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THE AUTHORITY OF THE PRESIDENT OVER CORPORATE LITIGATION: A STUDY IN INHERENT AGENCY

ROGER J. GOEBEL

INTRODUCTION

It is a traditional rule of corporate law that the board of directors exercises plenary power over corporate management. In fact, however, the twentieth century has witnessed a decided shift of the functional center of authority to the corporate officers. Although a basic residuum of authority remains in the board of directors, the officers, especially the president, in the majority of corporations exercise the day-to-day control of corporate affairs. In practice the modern corporation is occasionally directed by a general manager, but more often by the president (or perhaps, to use a mode currently in vogue for large public-issue corporations, the chairman of the board), who either is given express general managerial authority or simply assumes general supervision tantamount to such authority over corporate affairs.

Technically, the president or other officer exerting managerial authority is an agent of the corporation. His powers should, then, be derived either directly from the constitution or by-laws, or indirectly as a sub-agent from delegation of authority by the board of directors. But for over a century, and ever more frequently in recent

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1 For the standard legal rules requiring a residuum of authority in the board, but permitting virtually wholesale delegation to managing agents and officers, see BALLANTINE, CORPORATIONS §§ 46, 48 (rev. ed. 1946); 1 HORNSTEIN, CORPORATION LAW AND PRACTICE §§ 511, 514 (1959); LATTIN, CORPORATIONS 222-23 (1959). On the modern extent of such delegation, see Kempin, The Corporate Officer and the Law of Agency, 44 VA. L. REV. 1273, 1277-83 (1959).
2 See 1 HORNSTEIN, op. cit. supra note 1, § 514.
years, the courts have also referred to the inherent authority, or powers *ex virtute officiis*, of the president. What precisely is the nature of this authority? The opinions are generally obscure as to whether this terminology is merely a cloak for traditional agency principles in somewhat unusual corporate settings, or is intended to indicate a quite distinct substantive authority. The commentators seem to recognize inherent authority or *ex officio* powers of the president as a distinct category of agency power, but are unfortunately imprecise as to its nature and scope.

The matter is not one of purely academic significance, a mere quibble over semantics. Recognition of some inherent authority in the president, indigenous rather than derived from the board of directors, can create considerable functional consequences. It would represent legal acceptance of independent operations by the president on behalf of the corporation, regardless of board direction and to some degree despite board division or even opposition. The pragmatic difference such recognition can make has been recently highlighted in a series of cases, notably in New York from *Sterling Industries, Inc. v. Ball Bearing Pen Corp.* to *West View Hills, Inc. v. Lizau Realty Corp.*

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3 *Fletcher, Cyclopedia of Private Corporations* § 553 (rev. ed. 1954) refers to it as inherent power, and *Ballantine, op. cit. supra* note 1, § 51 terms it *ex virtute officii* power, but neither defines its character.
4 *Hornstein, op. cit. supra* note 1, § 514, suggests that this power, termed *ex officio*, belongs only to the president who is also general manager, which inferentially makes it a derivative of general agency authority.
5 *Neal, Close Corporations: Law and Practice* § 8.05 & n. 36 (1958) identifies the inherent authority of a corporate president with the inherent authority or general agency power of the Restatement (Second), Agency (1958). Kempin, *supra* note 1, at 1282, would appear also to identify it with the Restatement sense. So far as student material is concerned, Note, *Inherent Power as a Basis of a Corporate Officer's Authority to Contract*, 57 Colum. L. Rev. 868 (1957), and Note, *Inherent Powers of Corporate Presidents*, 23 Wash. U.L.Q. 117 (1937), are not always clear but appear to conclude that inherent authority is generally merely an application of broad implied and apparent authority. Note, *Implied Powers of the Corporate President*, 40 Ky. L.J. 184 (1952), never reaches this theoretical issue. Note, *Inherent Powers of Corporate Officers: Need for a Statutory Definition*, 61 Harv. L. Rev. 867, 870-71 (1948), definitely concludes that there is an inherent power distinct from traditional agency implied or apparent authority, but confesses that the character of this power is obscure.
6 298 N.Y. 483, 84 N.E.2d 790 (1949).
which deal with the power of the president to conduct corporate litigation in the face of a deadlock among the directors or the tacit opposition of a majority of them.

The lack of clarity among courts and commentators over the character of the inherent power of the president may have resulted in part from the attempt to derive a general rule from a multitude of heterogeneous fact situations. Accordingly, this article will, after a necessary initial presentation of the general rules governing presidential authority to bind the corporation, concentrate on a specific case pattern: the power of the president to institute, defend, or conduct corporate litigation.

Selection of this case pattern has immediate practical value because of the relative frequency with which it has occurred in recent litigation. From an analytic point of view, isolation of this particular pattern not only appreciably narrows the field of inquiry, but also refines the conflict of interests by substantially excluding those of parties outside the corporation itself. It is comparatively rare that a third party can claim to have relied to his injury upon the president's power over litigation. Finally, in terms of academic theory, those cases in which the power of the president to litigate is challenged on the ground of a division of authority in the internal corporate management, serve as a unique focus upon the character and merits of inherent authority.

It is essential at the outset to have a clear grasp of the recognized principles of agency. The Restatement (Second) of Agency defines three categories: (real) authority, apparent authority, and inherent authority. Authority, often called real or actual authority, grants the agent the power to bind the principal in accordance with the principal's manifestations to the agent. Authority may be express, that is, explicitly granted, or implied. Implied authority may result 1) from the reasonable construction by the agent of the powers implicit in the express terms of his grant

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7 RESTATEMENT (SECOND), AGENCY § 7 (1958).
of authority, or 2) from a course of past dealings or from trade or customary usages related to the express grant.

Apparent authority gives the agent the power to bind the principal by virtue of the principal’s manifestations to third parties of the extent of the agent’s powers. It rests on the reasonable belief of the third party, due to manifestations by the principal, that the agent has powers which were not in fact accorded to him. In some circumstances the agent himself may make the binding manifestations of power to the third party, provided the principal knows of and acquiesces in such manifestations. In terms of this definition, there can be no such thing as apparent authority binding an undisclosed principal.

The concept of inherent authority represents Professor Warren Seavey's substantial contribution to the theory of agency. It is defined as the power of the agent to bind the principal arising solely from the agency relation itself, and existing for the protection of third parties harmed by or dealing with a servant or other agent. The Restatement sharply distinguishes inherent authority from apparent authority, because in the former there need be no manifestation by the principal to the third party; indeed, the principal may be undisclosed. The most common illustration of inherent authority is the doctrine of respondeat superior in tort liability.

In the field of contractual liability, the Restatement describes only three categories of cases in which the principal is bound by inherent authority: 1) A general agent does something similar to what he is authorized to do, but in violation of orders. Example: A broker in grain who gives a customary trade warranty although the principal forbade him to do so. 2) An agent acts purely for his

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8 Id at § 8. The Restatement in comment d distinguishes apparent authority from estoppel, which requires reliance by the third party, but courts usually do not, and the distinction is not material for the purposes of this article.

9 The theory was first elaborately presented in Seavey, Agency Powers, 1 Oeal. L. Rev. 3 (1948).

10 RESTATEMENT (SECOND), AGENCY § 8A (1958).

11 Id. at §§ 161, 161A, 194.
own purposes in entering a transaction authorized if he were actuated by the proper motive.\textsuperscript{12} \textit{Example}: An agent makes a contract for a loan on behalf of the principal, having previously formed the intent to steal the money. 3) An agent is authorized to dispose of goods, but departs from the authorized manner in which the goods are to be disposed.\textsuperscript{13} \textit{Example}: A principal gives an agent a painting with instructions to sell it, but only to a museum. The agent sells instead to a private collector.

In terms of academic theory, the question immediately arises: what relation does the inherent authority of the corporate president have to the types of inherent authority in agency above described? It is clear that each of the varieties recognized by the \textit{Restatement} rests upon a policy of protection for an innocent third party who will be injured unless the requisite authority, never granted by the principal, is nonetheless imputed to the agent. But query, is this the reason for according inherent authority to a corporate president? The suspicion arises that in corporate law this authority, whatever its nature, is accorded at least to some extent to benefit the corporation rather than any third party. We shall see whether or not this suspicion is accurate in considering 1) the powers of the president to bind the corporation generally, 2) the powers of the president in the conduct of litigation, 3) the powers of the president in the conduct of litigation when there is internal corporate division.

\section{I. The Authority of the Corporate President in General}

\textit{Power to Bind by Contract}

It is not possible to set forth the scope of obligational authority accorded by the law to the corporate president with any degree of dogmatic certainty. Courts quite

\begin{itemize}
  \item \textsuperscript{12} \textit{Id.} at §§ 165, 262.
  \item \textsuperscript{13} \textit{Id.} at §§ 175, 201.
\end{itemize}
naturally are more concerned with arriving at sound results in varying factual circumstances than with spinning a neat pattern of legal doctrine. There are many formulations of the president’s powers among the states, and they are not always applied with precise constancy even within the same jurisdiction. A major cause of this condition is the fact that the law in this area is in a process of growth and adjustment to the requirements of corporate reality. Creative evolution bars pat definition.

The first and basic distinction drawn by the authorities is between the president who is simultaneously general manager, and the president who is not. As a rule of law, this distinction is in the process of erosion; as a ground rule for intelligent discussion, it is probably still essential. The president-general manager has the status of a general agent, and can bind the corporation by any act done in the ordinary course of business operations. Broadly speaking, he can bind the corporation by any act related in some degree to the corporate ends. As for the office of president as such, there are two opposing views. The older, more narrow conception holds the president strictly to powers delegated by the board of directors. Outside of these, he has no more authority than any other member of the board of directors. The more modern, broad view recognizes the president as the normal functional head of the business. This rule accordingly gives him a prima facie authority to bind the corporation by any act within the normal scope of its operations.

**The President-General Manager**

Before discussing the scope of authority of the president-general manager, it would seem advisable to state the legal position of the general manager as such. A general manager is a general agent,¹⁴ that is, one granted authority to govern all the operations of a total business or some substantial unit thereof. The delegation of express powers

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¹⁴ *Id.* at § 73.
by the principal is always broad, and usually in expansive rather than limited terms. The general manager is accordingly quite free in construing additional derivative powers from those granted. Additional implied authority arises through customary practices in the business itself and through trade usages in general. The cumulative effect of such extensive derivative authority has been succinctly stated by the Delaware Supreme Court: "A general manager is, as the term indicates, a manager for all the general purposes of the corporation, and has implied authority to do anything that the corporation could do in the general scope and operation of its business." Finally, based upon the operative authority which the corporation permits the general manager to assume, an equally broad apparent authority is engendered to protect third parties reasonably relying upon it.

