead to buy it from Union Federal at a lower price after the foreclosure sale.\textsuperscript{127} The Nevada Supreme Court, citing cases in which agents interfered with their principals' contracts, held that the officer defendants could not be held liable for conspiring with their corporate principal where there was no evidence that they were acting for their own, individual advantage.\textsuperscript{128}

The allegation in \textit{Collins} was not that Union Federal officers interfered with the plaintiff's contract with Union Federal; rather, it was that Union Federal and its officers interfered with the plaintiff's prospective economic advantage with other potential purchasers of the property prior to foreclosure.\textsuperscript{129} While it may be the case that a defendant cannot interfere with or conspire to interfere with its own contract\textsuperscript{130} or prospective economic advantage,\textsuperscript{131} there is no reason why it cannot be liable for interfering with or conspiring to interfere with the plaintiff's contract or prospective economic advantage with a third party. Union Federal did have its own mortgage loan contract with the plaintiff, but Union Federal was in the position of a competitor vis-à-vis the plaintiff's relationship with the potential purchasers. There

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\item \textsuperscript{124} \textit{See}, \textit{e.g.}, Elliott v. Tilton, 89 F.3d 260 (5th Cir. 1996) (immunizing duly acting agents from liability for conspiracy to commit fraud and intentional infliction of emotion distress); Black v. Bank of Amer., N.T. & S.A., 35 Cal. Rptr. 2d 725 (Cal. Ct. App. 1994) (same).
\item \textsuperscript{125} Id.
\item \textsuperscript{126} Id. at 613-14.
\item \textsuperscript{127} \textit{See id.} at 622.
\item \textsuperscript{128} \textit{Id.} (citing Wise v. S. Pac. Co., 35 Cal. Rptr. 652 (Cal. Ct. App. 1963); Bliss v. S. Pac. Co., 321 P.2d 324 (Or. 1958)).
\item \textsuperscript{129} \textit{Id.} ("Collins alleged that the respondents conspired with one another and with each or all of the prospective purchasers of the Reef Hotel to induce the prospective purchasers not to purchase or lease the Reef Hotel from Collins.").
\item \textsuperscript{130} \textit{Applied Equip. Corp. v. Litton Saudi Arabia, Ltd.}, 869 P.2d 454 (Cal. 1994).
\item \textsuperscript{131} \textit{See Kasparian v. County of Los Angeles}, 45 Cal. Rptr. 2d 90, 102-03 (Cal. Ct. App. 1995) ("If a party has no liability in tort for refusing to perform an existing contract, no matter what the reason, he certainly should not have to bear a burden in tort for refusing to enter into a contract where he has no obligation to do so.").
\end{itemize}
was no allegation that either Union Federal or its employees were acting as agents of the potential purchasers, so the defendants could not have enjoyed an agent's privilege with regard to them. Union Federal's act of interference was unprivileged because its interest in obtaining the property did not outweigh the societal interest in having an open and untainted market for the property. And because Union Federal had no privilege or justification for interfering, it was not appropriate to give its officers a corollary agent's privilege to do so.

Using the agent's privilege to support a general defense to conspiracy claims is at odds with other limitations on civil conspiracy, such as the underlying duty requirement. Under the underlying duty requirement, if a defendant cannot be held directly liable for committing a tort, she cannot be held secondarily liable for conspiring with another to commit the tort. Logically, the inverse should also hold true: if the defendant can be held directly liable for committing the tort, she should also be subject to secondary liability for conspiring with another to commit that tort. In other words, just as acting in concert cannot destroy a privilege or "abrogate an immunity," it should likewise not create a privilege or immunity. Even courts that endorse the agent's immunity rule agree that corporate directors and officers may be held liable in tort "as conspirators or otherwise" if they "directly order, authorize or participate in the corporation's tortious conduct"—i.e., they may be liable directly for their own torts. It is inconsistent to hold that duly acting agents cannot be held liable for

132. Indeed, the individual defendants were alleged to have been acting solely in their capacity as agents or employees of Union Federal. Collins, 662 P.2d at 622. Alleging that the individual defendants were acting within the course and scope of their agency for a corporation is fairly common, as plaintiffs frequently seek to hold the entity liable for the acts of its agents under respondeat superior theory. In a sense, the agent's immunity rule prevents plaintiffs from having their cake and eating it, too: treating the agent act's as those of the corporation for respondeat superior purposes, and treating the agents as separate from the entity for conspiracy purposes. As discussed infra notes 175–83, however, the two theories are not necessarily inconsistent.

133. See supra note 122.

134. See, e.g., McMartin v. Children's Inst. Int'l, 261 Cal. Rptr. 437, 445 (Cal. Ct. App. 1989) ("As long as the underlying wrongs are subject to privilege, defendants cannot be held liable for a conspiracy to commit those wrongs. Acting in concert with others does not destroy the immunity of defendants.").


137. This is the case even if they are acting solely in their capacity as agents. See, e.g., Van Dam Egg Co. v. Allendale Farms, Inc., 489 A.2d 1209, 1211 (N.J. Super. Ct. App. Div. 1985) ("A corporate officer or director is liable to persons injured by his own torts, even though he was acting on behalf of a corporation and his intent was to benefit the corporation . . .."); Glenn D. West & Susan Y. Chao, Corporations, 56 SMU L. Rev. 1395, 1403 (2003) ("Texas has long recognized that, as a general rule, corporate agents (including officers and directors) are individually
conspiring to commit torts that they can be held liable for committing directly. Yet this is precisely the result when the agent’s immunity rule is applied as a defense to civil conspiracy claims generally.

As was discussed above, the underlying duty requirement impairs the conspiracy policy of punishing culpable actors by shielding certain parties from liability on a basis—a lack of duty—that is unrelated to their culpability. However, the requirement is defensible in that it only limits liability for culpable actors where doing so promotes the policy of limiting the class of persons who owe the underlying tort duty.\textsuperscript{138} The agent’s immunity rule also impairs conspiracy policy by shielding culpable actors from liability. It, too, is defensible only if it promotes some other policy.

When exported outside of the interference context in which the privilege developed, the agent’s immunity rule does not promote substantive tort policy. On a claim against an agent for conspiring to interfere with the principal’s contract, the agent’s privilege theory negates an agent’s tort duty to avoid interfering, and the underlying duty requirement preserves that policy by preventing the agent from being held liable for conspiring to interfere. This is the key distinction that opinions such as \textit{Applied Equipment} either failed to grasp or failed to articulate in asserting the existence of a broad-based agent’s immunity rule—although the agent’s privilege is relevant to claims for conspiracy to interfere, it is relevant to the underlying interference claim, not to the conspiracy allegations.\textsuperscript{139} The agent’s privilege theory simply has no bearing on conspiracies to commit most torts. Where everyone owes the underlying tort duty, such as the duty to refrain from committing fraud, no tort policy is promoted by exempting a certain class of defendants—agents and employees—from conspiring to commit it. Indeed, fraud doctrine converges with conspiracy doctrine in seeking to deter and punish all culpable actors. Thus, the agent’s immunity rule undermines fraud policy as well.

Given that the agent’s immunity rule promotes neither conspiracy policy nor substantive tort policy, the only possible defense of the rule is that it promotes the policies of agency law. This leads us to the second doctrine from which the agent’s immunity rule is derived—the single legal actor theory.

\textsuperscript{138} See supra notes 79–90 and accompanying text.

\textsuperscript{139} It is understandable that courts might overlook this distinction. Interference with contract and conspiracy to breach a contract both involve non-contracting parties disrupting a contracting party’s agreement with the plaintiff. It is also likely that the plaintiffs who craft the claims that come before the courts are not crisply distinguishing between conspiracy to breach a contract and conspiracy to induce a breach of contract. However, that the oversight is understandable does not alleviate the problems that result therefrom.
B. The Single Legal Actor Theory

Under basic principles of corporate agency law, a corporation is personified through the acts of its agents. Thus, when agents of a corporation act, their acts are deemed to be the corporation’s acts, and the corporation is viewed as the only legal actor. Because a conspiracy requires an agreement, and an agreement requires a meeting of the minds between two or more actors, the fiction that the corporation is the sole legal actor defeats a conspiracy claim because a corporation cannot “conspire” with itself any more than an individual can. Like the agent’s privilege theory, the single legal actor theory provides an exception—the agent loses immunity where the agent is acting for personal gain and not to benefit the company.