An initial reaction might find such sweeping implied and apparent authority almost limitless. But this is to overstate the case. In practice, many courts restrain the authority to that which "is usual and necessary in the ordinary course of business actually followed by the corporation." So held the Arizona Supreme Court in an often cited decision holding that the manager of a clinic had neither implied nor apparent authority to guarantee a distinguished physician minimum earnings for two years as an inducement to join the staff. The Ohio court reacted likewise in refusing to find that a building corporation manager, authorized to seek buyers for the corporate stock,
thereby acquired implied authority to sell the building itself.\textsuperscript{19}

Other courts, however, raise presumptions of authority so broad that it is extremely difficult for the corporation to defeat them. Rules that "the powers of the managing officers of a corporation are coextensive with those of the principal except in relation to matters over which the stockholders alone have control,"\textsuperscript{20} or that the manager's powers are coextensive with the general scope of the business,\textsuperscript{21} or that the manager has prima facie power to do anything the board of directors could authorize or ratify,\textsuperscript{22} suggest that the doctrinal limits of implied authority are being surpassed. Fletcher's \textit{Private Corporations}' survey of the cases comes to the conclusion that a general manager has authority to do any act or make any contract within the scope of ordinary corporate business, and any limits placed on him of which third parties have no notice will not diminish his authority.\textsuperscript{23} This is essentially the same as the first variety of inherent authority presented by the Restatement noted at the outset of this article.\textsuperscript{24} Whatever the theoretical justification, however, the practical implications of such an extensive imputation of power are clear.

The scope of authority of the president-general manager is of course the same as that of the general manager alone. The formula varies from jurisdiction to jurisdiction—authority to do any act or make any contract appropriate in the ordinary course of business,\textsuperscript{25} to make any contract

\begin{footnotes}
\item\textsuperscript{19} Miller v. Wick Bldg. Co., 150 Ohio St. 93, 93 N.E.2d 467 (1950); accord. Sterling v. Trust Co., 149 Va. 867, 141 S.E. 856 (1928).
\item\textsuperscript{20} Coe v. American Fruit Growers, 164 Ore. 90, 96, 100 P.2d 234, 236-37 (1940).
\item\textsuperscript{21} Petition of Mulco Prods., Inc., \textit{supra} note 15; Wells-Dickey Co. v. Embody, 82 Mont. 150, 266 Pac. 869 (1928).
\item\textsuperscript{22} Victory Inv. Corp. v. Muskogee Elec. Traction Co., 150 F.2d 889 (10th Cir.), \textit{cert. denied}, 325 U.S. 774 (1945) (applying Oklahoma law).
\item\textsuperscript{23} 2 \textit{Fletcher, Cyclopedia of Private Corporations} § 594 (rev. ed. 1954).
\item\textsuperscript{24} See note 11 \textit{supra} and accompanying text. The conclusion that the general manager's authority to do any act within the scope of the business is inherent authority is also reached by Kempin, \textit{The Corporate Officer and the Law of Agency}, 44 VA. L. REV. 1273, 1277-82 (1958), and in the Note, 61 HARV. L. REV. 867, 868 (1948).
\end{footnotes}
to fulfill corporate purposes, \textsuperscript{26} to do anything which the board of directors can authorize or ratify \textsuperscript{27} — but the underlying principle remains the same. Since the president-general manager has functional control of all aspects of the business, issues the directives which regulate its internal regime, and conducts personally or through agents the relations with the outside world, it is only just that he bind the corporation by any act or contract reasonably related to the corporate economy.

The only question then is how remote from the corporate economy an act or contract must be before it ceases to be binding upon the corporation? Obviously, none of the formulations above provide absolute lines of demarcation, and the actual decision will be heavily fact-oriented. Attempts by the corporation to use a standard saving clause, \textit{i.e.}, that the general manager shall exercise full control "subject to the orders of the board of directors," as a defense in subsequent litigation get short shrift in modern cases. Unless the directors intervene actively to exercise this limitation, the courts regard the president-general manager as fully competent. \textsuperscript{28} The only genuine limitation is that a contract deemed unusual or extraordinary does not bind the corporation. \textsuperscript{29} Even here past custom within the firm can render a superficially unusual act authorized. \textsuperscript{30} What is unusual or extraordinary can only be determined by factual analysis of the individual corporation’s practices, in conjunction with the trade usages, with whichever is the greater setting the outer limit. \textsuperscript{31} Appraising the decisions

\textsuperscript{26} Hobbs v. Homes, Inc., 246 Iowa 1195, 71 N.W.2d 592 (1955).
\textsuperscript{27} Fletcher Oil Co. v. City of Bay City, 346 Mich. 411, 78 N.W.2d 205 (1956); Barnett v. Kennedy, 185 Okla. 409, 92 P.2d 963 (1938); C. L. McClain Fuel Corp. v. Lineinger, 341 Pa. 364, 19 A.2d 478 (1941). For a general survey, see 2 \textit{FLETCHER, supra} note 23 at § 594.
\textsuperscript{28} Blue Goose Mining Co. v. Northern Light Mining Co., 245 Fed. 727 (9th Cir. 1917); Phoenix Fin. Corp. v. Iowa-Wis. Bridge Co., 41 Del. (2 Terry) 130, 16 A.2d 789 (1940) (secretary-treasurer-general manager).
\textsuperscript{29} Bacon Piano Co. v. Medcalf Jewelry & Music Co., 225 Mo. App. 463, 40 S.W.2d 762 (1931); see 1 \textit{HORNSTEIN, CORPORATION LAW AND PRACTICE} § 514 (1959).
\textsuperscript{31} Kempin, \textit{supra} note 24, at 1278-79, citing cases at 1279 n.17.
as a whole, there is a distinct trend toward making it extremely difficult for a firm to deny contractual liability for the conduct of its president-general manager, with the sweep of language in some cases suggesting that something more than normal implied or apparent authority is the ultimate rationale. 32

It is time to return to the validity of the distinction between the president who is general manager and the president who is not. As a current rule of law, it is probably true that the president-general manager has a broader range of authority than one who holds the presidency alone, 33 and this condition will undoubtedly continue in states which limit the president as such to the level of any other director. 34 But elsewhere the distinction is being undermined. One factor is that courts find it increasingly desirable to imply the status of general manager, either by construction of some express grant of power, 35 or more often by inferring it from the manner in which the president has been allowed to conduct business transactions. 36 More significant is the tendency simply to attribute to the office of the presidency powers approximating those of a general manager, on the theory, expressed as long ago as 1902 by the Wisconsin Supreme Court, that in fact “presidents of corporations well-nigh universally exercise the power of a

32 Barnett v. Kennedy, supra note 27, at 414, 92 P.2d at 968; C. L. McClain Fuel Corp. v. Lineinger, supra note 27, at 368, 19 A.2d at 480; cf. Diederich v. Wisconsin Wood Prods., Inc., 247 Wis. 212, 216-17, 19 N.W.2d 268, 271 (1945), where the court found apparent authority to contract on the basis of a rather equivocal letter, despite a specific subsequent prohibition by the board of directors. Heavy stress was laid on the appearance created by the implied power of the president-general manager, which the court said extended to any act the corporation could do in its ordinary business.


To appreciate the extent of this tendency requires an analysis of the current status of the office of the president in se, to which we now turn.

Authority of the President

The two alternative rules have already been indicated—the president has no more power than any other director versus the president has personal authority to obligate the firm within the normal scope of its business. Corporate law authorities generally declare that the older narrow rule still obtains in a slight majority of jurisdictions, but their categories of cases hopelessly conflict with one another. This is not surprising because, as noted before, the diversity of formulae and the heterogeneity of fact situations make clear categorization almost impossible. However, there is agreement that the trend is toward the broader rule, and that this is desirable because more in accord with commercial realities and the expectations of the lay public.

The older, narrower concept of the president's authority stems from a nineteenth-century policy opinion that corporations should be favored and their assets protected from unnecessary invasion. This could be attained by requiring the utmost regularity in internal corporate operations, and holding the officers strictly to the more or less express grants of authority in the by-laws or board resolutions. This policy consideration has largely disappeared in the wake of our present view of the corporation as the subject of considerable

37 St. Clair v. Rutledge, 115 Wis. 583, 592, 92 N.W. 234, 237 (1902).
38 The basic state-by-state compendium is in 2 Fletcher, Cyclopedia of Private Corporations §§560-91.1 (rev. ed. 1954). Compare with this survey and each other the lists in Ballantine, Corporations §51 (rev. ed. 1946); 1 Hornstein, Corporation Law and Practice §§513-14 (1959); Note, 40 Ky. L.J. 184, 186-87 nn.7-9 (1952); Note, 50 Yale L.J. 348, 351-52 nn.23-24 (1940).
392 Fletcher, supra note 38, at 558, criticizes the narrow rule for failing to protect the public in dealings with the corporation. Lattin, Corporations 228-29 (1959) and 2 O'Neal, Close Corporations: Law and Practice §8.05 (1958) cite approvingly the trend toward giving the president general managerial powers. In accord are Kempin, supra note 34, at 1281-83; Notes, 57 Colum. L. Rev. 868, 885 (1957); 40 Ky. L.J. 184, 191-92 (1952); 50 Yale L.J. 348, 350 (1940).
social obligations, bearing the risks of social intercourse whenever the public interest so demands, but more traditionally-minded courts find the narrow concept a still useful tool.

Doctrinairily, the strict rule, whose hallmark is the slogan that the president as such has no more powers than any other director, follows simple agency principles. All the powers of the president must come from: 1) "the organic law of the corporation" — the by-laws and basic resolutions, 2) explicit directives from the board, 3) construction of the express powers granted, 4) implication from usage, custom, and the nature of the company's business. The last source is obviously the most elastic, and with judicious stretching might well reach the same extent as the broad rule's formulation of presidential authority within the ordinary scope of the business. The critical factor is that the more strict courts cast a jaundiced eye on easy implication, and place upon the plaintiff the burden of establishing the custom in the business from which the challenged authority is to be derived. Certainly there is no possibility that these more tradition-oriented courts will impute to the president any inherent powers, unless he is also general manager.

From the practitioner's viewpoint, it would be easy to condemn this narrow rule as antiquated and doomed to

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43 Thus, A. J. McMahan & Co. v. Hibbard, 182 Okla. 503, 78 P.2d 409 (1937), and Kelly, Murray, Inc. v. Lansdowne Bank & Trust Co., 299 Pa. 236, 149 Atl. 190 (1930), have been cited as following both the strict and the broad rules.
44 E.g., Grant v. Duluth, M. & N. Ry., 66 Minn. 349, 352, 69 N.W. 23, 24 (1896): "As presidents of corporations very frequently exercise . . . wider powers than those given them by the articles and by-laws of the corporation, courts . . . have usually adopted a very liberal rule in favor of persons contracting with such officers, whenever there was evidence reasonably tending to show that it had been the custom . . . ." (Emphasis added.) The plaintiff here lost $16,000 through his inability to prove such a custom.
45 See note 34 supra and accompanying text.
extinction—too easy, and rather inaccurate. Short of creating absolute liability, some dike must be erected to protect the corporation from a flood of unforeseen obligations incurred by the acts of its president, properly motivated or not. Jurisdictions adopting the broader implication of presidential authority use the device of a denial of this presumption of authority to unusual or extraordinary contracts. Courts in a more traditional vein achieve the same goal by denying any presumption of authority at the outset, and then carefully construing the real delegation of power to reach what are often eminently sensible results.  

There is no hesitation in a proper case to find for the third party. However, it is unfortunately true that adherence to strict agency can have something of the same effect in this area as donning a pair of blinkers. It is not hard to find instances in which the strict rule operates so rigorously as to confound the reasonable expectations of innocent third parties, while the broader rule would bring warranted relief.

Both because it enables greater flexibility in practical operation and because it poses more interesting issues for analysis, the rule that the president has some powers by virtue of his office alone deserves more attention. This rule is also derived from the nineteenth century, but has really flowered in more recent years through more frequent application. It commences from a different policy premise.

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The president is deemed the usual functional head of most corporations, because most matters are too pressing to await intermittent board of directors' attention. The dealing public has come to expect that presidents exercise such leadership, and rely upon it in transactions with the corporation without demanding overt indicia of board approval. Therefore, both to accommodate the normal practice of modern corporations and to justify the general anticipations of the public, it is desirable to impute to the president some incidental authority by virtue of his office.

Most courts and commentators refer to this incidental authority as inherent, or as powers *ex virtute officii*. Since we must still maintain the caveat that it is uncertain whether this means a broad implied or an inherent authority (as the terms are used in the Restatement), for shorthand reference it will be called the broad rule. The leading Delaware case, *Italo-Petroleum Corp. of America v. Hannigan*, well enunciates it as the rule that the president "is presumed to have, by virtue of his office, certain more or less limited powers in the transaction of the usual and ordinary business of the corporation." 49 This expression reveals two features of interest: the incidental authority is 1) presumptive, and 2) limited.

To take the topic of limitation first, the formula restricting presidential authority to acts in the ordinary course of business is probably the most common. 50 Somewhat broader formulations extend this authority to "contracts made . . . within the scope of . . . the corporation's legitimate purposes" 51 any act done in furthering corporate objectives, 52 or "any contract pertaining to the cor-

49 Supra note 48 at 545, 14 A.2d at 405.
porate affairs.″ The last is the variation favored in Illinois, which has been probably the most influential jurisdiction in the promotion of ex officio authority. The statement that the president may perform any act which the board of directors could authorize, popular in describing the gamut of the president-general manager's authority, is not often used for the president only. The most immediate observation of these formulations is that there is little critical difference from those used to descry the limits of the president-general manager's powers, and indeed they are not infrequently stated to apply to the president or general manager in the alternative. This raises the practical question whether or not beyond the umbra of acts within the president's powers there still remains a penumbra of acts within the authority of a president-general manager alone. A little extrapolation suggests that if such a penumbra still exists, it is doomed to eventual oblivion.

Now, what are the effective limits of the president's powers? The standard rule here, as for the president-general manager, would winnow out unusual or extraordinary contracts—the same fact-oriented test with the same difficulty of generalization. Vague as it may sound, though, this is a very real restraint. It received its greatest prominence when proclaimed by Judge Learned Hand in Schwartz v. United Merchants & Mfrs. Inc., noteworthy because with one blow it relegated to the past the New York rule authorizing any act which the board of directors could ratify, because it was not readily amenable to the unusual act approach. Judge Hand's decision barred a contract to make the plaintiff an exclusive sales agent with high commissions. Other frequently voided extraordinary

57 72 F.2d 256 (2d Cir. 1934).
contracts include: hiring of a sales agent who would receive an interest in the corporate profits, making a lifetime employment contract, transfer of corporate assets, and purchase of or merger with another corporation.

But how high a hurdle is the unusual acts doctrine today? There are already cases holding that corporate acquiescence can vitiate the limit: "when a corporation allows its president to assume complete control over the affairs of the corporation he then does have, prima facie, the power to make ... [an extraordinary contract]." Even more significant is the fact that, as Judge Medina has recently noted, the range of unusual acts and contracts is steadily narrowing under the impact of modern corporate existence in which "third parties commonly ... [rely] on the authority of such officials in almost all the multifarious transactions in which corporations ... [engage]. The pace of modern business life ... [is] too swift to insist on the approval by the board of directors of every transaction that ... [is] in any way 'unusual.'"

There is ample case law to warrant such an appraisal. It provides the basis for an educated guess that eventually only acts radically unrelated to the corporate economy will be held out of the scope of the president's authority—not

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63 Lee v. Jenkins Bros., 268 F.2d 357, 366 (2d Cir. 1959) (dictum).
unlike the widening of the scope of employment rule in present tort liability.

The other feature of the broad rule to be considered is its presumptive or prima facie character. Previous writers have quite accurately observed that if the presumption of authority is made irrebuttable, it would then represent a truly inherent, indefeasible power.\(^6\) But decisions which present the authority of the president in such terms are quite rare. One such decision is *Moore v. Phillips*,\(^6\) a 1959 California appellate case, which is a valid instance of inherent authority in the Restatement sense. The suit in question was to recover commissions for financing real estate construction on land owned by four corporations. The circumstances were rather involved, but the president of all four corporations was held to have acted as agent for them as undisclosed principals. This eliminated apparent authority, and the language of the court readily transcended implied authority. The opinion declared that the president, as executive officer, was "more than an agent," and could in effect speak and act as the corporation in furthering its objectives.\(^6\) To these may perhaps be added a 1934 Eighth Circuit opinion holding that a president acting as agent for his corporation as undisclosed principal could bind it by any act which the board of directors could authorize,\(^6\) and a 1959 Louisiana decision holding that the presumptive power of the president overrode a rather clear charter provision stripping him of authority to deal in corporate realty.\(^6\) But this rather scant body of case law is all that the author is willing to venture as even possible illustrations of an inherent authority in the Restatement usage.

\(^6\) Kempin, *The Corporate Officer and the Law of Agency*, 44 Va. L. Rev. 1273, 1278 (1958) (citing no illustrative cases); Note, 61 Harv. L. Rev. 867, 870 (1948), citing only St. Clair v. Rutledge, 115 Wis. 583, 92 N.W. 234 (1902), which is probably more accurately described as a result produced by apparent authority.


\(^6\) *Ibid.*

\(^6\) Adams v. Barron G. Collier, Inc., 73 F.2d 975, 979 (8th Cir. 1934).

But *quaere*, does this mean that the ex officio presumption of authority in the president is only an extended implied or apparent authority? Consider the language of a recent Georgia opinion, *Chalverus v. Wilson Mfg. Co.*: "One acting in the capacity of president or general manager of a corporation is presumed to be its alter ego. He is its chief executive officer and agent, and, without any special delegation of authority, is presumed to have power to act for it in matters within the scope of its ordinary business." Is this sort of imputation of power accurately described as implied authority?

In effect what the modern courts are doing is to read into the office of the president a broad capacity to act for the corporation, perhaps as broad as the corporate charter itself, and certainly as broad as the normal corporate economy. It would seem that whenever a corporation today names its president, even if it narrowly restricts his express powers to those of a figurehead, willy-nilly it has also granted him implied powers measured by what is trade usage for similar corporations. Granted that the presumption is rebuttable, how easy in a given case is it for the corporation to rebut an inference based on popular conceptions of the office of the president?

All of this is said not by way of criticism of the practical consequences of the ex officio powers doctrine—to the contrary, it would seem a highly justifiable accommodation of the law to the normal expectations of the community in corporate transactions as well as giving the average president a convenient ease of operations in his office. But it is intended to raise this question: If authority deemed to reside in a person by virtue of his position is so expansive as to cover nearly any act reasonably related to the corporation, and is protected by a presumption implied in law rather than in fact, would it not be more accurate to term such authority inherent rather than implied? Is

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70 212 Ga. 612, 613, 94 S.E.2d 736, 738 (1956).
71 Kempin, *supra* note 65, at 1282-83; *cf.* Notes, 57 *Colum. L. Rev.* 868, 885 (1957); 50 *Yale L.J.* 348, 349, 353 (1940).
it not possible that here is a form of inherent authority not directly provided for in the Restatement?

Summary

The lawyer as a pragmatist will want to know what is the effective range of the powers of the president. If the president is also general manager, this range approximates that of the corporate structure itself, though the limitation against glaringly extraordinary acts and contracts does remain. The president in a state treating him as any other director is restricted to those powers spelled out, but to protect innocent third parties a gradually widening range of customary authority can be proved. Moreover the trend in the last quarter century appears decisively toward the broader rule. This ex officio authority of the president within the ordinary conduct of business is surrounded by a dike against unusual contracts, but this dike has shown signs of leakage. It is probable that the president in these jurisdictions can obligate the corporation by any contract which a jury can find to be reasonably related to the corporate economy, judged by contemporary corporate practices. It is likely that the presumption of authority involved will grow increasingly harder to rebut.

In terms of doctrinal development, any ex officio powers of the president and those of the president-general manager represent at the very least an extremely broad implied authority. In the author's opinion, under this facade of imputed customary authority there lurks a true species of inherent authority by no means totally identifiable with that recognized in the Restatement. Future developments may permit us to discern its contours more exactly. Thus far the stress in its rationale has been laid on the expectations of the public. The second portion of this article, on the power of the president to conduct litigation, may show that the rationale for this variety of inherent authority derives equally as much from a desire to promote the corporation's interests as such.
II. THE AUTHORITY OF THE PRESIDENT OVER CORPORATE LITIGATION

In the myriad cases involving the authority of the president to create general corporate obligations, it was necessary to speak with caution. In the more limited area of case law involving the authority of the president over corporate litigation, it is possible to draw more definite conclusions. There are perhaps only one hundred decisions in point, and a careful culling of their contents demonstrates that the president prima facie does have authority to engage counsel to institute, defend, conduct or settle litigation, or simply to provide legal services. Further, though most cases provide a factual basis for a finding of implied authority, there is substantial support for deeming his power in this regard an inherent one.

Historically, the first distinct imputation of the power to conduct corporate litigation was made in favor of bank presidents and managing cashiers. The motive force for such imputation is quite obvious: it was absurd to require the president of a bank to document his authority with an enabling resolution every time he wished to foreclose a mortgage, engage in a construction of a trust instrument, or sue on a promissory note. To facilitate bank management, courts were quite willing to find grounds for implying authority in the president or cashier. From implying authority in fact to implying authority as a matter of law was an easy step early taken. By the start of this century, the dictum that the president of a bank \textit{ex virtute officii} could institute litigation was universal.