The exception makes sense—if the agent is not acting as an instrument of the principal, there is no reason to respect the fiction that the principal is personified “through” the agent.

Between the agent’s privilege theory and the single legal actor theory, the latter is more commonly relied upon in immunizing agents from conspiracy liability. This is not surprising given that the sin-

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141. Hartley, 678 F.2d at 970.
142. See Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911, 914 (5th Cir. 1952) (“It is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation.”).
143. This Article eschews the more commonly-used term “intracorporate conspiracy doctrine” for two reasons. First, scholars have used that term inconsistently to refer both to courts rejecting and upholding the viability of claims of conspiracy between a corporation and its agents. Compare Brickey, supra note 12, at 144-45 (“Under the intra-corporate conspiracy doctrine . . . federal courts have almost uniformly held that a corporation and its officers and agents are generally incapable of conspiring under section 1 of the Sherman Act.”), with John T. Prisbe, The Intracorporate Conspiracy Doctrine, 16 U. BALT. L. Rev. 538, 538 (1987) (“Under the intracorporate conspiracy doctrine, a corporation is deemed capable of engaging in a conspiracy with its own officers, directors, employees, and agents.”). Second, the single legal actor theory, as extended via the agent’s immunity rule, may not necessarily be confined to the corporate context. See infra notes 187-88 and accompanying text.
144. See, e.g., Nelson Radio, 200 F.2d at 914 (dismissing intracorporate conspiracy claim where plaintiff did not allege any exception to the single legal actor rule, such as where “officers, agents, and employees were actuated by any motives personal to themselves”); Wise v. S. Pac. Co., 35 Cal. Rptr. 652, 665 (Cal. Ct. App. 1963) (immunizing agents where they act “in their official capacities on behalf of the corporation and not as individuals for their individual advantage”).
145. Most cases that immunized agents from liability for interference with contract rely upon both the agent’s privilege theory and single legal actor theory. See, e.g., Wise, 35 Cal. Rptr. at 665 (citing Bliss v. S. Pac. Co., 321 P.2d 324, 328-29 (Or. 1958)), which itself relied upon the seminal single legal actor case of Nelson Ra-
Single legal actor theory is actually a defense to conspiracy claims, whereas the agent's privilege theory is really a defense to underlying claims for interference with contract. However, the single legal actor theory is just as problematic as the agent's privilege theory when used as a justification for a broad-based agent's immunity rule.

Given that the agent's immunity rule undercuts both conspiracy and substantive tort policy, it is only justifiable to use the single legal actor theory to broadly immunize agents from civil liability if doing so maintains consistency in agency law. If the agents "are" the corporation for other purposes, then arguably they should also "be" the corporation for purposes of conspiracy's plurality requirement.

But consistency in agency law is a myth. The single legal actor theory has not been applied uniformly to conspiracy claims in the various fields of law in which it has arisen. It is applied in some contexts but not others in order to accommodate the particular substantive concerns at stake. The result should be no different for common law civil conspiracies.

1. The Single Legal Actor Theory in the Antitrust Context

The single legal actor theory actually addresses several related, but distinct, questions. First, can the acts of a single corporate agent constitute a conspiracy under the theory that the agent and corporation "agreed" with each other? Second, can multiple agents of a single corporation constitute a conspiracy? Third, under what circumstances can a corporation be held liable for conspiracy based on the acts of its agents?146

In the antitrust context, the general rule is that acts by one or more agents of a single corporation do not constitute a conspiracy. Conspiracies in restraint of trade are prohibited by section 1 of the Sherman Act.147 Unlike other antitrust statutes, which prohibit unilateral conduct and so raise no issue of multiplicity of actors, section 1...
requires a plurality of actors to establish a violation; it is one of those relatively rare instances where what would be permissible if done alone (restraint of trade) is illegal when two or more persons combine to do it.\textsuperscript{148} Courts have uniformly held that a single agent cannot combine with his or her corporation to form a conspiracy to restrain trade within the meaning of the Sherman Act; two or more minds must be involved.\textsuperscript{149} Although the law entertains the legal fiction of the corporation as a "person," it would be a stretch to say that when an individual acts unilaterally, there is an agreement or combination between the agent and the fictional entity. Moreover, without the single legal actor theory, conspiracy liability would be automatic every time an agent acted within the scope of employment.\textsuperscript{150}

When multiple agents within a single company combine, however, the meeting of two or more minds exists even without "counting" the corporation as separate actor. In these circumstances, the supposed conflict between agency principles (which treat the corporation as existing through its agents) and conspiracy principles (which treat the corporation as an entity separate from its agents) is absent. Nevertheless, the majority rule is that an intracorporate combination of multiple agents, just like the unilateral act of a single agent, does not constitute a conspiracy for purposes of the antitrust laws.\textsuperscript{151}

There are several rationales for this rule. First, since a corporation can only act through its officers, and since normal commercial conduct of a single trader alone may restrain trade, many activities of any business could be interdicted were joint action solely by agents of a single corporation acting on its behalf held to constitute a conspiracy in restraint of trade.\textsuperscript{152}

\textsuperscript{148} See Welling, supra note 39, at 1158 & n.17 (citing cases). Section 2 of the Sherman Act also prohibits conspiracies to monopolize trade, which requires a plurality of actors, but in addition also prohibits actual and attempted monopolization, which may be committed by one person. See 15 U.S.C. § 2 (2000); Brickey, supra note 140, at 438 n.22 (noting that this distinction may be material in analyzing conspiracy claims brought under either section 1 or 2 of the Sherman Act); Welling, supra note 39, at 1158 n.15.

\textsuperscript{149} See, e.g., Union Pac. Coal Co. v. United States, 173 F. 737, 745 (8th Cir. 1909). The court explained:

\textit{[A] corporation can act only by an agent, and every time an agent commits an offense within the scope of his authority under [the government's] theory the corporation necessarily combines with him to commit it. This cannot be, and it is not, the law. The union of two or more persons, the conscious participation in the scheme of two or more minds, is indispensable to an unlawful combination, and it cannot be created by the action of one man alone.}

\textit{Id. at 745; see also} Solomon v. Houston Corrugated Box Co., 526 F.2d 389, 396 (5th Cir. 1976) (reaching similar result); Goldlawr, Inc. v. Shubert, 276 F.2d 614, 617 (3d Cir. 1960) (same).

\textsuperscript{150} Welling, supra note 39, at 1161.

\textsuperscript{151} See id. at 1162–63 (discussing the majority approach as taken in Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911 (5th Cir. 1952)).

\textsuperscript{152} Atty. Gen., \textit{Report of the Nat'l Committee to Study the Antitrust Laws} 31 (1955); \textit{see also} Welling, supra note 39, at 1164 & n.45 (citing same).
Second, a combination within a single company does not raise the anticompetitive concerns that section 1 was designed to protect against—namely, anticompetitive conduct between separate business entities.\textsuperscript{153} Third, holding that the conduct of a single company constituted a conspiracy in restraint of trade under section 1 of the Sherman Act would render meaningless section 2's coverage of monopolization.\textsuperscript{154}

Thus, the prioritization of agency principles over conspiracy principles cannot alone explain the rejection of multiple-agent conspiracies in the antitrust context. The single legal actor rule in the antitrust context is based on substantive antitrust policy, not conspiracy law or agency law.

2. The Single Legal Actor Theory in the Criminal Context

Notably, the same courts that have rejected intracorporate conspiracies under the antitrust laws have upheld such conspiracies under the general federal conspiracy statute.\textsuperscript{155} Although, as in the antitrust context, courts reject criminal conspiracies where a single corporate agent acts unilaterally,\textsuperscript{156} they will uphold conspiracy liability where multiple agents within a single corporation act together.\textsuperscript{157}

The acts of multiple agents within a corporation may support criminal conspiracy liability, but against whom? The potential liability of the agents and the corporation involve different considerations. If cor-

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\textsuperscript{153} See Travis v. Gary Cnty. Mental Health Ctr., Inc., 921 F.2d 108, 110 (7th Cir. 1990) (Easterbrook, J.) ("[T]he antitrust laws aim at preserving independent economic decisions, which supposes cooperation inside economic entities—cooperation that cannot be called "conspiratorial" without defeating the foundation of competition."); Ray v. United Family Life Ins. Co., 430 F. Supp. 1353, 1358 (W.D.N.C. 1977) ("Officers and directors of a single business entity are not expected to compete with each other. Thus, a conspiracy among them does not ordinarily present the anti-competitive problems the Sherman Act was intended to proscribe.").
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\textsuperscript{154} Dussouy v. Gulf Coast Inv. Corp., 660 F.2d 594, 603 (5th Cir. 1981) ("[A]pplying the prohibition of combinations in restraint of trade contained in section 1 of the Sherman Act to activities by a single firm renders meaningless section 2 . . . "); Prisbe, supra note 143, at 546–47.
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\textsuperscript{155} Brickey, supra note 12, at 144–45; compare, e.g., Morton Bldgs. of Neb., Inc. v. Morton Bldgs., Inc., 531 F.2d 910, 916–17 (8th Cir. 1976) (refusing to find an antitrust conspiracy between a corporation and various of its employees), with Egan v. United States, 137 F.2d 369, 378–80 (8th Cir. 1943) (upholding criminal conspiracy between corporation and its agents).
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\textsuperscript{156} Welling, supra note 39, at 1186 (citing United States v. Carroll, 144 F. Supp. 939, 941 (S.D.N.Y. 1956) (adding that where an agent acts unilaterally, a finding of plurality "would over-extend the fiction of corporate personality").
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\textsuperscript{157} State v. Parker, 158 A. 797, 800 (Conn. 1932); People v. Dunbar Contracting Co., 151 N.Y.S. 164, 166 (1914); Standard Oil Co. v. State, 100 S.W. 705, 718 (Tenn. 1907); Brickey, supra note 140, at 439–40; Welling, supra note 39, at 1197–99 (citing Am. Med. Ass'n v. United States, 130 F.2d 233, 253 (D.C. Cir. 1942)).
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porate agents combine together to pursue an unlawful objective, they are criminally liable for their own conduct, and are not shielded by the corporate form. Indeed, each agent is liable for his or her own role in the combination, regardless whether he or she is acting on behalf of the corporation or for her own personal gain. Whether or not the corporation will be held criminally liable for conspiracy based on the acts of its agents, however, is based on traditional principles of respondeat superior. If multiple agents of a corporation conspire together, the plurality requirement of a conspiracy is met. As long as at least one of those agents is acting within the scope of his or her agency or employment, the corporation will be held vicariously liable—even if the other co-conspirators are non-agents. By contrast, even if all the co-conspirators are agents, if each of them is acting outside the scope of their employment, the corporation will not be held liable for conspiracy because there is no basis through which to apply respondeat superior.

Courts have thus rejected the agent's immunity rule in the criminal context: there is no immunity for agents who conspire with their corporate principal or employer. Accordingly, there is also no place for a personal gain exception: agents are liable for their own conspiracies, regardless of whether they do so in their capacity as agents or individuals. That an agent acted for personal gain may be relevant, in that it

158. United States v. Bach, 151 F.2d 177, 179 (7th Cir. 1945) ("Corporate agents may be criminally liable individually for acts done by them on behalf of the corporation, even though the corporation may or may not be liable."); cf. RESTATEMENT (SECOND) OF AGENCY § 343 (1958) ("An agent who does an act otherwise a tort is not relieved from liability by the fact that he acted at the command of the principal or on account of the principal . . . "); Welling, supra note 39, at 1176 ("[T]he individual agent remains personally liable for the crime, notwithstanding the imposition of liability upon the corporation.").

159. See, e.g., Bach, 151 F.2d at 179. The Bach court explained:

The fact that the price was paid to Pines Bros. Distributing Company and did not go to the defendant does not relieve him from his criminal responsibility for having made the sale. He actually participated in the transaction and knowingly and intentionally sold the whiskey at a price over the ceiling. The fact that the corporation may or may not also be liable does not absolve its agent who makes an illegal sale, even though, at the time of the sale, he is acting in a representative capacity.

Id.


161. Brickey, supra note 140, at 441. Brickey explained:

The company is held liable for conspiracy because once the acts and intent of its own agent are imputed to it, the corporation is accountable for the legal consequences that flow from the agent's interaction with the outside purchasing agent. In other words, [the corporate agent] has the power to engage the corporation in a conspiracy with the outside purchasing agent.

Id.
may constitute circumstantial evidence of the existence of an agreement and/or of the agent's specific intent to achieve the objective of the conspiracy. But it should not be relevant to whether the agent is immune from liability in the first place. And from the corporation's perspective, whether the agent is acting to benefit the corporation or the agent herself is relevant to whether the corporation will be held liable for the agent's conspiracy under respondeat superior principles.

3. Comparing the Single Legal Actor Rules in the Criminal and Antitrust Contexts

The difference in the treatment of agents in the antitrust and criminal contexts can be explained by the different policy considerations in the two contexts. The foundation of the criminal conspiracy doctrine is the notion that the joint nature of the enterprise increases the risk of successful achievement of the unlawful objective above and beyond the risk that would exist if the participants acted independently of each other. When multiple corporate agents act together, the likelihood that they will accomplish their goals is often higher (because of efficiency, pooled resources, increased morale, etc.) than if they would have acted independently.

But the premise of punishing concerted conduct is that the object is wrongful, not that the conduct is concerted. The conduct that criminal law targets is different from the conduct targeted by antitrust law. Where corporate agents combine to falsify documents, give bribes, or defraud the government, there is no doubt that the object is wrongful. Such acts cannot be said to be incidental to legitimate business activity. However, where corporate agents coordinate to conduct activity that results in the restraint of trade, their actions are not

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162. Cf. United States v. Hammond, 642 F.2d 248, 250 (8th Cir. 1981) ("[T]he motive of the accused is immaterial except insofar as evidence of motive may aid determination of the state of mind or intent of the defendant."); Alan R. Bromberg & Lewis D. Lowenfels, Aiding and Abetting Securities Fraud: A Critical Examination, 52 Ala. L. Rev. 637, 739-48 (1988) ("Benefit or gain derived by the aider-abettor is not one of the three traditional elements of aiding-abetting—primary violation, knowledge, and substantial assistance. Benefit nonetheless has significance in aid-abet cases. The courts mention it with some frequency and attach varying weight to its presence or absence in deciding whether either the knowledge or the substantial assistance requirements (or both) are satisfied.").

163. But see Shaun P. Martin, Intracorporate Conspiracies, 50 Stan. L. Rev. 399, 434 (1998) (arguing that there is no tenable basis for continuing to uphold intracorporate criminal conspiracies in the wake of the U.S. Supreme Court decision in Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984), notwithstanding that the facts in Copperweld raised antitrust issues).

164. See supra notes 38-41 and accompanying text.

165. See Mijuskovic, supra note 62, at 567 ("There is nothing inherently wrong with agreeing and planning to take a particular course of action.").

166. Brickey, supra note 140, 440 & nn.32-33, 36.
necessarily "wrongful" in the eyes of antitrust law. The object of all competition is, in a sense, to restrain trade, and the Sherman Act was designed first and foremost to promote competition. The Sherman Act thus seeks not to eliminate the restraint of trade, but rather to induce an optimal level of trade restraint. Accordingly, courts restrict the scope of intracorporate conspiracy liability so as to avoid chilling socially desirable conduct.

Criminal conspiracy law, by contrast, does not seek to induce an optimal level of unlawful activity. It seeks to eliminate it. Because there is no risk of chilling legitimate conduct in the criminal context, intracorporate conspiracy liability can be more expansive than in the antitrust context and still promote the goals of the substantive law at issue.

4. Whether to Apply the Single Legal Actor Theory to Bar Common Law Civil Conspiracy Claims

As the foregoing discussion demonstrates, the single legal actor theory is not applied uniformly: courts utilize it in some contexts and reject it in others, depending on the applicable substantive policies in a given context. When a court is facing a common law civil conspiracy claim against an agent or agents for conspiring with a principal, it should choose whether to borrow the antitrust rule (accepting the single legal actor theory) or the criminal rule (rejecting it) by comparing the substantive policies at stake in those contexts to the substantive policies at stake before it.