Movement from the idea that it was advantageous to grant bank presidents this power to the idea that it was

\begin{itemize}
  \item \textit{Savings Bank v. Benton}, 59 Ky. (2 Metcalfe) 240 (1859) (president);
  \item \textit{Eastman v. Coos Bank}, 1 N.H. 23 (1817) (cashier);
  \item \textit{National Bank v. Earl}, 2 Okla. 617, 39 Pac. 391 (1895) (president);
  \item \textit{cf. Western Bank v. Gilstrap}, 45 Mo. 419 (1870) (cashier).
\end{itemize}

\begin{itemize}
  \item \textit{E.g.}, \textit{Yatesville Banking Co. v. Fourth Nat'l Bank}, 17 Ga. App. 420, 87 S.E. 606 (1916) (memorandum decision);
  \item \textit{Merchants' Nat'l Bank v. Eustis}, 8 Tex. Civ. App. 350, 28 S.W. 227 (1894);
\end{itemize}
equally advantageous to grant all corporate presidents the same power—especially if the corporation was litigation prone—involved no drastic mental leap. As early as 1842 a New York court was asserting: “It is a matter of every day’s occurrence for the presidents or other head officers of corporations to employ and retain attorneys and counsel to prosecute and defend suits, or to assist in legal proceedings in which the corporation is interested.” In the succeeding century, whenever the authority of the president over corporate litigation has been judicially called in question, it has usually been upheld as a matter of course. By way of statistical summary, sixteen jurisdictions, led by Illinois, New Jersey and New York, have recognized such presidential power, and federal courts in three states lacking a binding state precedent have declared for it. Utah and Wisconsin have thus far upheld such authority only in situations involving some emergency, five other jurisdictions have endorsed the exercise of this power by a bank president, and a final eight have only had occasion to sanction the exercise of litigious authority by presidents who were also general managers. Only three states—Iowa, California and Massachusetts—have categorically refused to impute power over litigation to the president as such, and the latter two have proved willing to grant it to a president-general manager. Professor Lattin has

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74 American Ins. Co. v. Oakley, 4 N.Y. Ch. (9 Paige 496, 501) 789, 792 (1842).
75 For case citations, see the Appendix under the appropriate state name. The sixteen jurisdictions are Illinois, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Nevada, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, Texas, Washington, West Virginia, and the federal common law prior to 1935. Federal courts in Alabama, Maryland and Virginia are in accord. Connecticut’s recent decision, Zaubler v. West View Hills, Inc., 148 Conn. 540, 172 A.2d 604 (1961), certainly suggests the same rule would obtain there in an appropriate case.
76 See the Appendix under the appropriate state name. Georgia and Oklahoma support the authority both of bank presidents and president-general managers. Arkansas, South Dakota and District of Columbia have only had cases involving bank presidents, and California, Massachusetts, Missouri, New Mexico, Oregon and Rhode Island have thus far only sanctioned the power of the president-general manager.
77 See the Appendix under the appropriate state name. In addition, Dent v. Peoples Bank, 118 Ark. 157, 175 S.W. 1154 (1915), held that while a bank president did have power to hire counsel to conduct specific suits, he
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stated that the law is moving toward a rule recognizing presidential power to appoint counsel as an incident to authority to manage the corporation. It would be more accurate to assert that the law has already arrived at such a rule.

Although on the periphery of the subject, the power of officers other than the president to conduct litigation is not without practical significance and should be briefly noted. As observed above, the cashier or treasurer of a bank was early granted this power as a matter of convenience, especially to insure prompt collection of debts. Not surprisingly, since many states place the emphasis on the existence of a managerial status in the president, the power of any official having substantial managerial qualities is generally considered to extend to control over law suits. Again, a vice-president or other officer acting in lieu of the president clearly will succeed to the latter's prerogatives. But, a secretary, treasurer or other lower official as such cannot claim to exert such power over litigation normally, since it is patently far afield from his regular duties; however, even here circumstances may warrant a finding of implied authority or ratification. Finally, even

could not engage a long-term general counsel—a rather restrictive view compared with most states. Taylor v. Friedman Co., 152 Ga. 529, 110 S.E. 679 (1922), is the only other decision denying presidential authority worthy of note. In an action to enforce a foreign judgment, the court held that while a president might have power to engage counsel generally, he did not have authority to bind his corporation to accept jurisdiction in a foreign forum and defend there. Since Georgia has been perfectly willing to permit the president-general manager of a foreign corporation to bind his firm by hiring local counsel in a suit in Georgia, Dublin & S.W. Ry. v. Akerman & Akerman, 2 Ga. App. 746, 59 S.E. 10 (1907), the Taylor opinion can only be characterized as an excess of chauvinism.

78 LATTIN, CORPORATIONS 231 (1959).


on strict agency principles it is perfectly permissible to allow lower officers to sue or defend on behalf of the corporation in some emergency, as when a receivership is threatened, or corporate assets may be depleted, or the internal organization of the corporation has erupted in factional disorder.\(^3\)

Returning to mainstream, the juridical underpinning of the rule that a president prima facie has power over corporate law suits must now be examined. Many decisions quite naturally simply declare for the president's authority without more, leaving no room for any analysis. Fortunately most courts are more helpful. The largest number look to implied agency, based on construction from an express grant,\(^4\) from a past custom,\(^5\) or from ratification in virtue of a knowing acquiescence of the board of directors.\(^6\)

The readiness with which a jurisdiction will imply authority is proportionate to some degree to their adherence to the narrow or broad view of presidential authority over contracts noted in the first section of this article. The leading Iowa decision, \textit{Ney v. Eastern Iowa Tel. Co.},\(^7\)

\begin{itemize}
  \item Hillcrest Paper Co. v. Ohlstein, 10 Misc. 2d 286, 172 N.Y.S.2d 827 (Sup. Ct.), \textit{aff'd mem.}, 6 App. Div. 2d 864, 175 N.Y.S.2d 1021 (1st Dep't 1958) (suit to preserve corporate assets); Golden State Glass Corp. v. Superior Court, 13 Cal. 2d 384, 90 P.2d 75 (1939) (defense against receivership); Central Sherwood Bldg. Corp. v. Saltzstein, 245 Wis. 138, 13 N.W.2d 525 (1944) (suit arising out of intra-corporate factionalism).
  \item Potter v. New York Infant Asylum, 44 Hun. 367 (Sup. Ct. 1887), \textit{aff'd mem.}, 118 N.Y. 684, 23 N.E. 1147 (1890) (alternative holding); Traxler v. Minneapolis Cedar & Lumber Co., 128 Minn. 295, 150 N.W. 914 (1915).
  \item Pixley v. Western Pac. R.R., 33 Cal. 183 (1867) (ratification of oral contract even though by-laws required all contracts to be in writing and by the board of directors); Warren v. Boston Nat'l Bank, 252 Mass. 523, 147 N.E. 887 (1925); Twohy v. Slate Creek Mining Co., 31 Wash. 2d 668, 198 P.2d 832 (1948) (alternative holding).
  \item 162 Iowa 525, 144 N.W. 383 (1913). Similarly adhering to the view that the president as such has no more authority than any other director are Pacific Bank v. Stone, 121 Cal. 202, 53 Pac. 634 (1898); Kelly v. Citizens
\end{itemize}
for example, specifically adhered to the Iowa doctrine that a president has no authority but that expressly derived from the basic corporate organs. An attorney was therefore held unable to recover for services rendered a corporation whose president (not a general manager) engaged him to sue the largest stockholder for an accounting. This narrow agency formulation seems rather limited for modern corporate operations, and only succeeded in working practical hardship on an attorney acting in reasonable reliance on the president’s putative powers. A good contrast is *Twyeffort v. Unexcelled Mfg. Co.*, \(^{88}\) which followed the broad rule in permitting a general counsel to recover for somewhat unusual services. The New York Court of Appeals quite sensibly noted that what was unusual work for a corporate counsel need not be an extraordinary contract for the president to make, taking the broader perspective of his extensive managerial functions—a healthy policy attitude in the modern corporate world.

Events may expand implied authority. The Rhode Island Supreme Court illustrated this in allowing recovery of attorneys’ fees for services rendered lower corporate officers in defending a suit brought against them by the president (who eventually won) in a serious factional dispute. The reasoning is impeccable implied agency theory:

\[\text{If by reason of an emergency or by necessity it becomes impossible for an agent to protect his principal’s property or interests by a strict compliance with his usual or regular authority, the scope of his authority is extended or varied to fit the circumstances. The officer or agent who then acts in good faith and with reason-}\]

\(^{88}\)263 N.Y. 6, 188 N.E. 138 (1933). In substantial accord are Lewis v. Pulitzer Publishing Co., 77 Mo. App. 434 (1898) (hiring of a general counsel for a newspaper not unusual because of frequent libel actions); Smith v. McKee, 55 S.D. 572, 226 N.W. 766 (1929) (quiet title action within the ordinary course of business of bank president); Hackney v. York, 18 S.W.2d 923, 924 (Tex. Civ. App. 1929) (president authorized “to employ an attorney to render services necessary to the proper management of the business”).
able discretion... is still held to be acting for his principal with authority to bind him by his acts.  

This lucid rationale provides the basis for a critique of an older California precedent, *Pacific Bank v. Stone*. There the president resigned and the board of directors was ousted by a court order granting an application for a receivership by creditors. The vice-president then hired an attorney who successfully defended the rights of the management in the subsequent proceedings. The chaos in the corporation could not have been more pronounced, yet when the attorney sued for his fee, the court denied recovery. Arguing with remarkable insensitivity to the prudent reaction of the vice-president, the opinion declared that even in an emergency an officer who is not also general manager must resort to the board of directors for authorization before hiring counsel. This unrealistic precedent was weakened by a 1939 California decision. When the president brought a personal action for a receivership, the vice-president and secretary, who were two of the four directors, were permitted to defend in the corporate name—even though the president's suit alleged personal malfeasance on their part. The result is proper because in fact they were the operational managerial authority in the corporation.

Turning from implied to other types of authority, it is time for a little refining categorization. There have been essentially only three factual circumstances in which the president's authority over litigation has been in issue: 1) an exception to the president's right to begin or defend suit by the adverse party; 2) a challenge by the corporation itself, usually in an attempt to set aside an unsatisfactory judgment; and 3) a suit by the attorneys for the value...

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90 121 Cal. 202, 53 Pac. 634 (1898).
91 Golden State Glass Corp. v. Superior Court, supra note 83. The recent decision, Sealand Inv. Corp. v. Emprise Inc., supra note 82, ruled that a corporate officer with 50% stock control could not sue in the corporate name the president and other 50% ownership. The court found no emergency warranting suit, and an absence of managerial authority in the officer.
of their services. Only in the third situation is there any possibility of third party interests being involved, which interests constitute the basis both for apparent authority and the Restatement's variety of inherent authority.

When a president who lacks implied authority hires an attorney, binding apparent authority can rise from only two sources: a) direct manifestations by the corporation, as in a misleading resolution of the board of directors, or b) indirect manifestations via the president himself, in the form of similar conduct which is authorized. But direct manifestations of a deceptive character are by the nature of the case extremely rare, and since the conduct of litigation is a rather \textit{sui generis} affair, indirect manifestations are hard to conceive of. Courts nonetheless do speak of apparent authority operating in behalf of the attorney, but the manifestations relied upon are only the normal activities of the president as a manager. This is not terribly persuasive of a genuine apparent authority. The opinions tend to observe rather caustically that "it would be an unusual occurrence for members of the bar to take the precaution to inquire . . . whether or not a certain agent or representative who employs them has been authorized to do so by a formal resolution of the board of directors. . . ." This in effect negates any duty of the attorney to inquire into the president or managing officer's powers at all.