The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.

Id.

168. See Brickey, supra note 140, at 439. For example:

By definition, the most successful competition might thereby be found illegal because it is dependent upon day to day communication, consultation and agreement among corporate officers and employees. Courts have therefore sought to minimize the risk that joint internal decisions will be held to violate the antitrust laws by generally requiring that separate business entities constitute the conspiracy.

Id.

169. Antitrust and criminal conspiracies are not the only two contexts in which the single legal actor issue has arisen. Intracorporate conspiracies have frequently been alleged under 42 U.S.C. § 1985(3), which provides a private cause of action for individuals injured by a conspiracy to deprive them of their civil rights. Douglas G. Smith, The Intracorporate Conspiracy Doctrine and 42 U.S.C. §1985.3: The
Applicability of the Single Legal Actor Theory to Interference Claims

Utilizing a methodology in which a court decides whether to apply the single legal actor theory based on substantive policy considerations yields the same results as a policy-based methodology for applying the other source of the agent's immunity rule, the agent's privilege theory. In other words, it should be applied to claims for conspiracy to interfere, but not to civil conspiracy claims generally.

Consider the propriety of applying the single legal actor theory to bar a claim against an agent for conspiring to interfere with the principal's contract. Recall that under the agent's privilege theory, agents are permitted to induce a breach so as to prevent the breaching party—the principal—from absorbing the cost of the agent's tort liability (either through a chilling effect on the agents' conduct or through indemnification). A fundamental assumption supporting this rationale is that a breach of contract by the principal is not wrongful, but is an incident of legitimate business.

Similarly, the primary concern underlying application of the single legal actor rule in the antitrust context is that an alternative rule that upheld intracorporate conspiracies could proscribe legitimate business activity and impair competition. Because the policy concern in the interference context is similar to that in antitrust contexts—promoting economically desirable behavior—the result should be the same: the agent should be deemed to "be" the principal when bringing about the breach (just as the agent "was" the principal when executing the con-

Original Intent, 90 Nw. U. L. Rev. 1125, 1130 (1996). The majority rule is that an intracorporate conspiracy is not viable in the civil rights context. Id. at 1148–51. This arguably promotes congressional intent and prevents 42 U.S.C. § 1985(3) from becoming a "general federal tort statute." Id. at 1138–39 (quoting Griffin v. Breckenridge, 403 U.S. 88, 101–02 (1971)). The majority rule in the civil rights context thus mirrors the majority rule in the antitrust context, albeit for different reasons. But see Travis v. Gary Cmty. Mental Health Ctr., Inc., 921 F.2d 108, 110 (7th Cir. 1990) (Easterbrook, J.). In Travis, the court explained:

[The antitrust laws aim at preserving independent economic decisions, which supposes cooperation inside economic entities—cooperation that cannot be called "conspiratorial" without defeating the foundation of competition. Similarly, § 1985 aims at preserving independent decisions by persons or business entities, free of the pressure that can be generated by conspiracies, and again intra-corporate discussions lie outside the statute's domain.

Id. Nothing in this Article suggests that courts should disregard civil rights conspiracy opinions, or opinions dealing with principal-agent conspiracies in any other context in which they might arise, so long as those opinions include a reasoned analysis of the particular policy concerns at stake. The antitrust and criminal contexts are simply paradigmatic of divergent outcomes in different substantive arenas.

170. See supra notes 118–19 and accompany text.
tract on behalf of the principal in the first place). 171 In other words, if
the tort duty not to interfere with a contract falls only on "stran-
gers" 172 and the world is divided into two categories—contracting par-
ties who do not owe a tort duty to avoid interfering, and strangers who
do owe such a duty—the agent will stand in the shoes of the con-
tracting party in order to avoid tort liability, 173 whether it be for inter-
ference, conspiracy to interfere, or any other formulation that a cre-
ative plaintiff could concoct.

Having a personal gain exception to the single legal actor rule also
makes sense in the interference context. From a doctrinal perspec-
tive, if the agent is not merely acting as an instrumentality or "arm" of
the principal, but rather in an individual capacity, there is little rea-
son to accept the legal fiction of the principal as the only legal actor.
Similarly, from a policy perspective, if the self-serving agent is not act-
ing purely to help the principal make efficient breach decisions, the
social value in immunizing the agent is lost.

Conversely, the rationale for rejecting the single legal actor theory
in the criminal conspiracy context—the group danger rationale—does
not apply to intracorporate conspiracies to breach the corporation's
contract. Under the efficient breach theory, a breach of contract is not
really a "danger" at all. It may be something to be regulated, but not
eradiated. And to the extent that a breach of contract is considered a
danger to the other contracting party or to society at large, there is no
increased danger where agents of a corporation coordinate to bring
about a breach, because the decision to breach would not have been
made or effectuated other than through the agents of the corpora-
tion. 174 Thus, at least in the context of claims for conspiracy to inter-

171. See 2A C.J.S. Agency § 402 (2004) ("If the agent acts within the scope of the
agency when the agent enters into a contract with a third person, the principal
immediately becomes a contracting party, with both rights and liabilities to the
third person. Since an agent acts for the principal in a representative capacity,
the principal, rather than the agent, is ordinarily bound by a contract entered
into by the agent on behalf of the principal.").

("One contracting party owes no general tort duty to another not to interfere with
performance of the contract; its duty is simply to perform the contract according
to its terms. The tort duty not to interfere with the contract falls only on stran-
gers—interlopers who have no legitimate interest in the scope of course of the
contract's performance.").

173. See, e.g., Shoemaker v. Myers, 801 P.2d 1054, 1069 (Cal. 1990) (for purposes of
claims against corporate agents to induce wrongful termination of employment
contract, "these defendants stand in the place of the employer, because the em-
ployer—the other party to the supposed contract—cannot act except through
such agents").

acting employee "could not induce a breach of contract; if there was a breach, he
breached it for and on behalf of his principal").
fere, it makes more sense to borrow from the antitrust context than the criminal context.

b. Inapplicability of the Single Legal Actor Theory to Intentional Torts Generally

When the law targets coordinated conduct resulting in the restraint of trade or a breach of a contract, as it does in the antitrust and interference contexts, there is a concern that upholding intracorporate conspiracy may limit normal or even desirable commercial conduct. But the same cannot be said of a conspiracy among a corporation's agents to commit fraud. Like criminal law, tort law seeks to eradicate, not regulate, fraud, whether it is perpetrated alone, through others, or in concert with others.

If anything, an intracorporate conspiracy to commit fraud is a paradigmatic case of group danger: agents and employees using the resources of the corporate form to increase the efficiency, scope, and likelihood of success of their wrongdoing. This increased group danger is present regardless of whether any or all of the agents are acting to benefit the corporation or for their personal gain. So long as their wrongdoing causes compensable harm to an identifiable victim—the factor that distinguishes the deterrent effect of the civil system from that of the criminal system—conspiring agents should be shown no more lenience in the civil system than under the criminal system.

That courts might borrow from the criminal context in setting the scope of liability for civil intracorporate conspiracies should be relatively uncontroversial, given that criminal law borrowed corporate liability doctrine from tort law in the first place. Historically, corporations were held to be immune from criminal liability, primarily because fictional entities were seen as being incapable of having the requisite mens rea or specific intent. Corporate criminal liability was first upheld in the mid-nineteenth century in the context of strict

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175. See Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions, 92 Harv. L. Rev. 1227, 1247 (1979) [hereinafter Developments] ("The respondeat superior doctrine of corporate criminal liability [is] derived from agency principles of tort law ... "); Gerhard O.W. Mueller, Mens Rea and the Corporation, 19 U. Minn. L. Rev. 21, 39 (1957) ("The growth of corporate criminal liability was fostered by analogies from the law of torts."); see also N.Y. Cent. & Hudson R.R. Co. v. United States, 212 U.S. 481, 494 (1909). The New York Central Court explained:

Applying the principle governing civil liability, we go only a step farther in holding that the act of the agent, while exercising the authority delegated to him . . . may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting in the premises.