With no attempt to find any overt manifestation by the board or in past similar conduct, but simply an imputation of authority in virtue of the holding of the office of president or general manager, the true rationale would

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92 A fourth rather rare fact pattern occurs when the corporation is sued in tort, usually for malicious prosecution, arising out of the original suit, and the corporation seeks to deny the authority of its president or managing officer. See Frost v. Domestic Sewing Mach. Co., 133 Mass. 563 (1882) (general manager had prima facie power to sue in replevin); Ricord v. Central Pac. R.R., 15 Nev. 167 (1880) (president and superintendent had prima facie authority to bring criminal charges for larceny); Underwood Typewriter Co. v. Shouldis, 253 S.W. 935 (Tex. Civ. App. 1923) (authority of general manager to bring criminal charge of theft is an issue of fact).

appear not to be apparent authority, but rather inherent authority in the *Restatement* sense—a binding of a principal by his general agent in order to protect a third party. *Fidelity & Casualty Co. v. Field*, a Nebraska case in which a district manager of an insurance company was held to obligate his corporation by hiring an attorney, deceived only by his managerial status, although the corporation reserved all engaging of attorneys to its home office, certainly fits the bill of inherent agency. Other cases, lacking this aspect of express violation of orders by the agent, nevertheless would seem more representative of inherent than apparent authority.\(^9\)

Leaving the area of suits by attorneys, and turning to challenges by the adverse party or the corporation itself, the absence of any third party interest would make it seem prima facie that only implied or a novel type of inherent authority could be involved. This is probably too facile a generalization. Especially where the challenge is in the form of an unsupported demurrer or exception by the adverse litigant, the operative rationale would appear to be more in the nature of a presumption of regularity than any aspect of agency. The idea is that a stranger ought not to be able to contest the authority of the president during the course of the litigation itself, or at least should be confronted with a fairly stiff presumption of valid authorization.\(^9\) Louisiana is the only jurisdiction that ever really had trouble in this respect. An unusually shortsighted doctrine developed there that permitted exceptions by the adverse litigant even in so extreme a case as *Jeanerette Rice & Milling Co. v. Durocher*.\(^7\) In that decision, the president of a corporation in process of liquidation who sued to collect debts, with the express consent of a majority

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\(^9\) 2 Neb. 442, 89 N.W. 249 (1902).
\(^7\) 123 La. 160, 48 So. 780 (1909).
of the individual directors, was prevented from recovering by one of the defendant debtors solely for want of a formal board resolution! The upshot in Louisiana was a statute which specifically accords to the president, vice-president or manager of every corporation the power to sue.\(^9\) This is only common sense. There seems no good cause to permit an adverse litigant (unless he be also involved in the corporate managerial structure, as a director or officer) to raise any technical objection to the authorization of the suit. Any abuse can be more properly resolved within the corporate structure itself.

It remains to consider a type of inherent authority which doesn't fit the *Restatement* usage because there is no third party whose interests are decisive.\(^9\) There is good ground for believing that such a new species of inherent authority exists. For one thing, courts so often use language stressing inherent or ex officio powers. Even though it is advisable to be more concerned with what a judge does than what he says, a knowledgeable presentation by a judge does have a strong flavor of credibility about it. Thus, one court proclaims the existence of "inherent powers of presidents of corporations, that is, the powers not derived from the express action of the board of directors or those to be deduced from the continued exercise by the president with the silent acquiescence of the board of directors,\(^1\) i.e., powers in no wise implied. As this rule is stated in a decision (discussed in the next section) which requires the rationale of inherent agency for intelligible explanation, it should carry substantial weight.

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\(^{99}\) Generally, such a suit represents a challenge by other elements within the corporation of the presidential authority. Cases where the attorney sues for services rendered, but the court is concerned only with the powers of the president and not with any reliance on the part of the attorney (apparent authority), are also included.

A review of the breadth of the incidents of this presidential authority in specific cases provides further pragmatic evidence that a novel species of inherent authority exists in corporate law.

First, this power has been held to exist in the president unless it is removed by "a positive or express direction not to employ counsel, or . . . a general direction . . . to take no steps to defend any action." So held the federal court in Blue Goose Mining Co. v. Northern Light Mining Co., in refusing to set aside a judgment against a corporation whose president lacked express authority to appear and defend. To denominate as "implied" a power which exists in the president ab initio and must be expressly removed by the board, is to stretch this agency concept beyond recognition. The power must be inherent. To drive the point home, consider this further language:

Of course, the "general charge" of the business vested in the president was subject to the control of the board of directors. But, unless the directors otherwise provided or took some action in the matter, there was no subtraction from the power of the president, with managing authority, to employ counsel to defend the suit against the corporation.

Second, even though the firm has a general counsel, or one is provided by the board, the president has been held to be able to hire additional counsel and to determine the course of the litigation himself—absent express denial by the board. Thus an often-cited Kansas decision reversed a trial court for refusing to permit the attorneys hired by the president from defending alone on behalf of the corporation in a liquidation action, and instead recognized the attorneys formerly hired by the board. Said the Kansas Supreme Court: "The mere fact that the board of directors

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101 Blue Goose Mining Co. v. Northern Light Mining Co., 245 Fed. 727, 730 (9th Cir. 1917); accord, Winfield Mortgage & Trust Co. v. Robinson, supra note 100, at 847, 132 Pac. at 980; Dallas Ice-Factory & Cold-Storage Co. v. Crawford, 18 Tex. Civ. App. 176, —, 44 S.W. 875, 878 (1898); Colman v. West Virginia Oil & Oil Land Co., supra note 100, at 169.
102 245 Fed. 727 (9th Cir. 1917).
103 Id. at 731.
had employed counsel would not necessarily take away from the president the right to control a case in court, and to have the bank represented by other counsel, if he saw fit." 104 According such far-reaching independent operational status to the president is a good sign that the court regards his authority as indigenous, and not derivative.

The third feature to be observed is the policy motivation for according this sort of authority. In normal circumstances, it lies in the promotion of speedy, convenient and easy handling of corporate affairs; 105 in abnormal situations, in the facilitation of immediate and resolute action. 106 Consider the following state of affairs. In a close corporation the treasurer and usual manager of affairs has been guilty of improper withdrawal of corporate funds. The president, previously largely inactive, wishes to sue the treasurer. Must he await formal authorization? No, said the Wisconsin Supreme Court in *Green Bay Fish Co. v. Jorgensen*: "It would be an idle formality to insist that the board of directors should be convened to do by formal resolution that which would be and ought to be so evidently within the power of the head of such a corporation." 107 And other courts have agreed. 108 The corporate interest is better served in pressing circumstances by declaring without exception that the power to hire counsel inheres in the office of the president, rather than by searching out or awaiting technical implied authorization.


105 *Western Bank v. Gilstrap*, 45 Mo. 419 (1870) (promptness in collection of debts); *Reno Water Co. v. Leete*, 17 Nev. 203, 30 Pac. 702 (1882) (prompt suit often desirable and delay for board vote unnecessary). Note especially *Root v. Olcott*, 42 Hun. 536, 539 (N.Y. 1st Dep't 1886) (bank cashier): "[S]uch a power [to sue] should not only be regarded as incidental, but indispensable . . . ."


107 165 Wis. 548, 553-54, 163 N.W. 142, 144 (1917).

108 See cases collected in note 106 supra.
Fourth and finally, the true protection of the corporation from abuse of this portentous power of the president lies in internal corporate remedies, or an action for damages from him, rather than in any judicial untying of the bonds he has (often in perfectly good faith) knotted. This proposition has been recognized consistently from the earliest decisions to the present, whether the fact pattern involved a suit for attorneys' fees,\textsuperscript{109} an exception to authority by an adverse litigant,\textsuperscript{110} or a subsequent challenge by or within the corporation itself.\textsuperscript{111} The corporation is obligated “even though the circumstances show that the president acted so improperly in employing the counsel that he might properly be held responsible for his breach of trust”;\textsuperscript{112} its relief lies in subsequent indemnification from the president, or in speedy “removal of the indiscreet officer.”\textsuperscript{113} This rule is strong evidence that it is an inherent authority with which we are concerned, for otherwise the corporation could be exculpated on the simple ground that the president exceeded his implied powers.

On the basis of the above consideration of incidents of the inherent power to litigate, it may be concluded that (except in some instances of suits by attorneys, where there is an overlapping) this authority is not the same as that inherent power of the general agent recognized by the Restatement. In Professor Seavey’s concept of the inherent agency power, the principal is obligated by the unauthorized act of the agent for the protection of a third party. In this corporate form of inherent agency, the president as agent has the power to act on behalf of and to bind the corporation, his ultimate principal, without authority from the board, his immediate principal, in order to further the

\textsuperscript{110} American Ins. Co. v. Oakley, 4 N.Y. Ch. (9 Paige 496) 789 (1842).
\textsuperscript{111} Davis v. Memphis City Ry., 22 Fed. 883 (C.C.W.D. Tenn. 1885); Fernald v. Spokane & B.C. Tel. & Tel. Co., 31 Wash. 672, 72 Pac. 462 (1903) (per curiam).
\textsuperscript{112} Fernald v. Spokane & B.C. Tel. & Tel. Co., \textit{supra} note 111, at 677, 72 Pac. at 463.
well-being of the corporate principal. No third party intrudes into the picture at all. The underlying policy motivation is that it is expedient to enable some person, normally the president but sometimes another managing officer, to take expeditious and decisive action in litigation on behalf of the corporation. Judgments on the worth of this concept, and the practical extent of its sweep, are possible only after we complete this study by analysis of those decisions in which the president's authority is questioned in virtue of internal corporate division or deadlock.

III. THE EFFECT OF DEADLOCK OR DIVISION

What happens when a corporation has a valid cause of action but the board of directors is equally divided on the wisdom of suit? May the president act, or is paralysis inevitable? Does it make any difference if the tie vote occurs when the corporation is being sued, rather than when it is the plaintiff? Must the president have recourse to the board even if he has reason to believe that the net effect will be a tie vote on the advisability of litigation or that the effect will be a vote against suit? Does jeopardy of a substantial corporate interest alter the answer to any of the questions above?

These are the fascinating questions which form the core of any consideration of the authority of the president over corporate litigation, and which plumb the depths of the theories of agency as applied to corporations. Their practical significance is demonstrated by the relative frequency with which they have cropped up in our courtrooms in recent years. New York alone has had eighteen cases in point since 1935, and for circumstances which are admittedly somewhat unusual, this is a considerable number. Nor is an end necessarily in sight. The breeding ground for problems of deadlock is the multiplication in recent years of the close corporation composed of evenly balanced shareholding groups, usually families or other corporations.114

This device is especially popular for corporate entities, precluded from entering into partnerships, which nonetheless wish to pool interests in a specific joint venture while retaining the highest measure of control. In such close corporations equal pairings of directors parallel equal allocations of shares and equal capital contributions. Most such corporations flourish or languish without arousing any legal problem. But the device is deadlock-prone, and when the harmony ends, the lawyer's headaches begin.

The circumstance of deadlock over the decision to engage in litigation is, in terms of likelihood, aberrant. Yet, as is not unusual in the law, it is precisely this situation that proves the most fertile soil for doctrinal growth. The more intricate the problem, the more delicate the solution, and the more sophisticated the legal principles derived therefrom. With particular reference to the authority of the corporate president over litigation, these deadlock and division cases prune away any issue of interests other than those of the corporation itself. Formulations of agency theory are restricted to implied authority or some variant of inherent authority. Issues of policy are necessarily framed entirely in terms of the welfare of the corporation itself. Within these contours, with each additional case the pattern of doctrinal development is becoming clearer, and the signs point to inherent authority as the juridical instrument for promoting the corporate interests in situations of division or deadlock over litigation.

Analytically speaking, there are five possible ways in which the doubt as to presidential authority can arise: 1) a division among the officers or directors, but no deadlock in the board; 2) an actual deadlock in the board; 3) no board vote, but the president has reason to believe a board vote would result in a tie; 4) no board vote, but the president knows any vote would be antagonistic to suit; 5) an actual majority vote on the board in opposition to suit. Each of these possibilities will be considered in turn, but first it may be prudent to state briefly the holdings of the major decisions in the area. This will enable free cross-reference among them and provide an initial outline of the case law—especially desirable in the
rather confusing condition of New York law, where a road map is essential.

One of the strongest decisions, upholding the president's power to sue even after an express adverse declaration by the board, is also one of the earliest, Recamier Mfg. Co. v. Seymour. Another early opinion, Colman v. West Virginia Oil & Oil Land Co., is notable for its clear presentation of inherent authority in allowing the acting president to conduct litigation despite an allegation that the majority of the individual directors were opposed to his action. In 1921 came the federal court decision in Regal Cleaners & Dyers, Inc. v. Merlis, which held the president could defend against a receivership action brought by two of the four directors. Similar leading precedents were Elblum Holding Corp. v. Mintz, permitting the president to sue affirmatively for a major corporate debt despite a tacit deadlock, and Lydia E. Pinkham Medicine Co. v. Gove, which extended this power in favor of a president-general manager to sue even in an actual deadlock. The law seemed headed toward a rule giving the president the right to sue despite actual or tacit deadlock among the directors, and the early New York cases were no exception.

Then came the celebrated decision of Sterling Industries, Inc. v. Ball Bearing Pen Corp., in which the New York Court of Appeals made a calculated return to the more usual principles of agency, and denied the president the right to sue following an actual tie in the board of directors. Sterling had its progeny, but soon the full extent of its

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115 15 Daly 245 (N.Y.C.P. 1889).
117 274 Fed. 915 (2d Cir. 1921).
118 120 N.J.L. 604, 1 A.2d 204 (Sup. Ct. 1938).
121 298 N.Y. 483, 84 N.E.2d 790 (1949).
122 Fanchon & Marco, Inc. v. Paramount Pictures, Inc., 107 F. Supp. 532 (S.D.N.Y. 1952), rev'd on other grounds, 202 F.2d 731 (2d Cir. 1953);
rule began to be whittled away. *Rothman & Schneider, Inc. v. Beckerman*\(^{123}\) declared that a general manager could sue in a tacit deadlock if the suit was against a technical outsider, rather than against a component member of the corporation, and *Paloma Frocks, Inc. v. Shamokin Sportswear Corp.*\(^{124}\) decided that the president could sue even against inside interests to enforce a prior arbitration clause, on the theory that the original contractual consent to arbitration could not be vitiated by less than a majority of the board. The stage was thus set for the most recent stellar attraction, *West View Hills, Inc. v. Lizau Realty Corp.*\(^{125}\) In this holding, the Court of Appeals has sanctioned the power of the corporate president to sue even though he must know that a majority of the directors would be opposed, inasmuch as the majority in essence were also the defendants. A connected Connecticut case, *Zaubler v. West View Hills, Inc.*,\(^{125a}\) allowed the continuance of the suit, even after the board of directors met and voted to order its withdrawal. This last rule can have no rationale other than inherent authority, and marks the modern high water mark of that doctrine. But it is now time to turn to an analysis of each of the possible problem areas.

**Division Among the Officers**

This category of cases need not long detain us, since the operative principle is rather clear. The functional center of authority within the corporation should control, regardless of the wishes of the other officers, absent any directives from the board. Ordinarily this will be the president,\(^{126}\) who may sue on behalf of the corporation, and need not resort to a shareholder’s derivative action even if there is substantial opposition by individual directors or

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\(^{125a}\) 148 Conn. 540, 172 A.2d 604 (1961).

\(^{126}\) Best-Site Associates v. Ventrice, *supra* note 120; Green Bay Fish Co.
officers, or if the suit coincides with his own interests as shareholder.

The problem of where the ultimate authority should lie occurred in a somewhat aggravated situation in *Freeman v. King Pontiac Co.*, a recent South Carolina decision. The president, the largest shareholder, was largely inactive, and the constitution called for the vice-president to be general manager. In fact the business was managed by one Moore. The vice-president sought to audit the books, as he had previously, and when refused by Moore, sued. The president in turn ordered the cessation of suit. The court held that the president should rightfully prevail, citing some rather general language giving him supervisory authority, but laying greatest stress on the fact that he was "for all practical purposes the owner of the corporation. . . ." The decision seems justified on the facts, but one wonders about the advisability of relating the power to sue to majority shareholding interest. Suppose the president were to sue the largest shareholder for some reason. The Iowa court in the *Ney* case, discussed in the previous section, held the president was then without power to sue. Has the president no fiduciary duty to the minority shareholders, or to the welfare of the corporation as an entity separate from the welfare of the largest shareholders? This question assumes greater urgency when we turn later to *West View Hills*.

**Actual Deadlock in the Board**

By all odds the most fascinating factual circumstances of any of the division or deadlock cases exist in the three

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130 *Id*. at —, 114 S.E.2d at 484.
131 *Ney* v. Eastern Iowa Tel. Co., 162 Iowa 525, 144 N.W. 383 (1913), discussed *supra* at note 87 and accompanying text.
Lydia Pinkham decisions, all bearing the same name, and all reflecting an internecine feud of which the Hatfields and McCoys could have been proud. The Lydia E. Pinkham Medicine Co. was a concern composed of equal shareholding interests, with a Pinkham as president and a Gove as treasurer. After some years of profitable sales of its medicinal preparations, dissension arose in 1925 between the two groups. Miss Lydia P. Gove, a strong-minded business woman, who was assistant-treasurer (effectually treasurer, since her eighty-year-old mother was largely inactive), felt that she should have the right to dictate advertising policies, in which field she had some rather drastic suggestions for innovations. When president Arthur Pinkham demurred, and continued to direct advertising his way, the feud was on. Miss Gove wielded the full power of the purse as a weapon, refusing to pay outstanding debts, allocate dividends, or settle the advertising agency accounts, with the avowed purpose of compelling the Pinkhams to sell out. Finally, the president resorted to suit in the corporate name to compel Miss Gove to fulfill the proper functions of the treasurer's office.

The Supreme Judicial Court upheld the president's power to sue by resorting to a double implication of authority. During a temporary truce in 1927, a board resolution had given the president general supervision of the business in the execution of the directives of the board. The court declared it necessary to construe this resolution liberally "to give the president charge of the business as a whole, subject of course to the power of the directors to give specific directions from time to time or to modify or recall the grant." Since the deadlock was a lasting one, this was tantamount to giving complete control of the corporation to the president. Having implied this sweeping authority of a general manager, Judge Qua went on to imply from


133 298 Mass. at 64, 9 N.E.2d at 579.
it the specific power to institute even such an unusual suit as this, not as an individual shareholder, but on behalf of the corporation.\textsuperscript{134} In other words, the board in 1927 in a somewhat equivocal resolution had impliedly authorized the president in 1939 to sue the treasurer! The merits of this rationale can perhaps best be seen by contrasting with it the opinion of Judge Conway in \textit{Sterling Industries, Inc. v. Ball Bearing Pen Corp.}\textsuperscript{135}

In \textit{Sterling}, the corporation, again composed of equal interests, had been formed largely to serve as exclusive sales agent for the Ball Bearing Pen Corp., which owned half the shares. After plaintiff corporation had expended considerable amounts in advertising, and had obtained orders for 300,000 pens, the Ball Bearing Pen Corp. breached the agency contract. The issue of suit for specific performance was brought up at a board meeting, and not surprisingly resulted in a tie. The president filed suit anyway. The New York Court of Appeals held against the president, arguing that there could be no longer any actual or implied authority (and rejecting the applicability of presumptive authority) after the tie in the board. Judge Conway reasoned that the parties by setting up an evenly divided board had intended that no action be taken without a majority vote. Since suit was an affirmative action, it was barred by the deadlock.

The two opinions set one another off nicely. They crystalize the real crux of the problem: in agency theory, what effect does a tie vote have? At first glance, Judge Conway is right. A tie vote should not create any new power: authorization by less than a majority is no author-

\textsuperscript{134} Id. at 65, 9 N.E.2d at 579-80. The second decision dealt with some additional matters in issue, and entered a final decree forbidding any further interference with the president’s conduct as general manager, except through a majority action of the board. The third decision ordered the treasurer to pay out moneys for actions taken by the president after the board deadlocked on their merits. Most noteworthy here was the sanctioning of his right to hire a general counsel (no doubt desirable in view of all prior litigation) at a salary of $1250 per month. 305 Mass. at 219-20, 25 N.E.2d at 336.

ization at all. Halting analysis with this statement would leave Sterling justified— in the court's interpretation of the facts. But this interpretation can be readily faulted. The basis for finding a pre-existing authority in Lydia Pinkham was the resolution creating supervisory powers in the president. In Sterling the by-laws clothed the president with power to sign and make all contracts and agreements in the name of the corporation, which can easily be construed as conveying authority as well to execute the contracts made. The suit here was for specific performance, not for damages. Could not an action for specific performance be reasonably interpreted as an execution of the original contract? The Court of Appeals took a similar tack in the Paloma Frocks decision, discussed later, when it held the president able to exercise an arbitration clause which had been previously authorized, despite a tacit deadlock. Such an implication is really no more far-reaching than the one in Lydia Pinkham.

Following this avenue of approach, we have a pre-existing power of the president to execute a contract, rather than a new power to sue. Then our agency question turns chameleon, and becomes: is prohibition by less than a majority any prohibition at all? In this shifted perspective, Sterling is wrong; Lydia Pinkham right.

Or is it? Let us return to the essence of implied authority: the agent acts reasonably to fulfill the principal's intention in accord with the principal's manifestations to him. However equivocal a tie vote may appear to be, it is totally unequivocal in one key respect—it manifests indecision. On what basis can the president as agent claim his implied authority should continue—when he has a clear manifestation that his principal is undecided on the specific point? A Canadian court put it well: "In this case there

136 This was the conclusion in Prunty, Business Associations, 1957 Survey of N.Y. Law, 32 N.Y.U.L. Rev. 1387, 1392 (1957).
139 Note that only the immediate principal, the board, is undecided. This
are no authorized officers—not for the purpose in hand. The board of directors has not acted.” 140 By this logical exercise, it seems certain that vote by less than a majority is a prohibition—when the issue is the continuation of implied authority. On this flip of the coin, Sterling is right and Lydia Pinkham (as well as Paloma Frocks) wrong.

But is there no other form of authorization available than implied agency? Authorization could come in the form of a statute—an imputed or compulsory agency. North Carolina has such a statute: “The president has authority to institute or defend legal proceedings when the directors are deadlocked.” 141 Louisiana, as we have previously noted, gives power to the president, vice-president or manager to sue.142 This has been quite reasonably construed to mean that the denial of authority by the board must be affirmative, and hence a tie vote will not suffice.143 Statutes such as these would effectually resolve the problem, but it is rather unlikely that legislatures, preoccupied with more weighty matters, will ever take the effort to enact them.