Id.

176. Welling, supra note 39, at 1174.
liability crimes for which no mens rea is required. However, this intent-based distinction was later abandoned, as courts adopted the view that the corporate agent's intent could be imputed to the corporation under the tort theory of respondeat superior. This is now the common law rule in the federal courts and in most states. Thus, as long as the agent commits a crime within the scope of employment and with the intent to benefit the corporation, the corporation itself will be criminally liable. A corporation's criminal liability for the acts of its agents is determined by the same respondeat superior principles, regardless of whether the agent commits the crime of conspiracy or some other crime. The agents, of course, are also liable for their own criminal conduct, regardless of whether or not the corporation is also held vicariously liable.

There is no reason why tort law should not take respondeat superior doctrine "back" from criminal law and apply it to civil conspiracies. Just as a corporation's criminal liability for the acts of its agents turns on whether the agent was acting on behalf of the corporation, so should its civil liability. Likewise, agents are liable for their own torts, just as they are liable for their own crimes. Accordingly,

177. Id. at 1175; see State v. Morris & Essex R.R. Co., 23 N.J.L. 360, 370 (N.J. 1852). The court clarified that corporations cannot be liable for any crime of which a corrupt intent or malus animus is an essential ingredient. But the creation of a mere nuisance involves no such element. It is totally immaterial whether the person erecting the nuisance does it ignorantly or by design, with a good intent or an evil intent; and there is no reason why for such an offence a corporation should not be indicted.

178. Developments, supra note 175, at 1247.
179. Id.
180. Id.; Welling, supra note 39, at 1176.
181. See supra note 159 and accompanying text.
182. If anything, doing so makes more sense in the civil context than in the criminal context. Although the stated rationales for applying respondeat superior liability vary, the doctrine is tied less to fault or responsibility than to the notion that the enterprise should absorb its agents' liability as a cost of doing business and can spread the costs of such damage to consumers. Rhett B. Franklin, Pouring New Wine Into an Old Bottle: A Recommendation for Determining Liability of an Employer Under Respondeat Superior, 39 S.D. L. Rev. 570, 573-76 (1994). Some commentators thus argue that application of respondeat superior is inappropriate in the criminal context. See, e.g., Samuel R. Miller, Corporate Criminal Liability: A Principle Extended to its Limits, 38 Fed. Bar J. 49, 68 (1979) ("Blindly applying tort principles of respondeat superior in the criminal context will only undermine the complex and difficult task of ensuring corporate compliance with the law."); Note, Criminal Liability of Corporations for the Acts of the Their Agents, 60 Harv. L. Rev. 283, 285 (1946) ("[S]hifting of the burden of loss to consumers, which is a principal justification of respondeat superior in the law of torts, has no application in the criminal law.").
183. See supra notes 136-37 and accompanying text. This assumes that the agent is not otherwise immune from liability. See Glenn G. Morris, Personal Liability for
if a corporate agent incurs civil liability for combining with another (be it a second agent of the corporation or an independent third party) and tortious damage results, the agent should be held liable. And if the agent was acting on behalf of the corporation when conspiring, the corporation should also be held liable.

A potential weakness in analogizing to corporate criminal conspiracy liability is what may be called the “double vicarious liability” problem. Criminal conspiracy is an independent crime. Thus, there is no reason to distinguish between a corporation's vicarious liability when its agent commits the crime of conspiracy as opposed to other crimes. But civil conspiracy is not an independent tort; it is itself a theory of vicarious liability. So holding a corporation liable for its agent's conspiracy is not necessarily the same as holding it liable for the agent's torts. Arguably, imposing civil conspiracy liability on the corporation under a respondeat superior theory means that the corporation is vicariously liable for the agent's own vicarious liability.

But double vicarious liability should be no more problematic than, say, double hearsay. Just as multiple levels of hearsay do not bar admission of evidence so long as a hearsay exception is satisfied at each level, multiple levels of vicariously liability should not bar liability so long as its imposition is justified at each level. Where a corporate agent conspires with another to commit an intentional tort such as fraud, the group danger rationale supports imposing liability on the agent for the damage that results from the co-conspirator's wrongful acts done in furtherance of the combination. And if the agent was acting within the scope of his agency and with the intent to benefit the corporation in so conspiring, this justifies imputing his intent to the corporation under respondeat superior.

Thus, although there may be exceptions, including contractual interference claims, the single legal actor theory does not justify applying the agent's immunity rule to most common law civil conspiracy claims. Rather, the agents should be held liable for conspiracy based
on their own conduct, and the corporate principal should be vicariously liable if the criteria for respondeat superior are satisfied.

5. Should the Agent's Immunity Rule Apply to Individual Principals?

It is not clear if courts would confine the agent's immunity rule to situations in which the principal is a fictional entity, or if instead they would apply it even where the principal is an individual. In Applied Equipment, the court held that the agent’s immunity rule “emanates” from the holding in Wise that “[a]gents and employees of a corporation cannot conspire with their corporate principal where they act in their official capacities . . . .”187 But Applied Equipment’s formulation of the rule itself does not qualify the rule by limiting it to the corporate principal or employer. There, the court held that “duly acting agents and employees cannot be held liable for conspiring with their own principals.”188 This language suggests that a duly acting agent of an individual principal or employer could also be immune.

The single legal actor theory is derived from the notion that a corporation is a fictional entity that cannot act but through its agents. Although an individual principal may, just like a corporation, be held vicariously liable for the acts of her agent committed within the scope of the agency,189 an individual can act other than through her agents. Should we entertain the fiction of the single legal actor in this context?

Again, it depends on substantive policy. Where the agent acting in the best interests of the individual principal counsels the principal to breach a contract, maintaining the distinction between tort and contract supports immunizing both the principal and the agent from tort liability. This is true either under the theory that the agent is “privileged” to induce a breach, or under the theory that the agent “was” the breaching party and thus owed no tort duty not to interfere. Conversely, where the individual principal and agent agree to commit fraud or some other intentional injury, the increased group danger of two or more people acting in concert exists, just as it would absent the principal-agent relationship. There is no policy justification either for granting the agent a privilege to conspire or for considering the principal to be the only legal actor.

188. Id. at 458 (emphasis added).
189. See generally Dalley, supra note 121 (discussing myriad rationales for holding principal liable for agent’s torts).
IV. UNDERSTANDING WHY COURTS APPLY THE AGENT'S IMMUNITY RULE

This Article has suggested that, because agents are liable for their own torts, even when acting on behalf of their principal, they should be liable for conspiring to commit torts, even when acting on behalf of the principal. It has also suggested that principals should be vicariously liable under respondeat superior theory for the acts of their agents in conspiring if such acts were committed within the scope of employment or agency. But liability for one's own acts, and respondeat superior liability for an agent's acts, are fairly uncontested propositions. Why, then, do some courts apply vastly different standards when limiting civil conspiracy liability for agents?

There are several possible explanations. First, courts often incorrectly frame the question as whether a corporation can conspire "with" its agents (or with itself), rather than addressing two separate questions: whether the agent or agents' acts constitute a conspiracy, on the one hand, and whether the corporation can be held vicariously liable for those acts on the other. Second, the language that some courts have used to express the scope of agents' immunity is unnecessarily broad, and later courts have seized on this broad language to improbably expand that immunity. Third, and perhaps most importantly, courts may be using the agent's status as a proxy for the agent's lack of intent, which goes to the very heart of the reason for imposing conspiracy liability at all.

A. The Fallacy of Agents Conspiring "With" the Corporation

The vicarious nature of a corporation's conspiracy liability is often overlooked. A corporation is never a separate actor that conspires with its agents. Rather, it is held vicariously liable for the acts of its agents in conspiring among themselves or with others. If a single corporate agent acts unilaterally, the corporation should not "count" as a second actor for purposes of the plurality requirement of conspiracy, whether in the context of antitrust, criminal law, common law civil torts, RICO, or any other context. There is no "group danger" when a single person acts alone; that he acts on behalf of a corporation should not change that fact.

190. See Mueller, supra note 175, at 40 ("[T]he common law has long ceased thinking in terms of vicarious liability every time a corporation is said to breach the law and is convicted."); Welling, supra note 39, at 1177 ("The vicarious nature of corporate criminal liability often is overlooked, and should be emphasized to avoid confusion in analyzing plurality standards.").

191. Welling, supra note 39, at 1177.

192. Of course, the corporation could be held liable under respondeat superior for the agent's torts or crimes committed within the scope of his authority, regardless of the presence or absence of conspiracy allegations.
But where two or more agents combine with each other, the corporation need not count as a co-conspirator for plurality purposes, so courts should not be permitted to hide behind the fiction of a lack of plurality to deny conspiracy liability. Rather, in analyzing a multi-agent intracorporate conspiracy, courts should analyze why the agents and the corporation may or may not be liable.

When courts frame the issue in the loaded terms of whether or not a corporation can conspire with itself or its agents,\(^\text{193}\) they suggest what the outcome will be.\(^\text{194}\) Take Worley v. Columbia Gas of Kentucky, Inc.,\(^\text{195}\) for example. In Worley, the plaintiff subcontractor sued a contractor, Mutual Pipeline Contractors, Inc., two of Mutual’s officers, Dix and Norwicke, and several other entities with whom the contractor dealt for conspiracy to maliciously prosecute the subcontractor for issuing checks on insufficient funds. On appeal by the defendants from the judgment, the Sixth Circuit first held that there was insufficient evidence to support the verdicts against the non-contracting entities, leaving only the contractor and its officers.\(^\text{196}\) The court then held:

This disposition of the case determines the issue of conspiracy, because Mutual could not conspire with itself or with its own officers to prosecute Worley. Mutual could be liable only for acts of its officers on the theory of respondeat superior. The corporation can act only through its officers and agents. We will consider only whether there is substantial evidence to prove that Mutual, Dix and Nowicke are liable for malicious prosecution of Worley.\(^\text{197}\)

The court was correct in asserting that the company “could be liable only for acts of its officers on the theory of respondeat superior.”\(^\text{198}\) However, respondeat superior liability is not necessarily inconsistent with conspiracy liability. The court failed to consider the possibility that the corporate agents, Dix and Norwicke, had conspired with each other to commit malicious prosecution—as opposed to simply whether they committed malicious prosecution directly. The court thus also

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193. \textit{E.g.}, Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911, 914 (5th Cir. 1952) (“A corporation cannot conspire with itself any more than a private individual can . . . .”).

194. \textit{See} Travis v. Gary Cnty. Mental Health Ctr., Inc., 921 F.2d 108, 109 (7th Cir. 1990) (Easterbrook, J.). The court set up the issue as follows:

Two rhetorical questions frame the dispute. (1) Why should action by a single employer be covered by \{42 U.S.C. § 1985\} just because discussions among the firm’s multiple agents precede decision? (2) Why should decisions taken by a plurality of actors be immune from check under § 1985 just because they take the trouble to incorporate? Which question you pose largely determines the outcome. It is therefore not surprising that courts have reached disparate conclusions.

\textit{Id.}

195. 491 F.2d 256 (6th Cir. 1973).


197. \textit{Id.} at 261.

198. \textit{Id.}
failed to consider whether the corporation could be held vicariously liable for conspiracy.

The distinction would not have made a difference to the corporation, but it could have mattered as to the liability of the agents themselves. Suppose Dix took the acts that allegedly caused the wrongful prosecution—falsely promising plaintiff that Mutual would advance funds to cover plaintiff's payroll checks—and Norwicke agreed with Dix to do so. The corporation would be liable under respondeat superior for Dix's acts, regardless of whether Norwicke conspired with him. But if the court refuses to consider whether there is an inter-agent conspiracy between Dix and Norwicke, Norwicke escapes liability. Such an outcome promotes neither agency law nor conspiracy law nor tort law.

Moreover, whether or not an agent may be held liable for conspiracy could have a significant impact on a plaintiff's recovery. Corporate employers and principals are generally thought to have deeper pockets than their agents and employees, so plaintiffs typically want to hold the corporation liable for the torts of its agents, not vice versa. However, where the principal is bankrupt or otherwise judgment-proof, the agents may represent the plaintiff's best chance of collecting on a judgment. Indeed, consider the lawsuits filed in the wake of the collapse of Enron. Where the agents of a tortfeasor are some of the world's largest financial institutions, like Citicorp or JPM Chase, conventional wisdom that the agents do not have deep pockets simply does not apply. Thus, a court's failure to distinguish between the agent's and the corporation's conspiracy liability, which results in a culpable agent escaping liability, could seriously impair a plaintiff's ability to recover damages.

B. Courts Unnecessarily Overstate the Scope of Agents' Immunity

Another reason that the scope of agents' civil conspiracy liability is unsettled is that courts often articulate principles of immunity that are broader than necessary to resolve the cases before them. For example, Nelson Radio & Supply Co. v. Motorola, Inc. was one of the earliest cases to adopt the single legal actor theory to bar a Sherman Act claim premised on an alleged conspiracy among multiple agents of a single corporation. But in so doing, the Nelson Radio court ex-

199. The outcome in Worley was not necessarily wrong: on the facts before it, the court found that there was no evidence that any defendant had done anything wrong, and that plaintiff's claim was defeated by numerous defenses in any event. See id. at 261-63. However, the opinion is still problematic in that the court's formulation of the scope of potential liability improperly framed the issue and could set later courts astray.

200. 200 F.2d 911 (5th Cir. 1952).
pressed a principle that was not necessarily confined to the antitrust context:

It is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation.\textsuperscript{201}

Although it may be "basic" that conspiracy requires a plurality of actors, it is not basic that multiple agents of a single corporation do not satisfy that plurality requirement.\textsuperscript{202} Indeed, at the time the Fifth Circuit handed down the opinion in \textit{Nelson Radio}, the U.S. Supreme Court had already upheld liability against multiple agents of a single corporation under the general federal conspiracy statute.\textsuperscript{203} Thus, only in the context of Sherman Act claims, where there is a concern about chilling legitimate competition by proscribing intracorporate conduct, was it "basic" that the acts of agents of a single corporation did not satisfy the plurality requirement. Further, because \textit{Nelson Radio}'s statement of the conspiracy rule was not tied to the substantive antitrust considerations that justified its application, later courts have relied on \textit{Nelson Radio} to preclude conspiracy liability for torts that have nothing to do with antitrust violations.\textsuperscript{204}

Similarly, \textit{Applied Equipment Corp. v. Litton Saudi Arabia, Ltd.}\textsuperscript{205} relied on a case that immunized agents from liability for conspiracy to interfere\textsuperscript{206}—a ruling justified by economic considerations peculiar to interference claims\textsuperscript{207}—to state the broad proposition that "duly acting agents and employees cannot be held liable for conspiring with their own principals."\textsuperscript{208} But this was pure dicta: \textit{Applied Equipment} addressed only a claim against a contracting party for conspiring to

\textsuperscript{201.} Id. at 914.

\textsuperscript{202.} Welling, supra note 39, at 1162.


\textsuperscript{204.} See, e.g., Fojtik v. First Nat'l Bank, 752 S.W.2d 669, 673 (Tex. App. 1988) (affirming broad principle of intracorporate conspiracy immunity from \textit{Nelson Radio}, and allowing claim against bank and two of its directors for conspiracy to commit fraud, conversion, and deceptive trade practices to proceed only because plaintiff alleged that directors were acting for personal gain).

\textsuperscript{205.} 869 P.2d 454 (Cal. 1994).

\textsuperscript{206.} See id. at 458 & n.4 (citing Wise v. S. Pac. Co., 35 Cal. Rptr. 652 (Cal. Ct. App. 1963)).

\textsuperscript{207.} Although shielding agents from tort liability in order to shield contracting parties from indirect tort liability for contractual breaches is the ultimate economic justification for the agent's privilege to interfere, see supra notes 116–19 and accompanying text, this was not the justification relied upon in \textit{Wise} itself. See supra note 116.