Absent a statute, and sticking to the traditional agency theory of implied authority, we are constrained to deny the president the right to litigate. But theory too ethereal has a way of yielding to reality. This pragmatic sense was dryly conveyed by a lower New York court in the remark: “It would be most unfortunate for a corporation with a deadlocked board of directors if no one had the

indecision cannot take away express authority if there is any which may be clearly derived from the ultimate principal, the corporation. Thus, if the by-laws give the president power to sue, indecision indicated by tie vote on an amendment to withdraw that power does not prevent the president's power from continuing. The status is the same as where the president's authority is derived from an express statutory grant. See notes 141, 142 infra.

140 In re Rothlish Investments Ltd., 8 West. Weekly R. (n.s.) (1953) 334, 336, 61 Man. 195, (Q.B.) (vice-president cannot sue the president in the corporation's name when each control half the board).
141 N.C. GEN. STAT. § 55-34c (1960).
142 LA. REV. STAT. § 12:35g (1951).
power to employ an attorney." In that decision a corporation in deadlock stood to lose substantially in condemnation proceedings for inability to agree on a counsel to represent it. On the last possible day the president hired an attorney, who defended the firm's interests quite satisfactorily. The court upheld this action, even though it cited no agency theory to permit it to do so. Far from disavowing this decision, Judge Conway in Sterling went to great pains to find (unfortunately probably erroneously) that there was no such emergency warranting action. A realistic appraisal of Lydia Pinkham suggests that the chaotic fiscal status that would have resulted in the corporation through failure to find authority in the president was the essential motivating force there, rather than the twelve-year old resolution, which has much the look of a deus ex machina.

If pragmatic necessity requires a finding of power to sue, what new theoretical justification can be found? There is only one: inherent agency. Through this technique the logical dilemma of a director's impasse can be circumvented. In implied authority we reason from the manifested indecision of the president's immediate principal, the board, and grind to a halt. In inherent authority, as Elblum and West View Hills later make quite clear, we look beyond the immediate principal of the board to the ultimate principal, the corporate entity itself. The president, so long as he retains the functional leadership of the corporate structure, derives authority independent of the board. This indigenous authority accrues to him in virtue of his office, in order to secure the operative vitality of the corporation.

145 Since the Sterling corporation was formed chiefly to market Ball Bearing's pens, the breach of the sales agency contract obviously represented a serious crisis for the corporation, and in the face of this Judge Conway's declaration that the corporation was still selling other merchandise is not convincing proof of the absence of crisis. Cf. 2 O'NEAL, CLOSE CORPORATIONS: LAW AND PRACTICE § 8.06 n.61 (1958).
146 298 N.Y. at 492-93, 84 N.E.2d at 794.
147 The author has been asked whether the president does not have his authority implied by virtue of his appointment to office under normal bylaws, i.e., implied from the ultimate principal, the corporation, rather than
Recognition of such independent substantive authority does raise a serious question: does this not in effect violate the universal statutory mandate that a corporation is to be managed by its board? A frank answer is yes, but only to a limited extent and for good cause. Judge Conway urged in *Sterling* that this recognition amends the statute to read that a corporation is to be managed by its board of directors, except in deadlock when it is managed by the president.\textsuperscript{148} What he overlooks is that the *Sterling* rule also modifies the statute so that it reads, a corporation is to be managed by its board of directors, except that if a president is quick or sly enough to act before the board deadlocks in vote, it is managed by him, but if he is too slow or too scrupulous, it is managed by no one! A corporation does not exist in a vacuum, and a policy of inaction will have ultimate (perhaps fatal) effects on corporate assets as much as a policy of action. The difference is that a policy of action is led by a president actually supervising the daily functioning of the firm, while a policy of inaction is no leadership at all.

A policy argument of more weight runs to this effect. The parties in the creation of a board representing equal interests have *eo ipso* bargained for a deadlock, and having obtained one should be left to their own devices.\textsuperscript{149} The fatal flaw in this contention is that the state is no longer concerned with the contracting parties in their initial con-

\textsuperscript{148} Id. at 492, 84 N.E.2d at 794.

\textsuperscript{149} Professor O'Neal sees this as one of the two competing policy interests in the adjudication of such a deadlock: “the desire to empower someone to act in an emergency to protect the corporation's interests, ... [versus] a desire not to deprive participants in a closely held enterprise of veto power which they bargained for as a condition of their participation in the enterprise.” 2 O'Neal, supra note 145, § 8.06, at 104. He opts for a compromise solution, allowing the president to sue only if the faction creating the deadlock is acting for a “fraudulent or unfair purpose.” *Ibid.* I would think a court might have some difficulty in determining when a faction is being “unfair.”
dition, but with a subsisting corporation. The state has a positive interest in seeing such a corporate entity function well, both for the social advantages of an efficacious economic unit, and to protect possible creditors. This state concern is already reflected in its refusal to permit the dissolution of a deadlocked corporation when it is a profitable entity.\textsuperscript{150} If in a partnership deadlock one partner can sue without the consent of the other,\textsuperscript{151} why should not society impose a similar rule on the corporation as the price the parties must pay for the benefits of a state charter? It is eminently sensible for a state to declare that "having once established satisfactory arrangements for carrying on the business of the corporation, it is but meet that less than a majority should not be permitted to grind the corporate wheels to a permanent stop."\textsuperscript{152}

Having concluded our dialectical examination, a final judgment can be rendered: \textit{Sterling} is wrong, \textit{Lydia Pinkham} right. \textit{Sterling} concentrated too narrowly on traditional rules of agency and failed to see the inimical effects upon the corporation itself. \textit{Lydia Pinkham} saw the potential chaos and averted it, though a faulty rationale was employed to achieve the desired end. The true \textit{ratio decidendi} for similar cases in the future should be inherent authority, fully warranted on policy grounds. The key policy motive was well expressed by a relevant North Carolina opinion:

The pillars of the business are not to be pulled down while the dispute is raging. The end in view is to enable the officers of


\textsuperscript{151} Hill v. Marsh, 46 Ind. 218 (1874); cf. Coggeshall v. McKenney, 114 S.C. 1, 103 S.E. 30 (1920). The issue rarely occurs in partnerships, but this appears to be its resolution. See 2 \textit{O'Neal, supra} note 145, § 8.05 n.49.

\textsuperscript{152} Thomas v. Baker, 227 N.C. 226, 229, 41 S.E.2d 842, 845 (1947). This decision is a good analogue to our issue here, for its concern is what powers a president should have when he holds over in office as a result of a deadlock in elections, reflecting a general deadlock. The court concluded he should have full powers as before the deadlock, looking to the paramount interests of the corporation itself. Curiously enough, the president sued in his own name, rather than in that of the corporation, as he is entitled to do by North Carolina's statute.
the corporation to move from dead center by reverting to the operative conditions theretofore established and subsisting. . . . What the parties want, and need, is to be extricated from their present tug of war.153

Tacit Deadlock in the Board

The largest number of cases have arisen when the president wishes to litigate but has good reason to know that half the board is opposed to his doing so. Both agency and public policy considerations are essentially the same in such situation as in an actual deadlock. The case law resolution is, however, somewhat more definite. The president's power to proceed is fairly secure 1) when he is also general manager, 2) when there is grave danger to a substantial corporate interest. In circumstances other than these the result will depend upon whether Sterling or West View Hills proves the more enduring precedent.

The leading decision giving authority to the officer who has managerial authority is undoubtedly Rothman & Schneider, Inc. v. Beckerman.154 A close corporation, composed of equal interests, was in the process of dissolution. By agreement the president retired from affairs, and the secretary-treasurer acted as de facto manager, in which capacity he prosecuted several suits for corporate debts. The fly in the ointment came when he sued the president's son-in-law, a former salesman, for conversion of $30,000 worth of jewelry. The defendant moved to dismiss on the strength of an affidavit by the president that he opposed suit.

Judge Fuld for a unanimous Court of Appeals sanctioned the suit, distinguishing Sterling on two bases. First, in Sterling the action was directed against a defendant who comprised in effect the other half of the board—an insider interest—while the suit here was directed against a third party. This aspect of the holding is dead law, since West View Hills has subsequently allowed suit against an insider

153 Id. at 229, 41 S.E.2d at 844-45.
interest. The second distinction was the absence of a formal tie vote. "Where there has been no direct prohibition by the board . . . the president has presumptive authority, in the discharge of his duties, to defend and prosecute suits in the name of the corporation." The purport of this is clear. The court is declaring that an inherent authority—termed presumptive—exists in the general manager, and is not terminated by anything short of an actual deadlock. Mere knowledge is no bar.

The Rothman decision has been justified on implied authority, indicated by the secretary-treasurer's prior suits, continuing even in the face of the tacit deadlock. An explicit holding to this effect is the opinion of the Rhode Island Supreme Court in Durfee & Canning, Inc. v. Canning. The court sustained the validity of a judgment procured by the president against the treasurer for a debt owing to the corporation, even though the treasurer controlled half the board, because the president was also general manager and had sued third parties for debts in the past without objection from the board. This was deemed an act in the ordinary course of business. However unobjectionable the result, the theory is awry. Such a suit had better not be an act in the normal course of business if the corporation is to survive very long. Authority implied from past custom in normal circumstances cannot survive in abnormal circumstances in tacit any more than in actual deadlock. The president cannot but know of the board's indecision, and loses his implied authority thereby. No, the just result is far better understood in terms of an inherent (presumptive) authority unaffected by deadlock of any sort. Correctly understood, such inherent power continues in the president "until changed by law or by a

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156 2 N.Y.2d at 497, 141 N.E.2d at 613, 161 N.Y.S.2d at 121.  
majority vote of the board of directors or stockholders, as may be required." 160

The resort to inherent authority has been more obvious in the emergency situations. In Regal Cleaners & Dyers, Inc. v. Merlis, 160 two of the four directors filed an action to place the corporation in receivership. The court declared that ordinarily the president should be able to litigate only with the board’s express or implicit approbation. Nonetheless, it allowed him to defend, reasoning that in this crisis someone had to act to protect the corporate interests: “If the company is solvent, for the president not to [defend] . . . might cause irreremediable injury, or perhaps total failure of justice to the shareholders.” 161 The same approach has been utilized in other receivership actions,162 as well as when a substantial corporate asset is endangered.163 In these cases there is no attempt to search out some source

159 Marron v. Wood, 55 N.M. 367, 376, 233 P.2d 1051, 1057 (1951), holding a president-general manager continues in full powers during a deadlock, and, inter alia, may sue the other faction for equitable relief in the corporation’s name.
160 274 Fed. 915 (2d Cir. 1921).
161 Id. at 917.
163 British Brokers, Ltd. v. Wolford, 29 Misc. 2d 997, 999, 219 N.Y.S.2d 827, 830 (Sup. Ct. 1961) (president may sue other 50% shareholder in tacit deadlock situation where emergency exists—the emergency here being risk to assets). The law as to lower officers is less clear. They can probably defend on behalf of the corporation, but not sue. Gottlieb v. Avery Realty Co., 182 La. 703, 162 So. 571 (1935), held that the secretary-treasurer, 50% owner, could defend in the corporate name a suit by the president, the other 50% owner, to foreclose a mortgage on corporation property. Cf. Gallagher v. Texagon Mills, Inc., 67 F. Supp. 845 (S.D.N.Y. 1946) (unspecified officers may offer a defense in corporate name against a suit brought by other unspecified officers and directors). But see Sealand Inv. Corp. v. Emprise Inc., 190 Cal. App. 2d 305, 12 Cal. Rep. 153 (1961) (a secretary-treasurer without managerial authority who has 50% shareholder control cannot sue the president and other 50% interest for diversion of corporate assets, as this is no emergency); M. & E. Luncheonette, Inc. v. Freilich, 30 Misc. 2d 637, 218 N.Y.S.2d 125 (Sup. Ct. 1961) (essentially same holding).
for implied authority, but simply the frank avowal that it is necessary to grant the power to protect the corporation.