\textsuperscript{208.} \textit{Applied Equip.}, 869 P.2d at 458.
interfere with its own contract, and thus did not deal with a claim for conspiracy to interfere against an agent.209

At least one California court recognized the inconsistency between the stated breadth of this principle in Applied Equipment and the scope of the underlying duty requirement. Unfortunately, however, the court resolved the conflict incorrectly, emphasizing the need for clarification of the governing principles in this context. In Black v. Bank of America,210 the defendant bank provided the plaintiff crop-owners with a series of revolving secured agricultural loans. The plaintiffs alleged a conspiracy among the bank and various of its employees to conceal the decision not to renew the loans so that the plaintiffs would continue to invest in the next year's crop, making the crop more valuable when the bank foreclosed on the security.211 The complaint included claims for conspiracy to commit each of the following: fraud, breach of the covenant of good faith and fair dealing, and intentional infliction of emotional distress.212

The Black court noted that Applied Equipment "recently reaffirmed" the agent's immunity rule, which "has long been the rule in California."213 However, according to Black, Applied Equipment "creates a conundrum" because it also suggests that "corporate employees may be liable for conspiring with the corporation, despite their acting on behalf of the corporation, when they owe a duty to the plaintiff independent of the corporation's duty," such as the "duty to abstain from injuring the plaintiff through express misrepresentation."214 The Black court went on to explain the "conundrum":

Given the breadthness of the type of duty that would apparently suffice to remove agents' immunity, and the ease with which a violation thereof may be pled, this exception to the rule of agents' immunity, it seems to us, threatens to swallow the rule. The Supreme Court does not reconcile its approval of this broad exception to the rule of agent immunity with its express affirmation of the rule itself.215

This statement reflects the Black court’s fundamental misconception of the relationship between the agent’s immunity rule and the underlying duty requirement. The rule that someone can be liable for conspiracy where they owe the plaintiff the underlying duty is not a "broad exception to the rule of agent immunity." Rather, it is coterminous with the agent’s immunity rule. Agents should only be provided immunity when substantive policy reasons counsel doing so. Where agents could be liable for committing the tort directly, no policy reason

209. See supra note 99 and accompanying text.
211. Id. at 726.
212. Id.
213. Id.
214. Id. at 727.
215. Id. at 727 (citations omitted).
counsels immunizing them from conspiring to commit the tort, even if they do so with the intent to benefit the principal. Because even duly acting agents are liable for their own fraud, the underlying duty requirement does not exempt them from liability for conspiring to violate the "duty to abstain from injuring the plaintiff through express misrepresentation." If the agent's immunity rule protected them where the underlying duty rule did not, the agent's immunity rule would become a "broad exception" to the underlying duty requirement, not vice versa.

The underlying duty requirement and the agent's immunity rule are thus two different routes to the same place. If a policy choice has been made that agents should be free from liability for acting in concert—as it has been for claims of conspiracy to interfere with the principal's contract or to restrain trade—then it does not matter whether that freedom is couched in terms of not owing the underlying duty or in terms of immunity.

Because the Black court failed to appreciate this relationship, it reached the wrong result. The court "reconciled" the "conundrum" it faced by distinguishing the cases relied upon by Applied Equipment as involving agents and employees outside the corporate structure of the principal, whereas the present case involves allegations of a conspiracy between a single corporation and its own employees. . . . In our view, the agent immunity rule has particular force in such a situation.217

Granted, the fiction that the corporation is the sole legal actor has more intuitive appeal where the alleged co-conspirators are all employees of the corporation, rather than retained outside agents.218 But this distinction still fails to provide any policy-based reason to immunize corporate employees who allegedly, knowingly, and intentionally pursued a plan to defraud a customer.219 Relying on a legal fiction is necessarily circular logic, because it begs the question of whether there is a justification for respecting the fiction. As was discussed above, consistency in application of agency principles is not a justification, because agency law already bends to the will of substantive law.

Moreover, if a corporation can only act through human agents, it is not clear why the fact that those agents are or are not part of the

216. See supra note 213 and accompanying text.
217. Id. at 728.
218. This was a questionable basis for the court's holding, given that the California supreme court in Doctors' Co. had rejected a purported distinction between agents and independent contractors for purposes of conspiracy immunity. See Doctors' Co. v. Super. Ct., 775 P.2d 508, 512 n.4 (Cal. 1989).
219. Given the procedural posture in Black—an appeal from the granting of a demurrer (motion to dismiss)—the court was required to accept the plaintiff's factual allegations as true. See Black, 35 Cal. Rptr. 2d at 726.
corporate structure should be dispositive. In the antitrust context, where the anti-competitive concern is the collusion of separate business entities that otherwise would be competing against one another, this distinction may make sense. But given that the claim in Black was for conspiracy to commit fraud, the court's failure to connect the co-conspirators' employment status to any substantive policies of either conspiracy or fraud doctrine rendered the opinion flawed.

C. Personal Gain as a Proxy for Intent

There is a potential policy-based explanation for courts broadly applying the agent's immunity rule. Courts may be using the fact that an agent was acting solely on behalf of his or her principal or employer as a substitute for a determination that the agent lacked the requisite intent to be a true co-conspirator. Or, inversely, courts may use the fact that the agent was acting for his or her own personal gain as a proxy for the fact that he or she did possess the requisite intent.

This is a similar hypothesis to the one proposed earlier in connection with the underlying duty requirement. The hypothesis proceeds from the premise that courts are generally skeptical of conspiracy claims. If the plaintiff could establish all of the elements of the tort against the defendant, the plaintiff would not need conspiracy allegations to hold the defendant liable. Courts may be reluctant to impose tort liability on someone who did not commit a tort and may be of the view that the amorphous doctrine of conspiracy is a blunt weapon which may cause collateral damage; in other words, it may result in the imposition of liability on innocent actors because of circumstantial evidence of an agreement. Any reluctance that might exist is likely heightened where the alleged co-conspirator is an agent of the tortfeasor, because all agents, even wholly innocent ones, provide assistance to their principals. Courts, in trying to weed out meritless claims against innocent agents who are merely "doing their job," have perhaps made doing one's job tantamount to lacking intent, and thus have made acting on behalf of the principal dispositive in defeating conspiracy liability.

This approach certainly has some appeal. Take the example of an attorney who advises her client on a course of conduct that eventually defrauds a third party: the attorney may or may not have known of and intended to further the client's fraudulent purpose. The mere fact that she provided the advice should not be sufficient circumstantial evidence to infer an agreement; it is certainly not unheard of for clients to utilize the unwitting assistance of their attorneys to perpetrate a wrong. The attorney is undoubtedly going to deny any intentional collusion whether she actually colluded or not. So looking to her

220. See supra notes 58–65 and accompanying text.
“stake” in the conspiracy may be a useful second-best alternative. If the attorney simply receives her ordinary fee in serving the client, we may feel confident that the attorney did nothing objectionable—no one goes out on a limb to commit wrongdoing if there is nothing in it for them. Conversely, if the attorney charges the client an increased fee or a bonus payment, or took a percentage of the profits that the client reaped as a result of the wrongful conduct, it would seem that the attorney really was “in on” the fraud when she provided her services.

If courts are using personal gain as a proxy for knowledge of and intent to further the wrongful object of the conspiracy, they should consider the scienter elements of conspiracy claims directly. After all, conspiracy law imposes liability, not upon all who combine to achieve a purpose, but only upon all who combine with knowledge of and intent to achieve a wrongful purpose. The knowledge and intent elements intrinsic to all conspiracy claims should already winnow out innocent actors. If an agent has an independent stake in the object of the conspiracy, this is good circumstantial evidence that the agent knew of the purpose of the conspiracy, and agreed to pursue it. But it is only circumstantial evidence. Shifting the doctrinal focus away from the intent element and considering the agent’s personal gain as an exception to a rule of immunity is both unhelpful and unnecessary.

Consider again Collins v. Union Federal Savings & Loan Ass’n, wherein the bank and its officers allegedly conspired to induce potential purchasers of plaintiff’s real estate to buy from the bank at foreclosure sale instead of from the plaintiff directly. If it is true that the bank officer defendants were merely following orders and were indifferent to whether the plaintiff was cheated out of an opportunity to sell the property, they should not be held liable for conspiracy because they lacked the requisite intent. But they should not necessarily be immune from liability. Suppose that the officers knew that they would be getting a bonus of two percent of whatever sum the bank earned at the foreclosure sale. This is evidence of their acting for personal gain—or at least may be, depending one’s definition of personal gain. It is also evidence of their intent to wrongfully interfere with plaintiff’s prospective advantage with potential buyers. In this instance, evidence of intent and evidence of gain overlap. But acting for

221. See supra notes 17, 29 and accompanying text.
222. 662 P.2d 610 (Nev. 1983); see supra notes 125-33 and accompanying text.
223. See, e.g., Wegerer v. First Commodity Corp., 744 F.2d 719, 729 (10th Cir. 1984) (McKay, J., concurring in part and dissenting in part). The court concluded:

If the exception to the rule is not limited to situations where an officer or employee receives a benefit or personal gain from an outside source, the rule will be swallowed up by the exception. Large salaries, bonuses, personal loans, stock options, etc. are common methods of remuneration for officers of corporations.

Id.
personal gain is not the only possible circumstantial evidence of intent. Suppose the corporate officers got no bonus for wooing prospective purchasers away from the plaintiff, but intentionally did so anyway with full knowledge that it would harm the plaintiff simply because they felt loyalty to the bank, or because they personally disliked the plaintiff. In these circumstances, should the lack of personal gain immunize them and defeat the claim at the pleading stage?

The hypothetical permutations of Collins indicate that the personal gain/corporate benefit test produces no better results than a straightforward intent test, and possibly worse results. To borrow an economic term, the intent test is Pareto superior and so should be used in lieu of the agent's immunity rule and personal gain exception thereto.

One could counter that the intent requirement is insufficient to protect agents from conspiracy claims, because intent is necessarily a fact-intensive inquiry that is not amenable to resolution on a motion to dismiss or even at summary judgment. Under this view, requiring a plaintiff to allege and prove that the agent acted for personal gain will weed out specious claims earlier and more often than would otherwise occur with an unfiltered intent test.

As an initial matter, this assumes that there are "too many" conspiracy claims being levied against agents. It is impossible to tell without empirical evidence. In any event, the personal gain exception is hardly of greater benefit to agents than the intent requirement. Under the personal gain exception, a plaintiff need not allege or prove that the agent received a personal benefit, only that the agent acted for the purpose of obtaining a benefit. Because the personal gain exception is really a personal motive exception, it requires delving into the mind of the agent just as much as the intent requirement does. Thus, it should be equally as resistant to resolution by motion.

Furthermore, courts are not always unwilling to resolve questions of intent as a matter of law. Where the agent defendant truly is just an innocent servant "doing her job," the plaintiff should be unable to produce the requisite circumstantial evidence of intent even after an opportunity to conduct discovery, so courts would likely dispose of such claims by summary judgment or sooner. Even at the plead-

224. See, e.g., In re Barral, 153 B.R. 15, 17 (S.D.N.Y. 1993) ("Findings as to fraudulent intent are peculiarly fact-intensive and as an affirmative finding can rarely be made as a matter of law.").
225. See, e.g., Cal. Civ. Code § 1714.10(c) (1998 & Supp. 2005) (allowing conspiracy claim against attorney to proceed without prior court approval if plaintiff alleges that attorney acted "in furtherance of the attorney's financial gain") (emphasis added).
226. See, e.g., Hahn v. Sargent, 523 F.2d 461, 468 (1st Cir. 1975). Importantly, a party against whom summary judgment is sought is [not] entitled to a trial simply because he has asserted a cause of action to which state of
ing stage, courts may grant a motion to dismiss where the plaintiff is unable to allege any facts from which one could reasonably infer that the defendant acted with intent. Where it was the agent's job to do the act which constitutes his or her alleged role in the conspiracy, the conduct alone should be insufficient to reasonably infer intent; rather, the plaintiff should be required to show some "plus factor" above and beyond the conduct itself.

In many instances, acting for financial gain may be the primary, if not only, evidence of such intent. If so, then the practical effect of requiring the plaintiff to show intent instead of financial gain may be minimal. But as this Article has demonstrated, there is a potential for the agent's immunity rule/personal gain exception paradigm to excuse culpable agents, without any corollary promotion of substantive policy. Moreover, from a doctrinal standpoint, avoiding a separate test of personal gain will make judicial decision-making more reasoned and predictable, which may ultimately be a benefit not only to the legal community, but to the business community as well.

To the extent that there is a concern that the mere filing of a civil conspiracy claim against an agent will be disruptive of a particular principal–agent relationship, Congress or the states' legislatures are free to create additional barriers to suit. California, for example, has passed a statute requiring that a plaintiff demonstrate to the court a reasonable probability of success before filing a claim against an attorney for conspiring with his or her client. One could debate the rel-
tive institutional authority or competence of courts and legislatures to make policy choices about which classes of agents should be exempt from which classes of conspiracy claims. But the thrust of this Article is that, whoever makes the choice, it should be based on policy, not blind adherence to precedent or legal fictions.

V. CONCLUSION AND RECOMMENDATIONS

Conspiracy is an inherently nebulous concept, and civil conspiracy, which is not even a tort, is more nebulous. But it is no solution to limit civil conspiracy claims with a yet more nebulous agent’s immunity rule. The agent’s immunity rule is a doctrine that has developed at the crossroads of conspiracy law, substantive tort law, and agency law. Where the policies of these fields run up against one another, one or more must yield the right of way. But there needs to be an order of priority so that all will know who should yield to whom.

As we have seen, the other major limitation on civil conspiracy—the underlying duty requirement—compromises conspiracy policies of preventing group danger only where necessary to promote tort policies. And although the agent’s immunity rule (as an extension of the single legal actor theory) ostensibly serves to maintain the “policy” of principal-agent unity, that formalistic principle has always been selectively applied in differing conspiracy contexts according to the dictates of substantive law.

In the civil conspiracy context, then, substantive tort law should rule the road. Where conspiracy policy is not in conflict with tort policy, they should both be promoted to the extent possible. And it is only where agency law does not conflict with either of the above that its policies should be promoted.

This order of priority can be expressed as follows. When faced with a claim against an agent for conspiring with his or her principal or employer to commit a tort, courts should ask at least five questions. First, is there more than one individual who is an alleged participant in the conspiracy? If not, the conspiracy claims should fail outright for inability to satisfy the plurality element. This will bar conspiracy claims premised on unilateral acts of a corporate agent, because the corporation should not “count” as a second actor for purposes of the plurality requirement. Whatever tort the lone agent may have committed must be alleged independent of conspiracy allegations. Where the principal is an individual and not a corporation, however, a single agent truly can conspire “with” the principal, so the conspiracy claim is potentially viable.

("[I]t appears that the pleading hurdle would only apply to attorney/client conspiracy causes of action which are not viable in any event. In such circumstances, overcoming the pleading hurdle is the least of the plaintiff's worries.").
Second, is there a policy reason to immunize the agent from liability for the underlying tort? If so, the agent should not owe that tort duty, and the underlying duty requirement will immunize the agent from liability for conspiracy to commit the tort.

Third, is there a policy reason to avoid proscribing the coordinated acts of multiple agents acting within or on behalf of a corporation? Because this question involves considerations of substantive policy, the outcome should typically be the same as that reached under the second question. The two contexts in which agent’s immunity have been properly upheld—contractual interference conspiracies and antitrust conspiracies—both involved the promotion of beneficial economic activity achieved through coordinated conduct.

Fourth, assuming there is no reason to exempt the agent or agents from conspiracy liability outright under questions two or three, did the agent(s) enter into an agreement with knowledge of and intent to achieve the wrongful object of the alleged conspiracy? Under this question, whether the agent acted in furtherance of his or her personal gain is relevant circumstantial evidence of intent, but is not dispositive of whether the plaintiff states a claim against the agent.

Fifth, should the corporate principal be held liable for the agent’s act of conspiring under respondeat superior principles? That is to say, was the agent acting within the course and scope of his agency or employment and with the intent to benefit the principal when he conspired? Here, too, the fact that the agent acted for his personal gain instead of to benefit the employer has relevance, but not for the reasons typically assumed by courts under the agent’s immunity rule.

Given the uncertainties that are intrinsic to conspiracy doctrine, application of this analytical framework will by no means solve all the problems courts face in dealing with civil conspiracy claims. It would, however, certainly be a step in the right direction.