The much-cited New Jersey decision, *Elblum Holding Corp. v. Mintz*,\(^{164}\) contributes an opinion quite illuminating in its indication of how far necessity can incite inherent authority to expand the powers of the ordinary president. A corporation controlled half by its president and half by its treasurer owned substantial property which was leased to the treasurer. Though the corporation was debt-ridden, the treasurer refused to pay back rents, and considerable acrimony arose within the corporation thereby. Finally the president brought suit. The interesting wrinkle is that the by-laws limited the powers of the president to essentially clerical tasks, and to serving as moderator and chairman of the board. The court nonetheless expressly held the power of the president to bring suit inherent, a capacity incidental to his office as such. Significantly, the justification it found for this inherent power lay in the president's fiduciary duties to the corporation as such:

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\text{[I]n reason and justice, he may employ and authorize counsel to institute necessary legal proceedings for the . . . purpose of preserving the interests of his corporation. . . . If the president were to fail to exercise the power to protect and defend the assets of his corporation, he might well be liable to his corporation for the resultant losses.}^{165}
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Remaining to be noted is the law in circumstances where no serious jeopardy to the corporation or its assets is involved. All the cases here are from New York,\(^{166}\)

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\(^{164}\) 120 N.J.L. 604, 1 A.2d 204 (Sup. Ct. 1938).

\(^{165}\) Id. at 609-10, 1 A.2d at 207. The *Elblum* case has inspired the best student note in this area, *The Role of the Corporation in Litigation Caused by Factions Disputes Among Directors*, 48 Yale L.J. 1082 (1939). The note discerns that the rationale here cannot be implied authority: "traditional rules of agency . . . appear to break down; for the very existence of the impasse would seem to be notice to the world that the president does not have implied authority to act for the corporation." *Id.* at 1084. It deems the undefined power to sue one provoked by crisis, *Id.* at 1084-85, and concludes that its use is practical and desirable because it can protect both shareholders and creditors. *Id.* at 1088.

\(^{166}\) Except for one real novelty, a pre-annexation decision from the Kingdom of Hawaii, *Waikapu Sugar Co. v. Hawaiian Commercial & Sugar Co.*, 8 Hawaii 343 (1892). The president of a peculiar corporation without a
and reflect the trend from Sterling to West View Hills. In the years 1949-1957, the lower courts invariably followed Sterling and disallowed presidential authority when a tacit deadlock existed. Then came Paloma Frocks, Inc. v. Shamokin Sportswear Corp. A contract existed between the two firms guaranteeing arbitration of certain disputes. When a dispute actually arose, the president of Shamokin knew that it would be an "idle gesture" to request the board, half composed of Paloma's representatives, to seek arbitration. He went ahead and asserted the arbitration clause, and the Court of Appeals upheld him. The rationale, as in Rothman, was that there had been no direct prohibition by the board, and therefore the prior contract served to provide him with implied authority. The result is perfectly sound, but the same caveat is made as before that this properly is an instance of inherent (presumptive) authority.

The effect of West View Hills should make it clear in New York that a president may sue in a tacit deadlock under any circumstances—crisis or not, prior suit or none, insider or outsider suit. A lower court has quite properly so held even when the president deliberately refrained from calling a board meeting because he knew a deadlock would result. The president could sue: his presumptive powers prevailed since there was no "formal interdiction."
. Tacit Opposition of the Board

*West View Hills, Inc. v. Lizau Realty Corp.*\(^{170}\) has been adverted to so often that a formal brief seems almost anticlimatic. But the opinion merits close attention, since it represents a major advance in corporate concepts and would appear to be the foundation stone for the building of future case law.\(^{171}\)

The facts are simply stated. The president was one of three directors in a long-dormant close corporation. While the corporation was active, he had directed its litigation, but no by-law gave him explicit authority to do so. In the present law suit, the president sued another corporation for alleged misappropriation of funds in a realty transaction. Since the other two directors were in control of the defendant corporation, they clearly opposed suit. But, as is not unexpected in a dormant corporation, there was no board vote against suit. To this writer at least, there is an uncomfortable aura about the whole affair, that suggests the president was not altogether altruistic in suing. This only has the effect, however, of making the actual holding that much stronger.

In a five-to-two decision, with Judge Dye writing for the majority, the Court of Appeals recognized in the president the power to sue. The opinion centers on two propositions: 1) "a corporate entity has independent, separate legal rights"\(^{172}\) from those of the board or shareholders; 2) the president has the power and the duty to sue to protect these rights, absent express prohibition. The dissent by Judge Froessel (with Chief Judge Conway, who wrote *Sterling's* opinion, concurring) challenges the decision as

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\(^{171}\) *West View Hills* has been expressly followed so far in *Custer Channel Wing Corp. v. Frazer*, 181 F. Supp. 197 (S.D.N.Y. 1959) (Maryland law) (president may sue though at least half, and maybe more of the directors oppose it); *British Brokers, Ltd. v. Wolford*, 29 Misc. 2d 997, 219 N.Y.S.2d 827 (Sup. Ct. 1961); *Birma Management Corp. v. 140 W. 42nd St. Realty, Inc.*, *supra* note 169; *Ace Tackless Corp. v. Fuhrman*, 22 Misc. 2d 38, 193 N.Y.S.2d 691 (Sup. Ct. 1959) (president may sue defendants who constitute two-thirds of the board and the majority shareholders).

\(^{172}\) 6 N.Y.2d at 347, 160 N.E.2d at 624, 189 N.Y.S.2d at 865.
"counter to the basic principles of corporate law,"¹⁷³ and contends that the president cannot have presumptive authority over litigation when he has actual knowledge of the opposition of a majority of the directors.

The policy key to West View Hills is the stress on the existence of independent legal rights and interests of the corporation as such. This stress is warranted. A cause of action is in a sense an intangible corporate asset. It has the potentiality of creating a judgment beneficial to the material assets or intangible well-being of the corporation. Majority stockholders cannot prevent minority interests from realizing this asset since every stockholder has a right to employ the stockholder's derivative action. Now the Court of Appeals has declared that the unformalized opposition of a majority of individual directors cannot prevent the president from realizing this asset on behalf of the corporation. In effect he has been given a new means of achieving his fiduciary task of protecting the interests of minority as well as majority shareholders, creditors, and the generic concern of society in having a well-functioning organization. The fact that the president may feel the need for suit to protect these interests, and a majority of the directors may not, "does not deprive him of his right and duty to perform the obligations and functions of his office as president, nor does it prevent the corporation, as a corporation, from commencing an action in its own behalf . . ."¹⁷⁴

The dissent does not really challenge the idea that the corporation has independent legal rights which should be protected. What Judge Froessel does assert is that the proper mode for the president to employ is the shareholder's derivative suit, a theory also propounded by Sterling.¹⁷⁵ But this alternative is not altogether satisfactory. Its drawbacks have been detailed elsewhere,¹⁷⁶

¹⁷³Id. at 348, 160 N.E.2d at 625, 189 N.Y.S.2d at 866.
¹⁷⁴Id. at 347, 160 N.E.2d at 624, 189 N.Y.S.2d at 865.
¹⁷⁶The limitations of the shareholder's derivative action are carefully detailed in an excellent student comment on West View Hills, 34 St. John's
notably the absence of a jury trial, bond posting requirements, the heavier burden of proof, and the substantial protection accorded the directors under the business judgment rule. It is rather significant that this alternative of the shareholder’s derivative suit was not given much weight by either *Lydia Pinkham* or *Elblum.*\(^{177}\) The director’s statutory suit is somewhat more suitable, but it exists only in New York and Michigan,\(^ {178}\) the president might have to bear the expenses if unsuccessful, and the suit is available only for causes of action running essentially against other directors or officers.\(^ {179}\)

Since these other modes of suing in the corporate interest do exist, imputation of power in the president to sue when a majority of individual directors are opposed is certainly not crucial. But the president is, after all, in a different status than a shareholder or even a director. He is normally the functional head of the corporation, supervising its general administration, and burdened with a fiduciary obligation toward its over-all welfare. He may well therefore have a stronger motivation to sue than any other single person in the corporate structure; specifically he may have a greater grasp of the urgency of suit than any individual director. If the feelings of the individual directors do not run deep, the managerial discretion of the president may well be trusted; if they do run deep, the directors can readily check the president. Altogether, though not indispensable, the power of the president here is desirable.

To complete the academic picture, there can be no serious doubt that this power is an inherent one. The majority opinion in *West View Hills* explicitly declared

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L. Rev. 330, 331-33 (1960). *Sterling’s* reliance upon it as a reasonable alternative was criticized in 2 O’Neal, *Close Corporations: Law and Practice* § 8.06 n.61 (1958).


that the omission to include power in the president over litigation in the charter or by-laws is irrelevant, as it will be implied — and clearly implied as a matter of law, and not of fact. The court again enunciated the legal proposition that "absent a provision in the by-laws or action by the board of directors prohibiting the president from defending and instituting suit in the name of and in behalf of the corporation, he must be deemed, in the discharge of his duties, to have presumptive authority to so act." The dissent argued that presidential power disappeared in the face of knowledge of opposition by a majority of directors, indicating they viewed the presumption involved as some species of implied authority. The majority did not adopt this interpretation; prohibition now equals an actual majority vote against action, and that alone. Altogether, the language and the holding could not more clearly evidence the fact that this authority is inherent, imputed in law rather than derived in fact.

The most weighty objection to the West View Hills rule is the possibility of abuse by the president. One might legitimately feel that the president should have power to proceed to litigate when the board is deadlocked (i.e., hold Sterling as wrong) and still have serious reservations of the wisdom of allowing the president to proceed when most directors as individuals object (i.e., feel West View Hills is equally wrong). Does it not infringe too much on the powers of the board, and present too excessive a temptation for the president who may see a golden opportunity to advance his own selfish interests without personal expense? The dissenters argued that the net effect was

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180 N.Y.2d at 346, 160 N.E.2d at 623, 189 N.Y.S.2d at 864: "[U]nless the president actually or impliedly possess such power the corporate interests may be prejudiced if not entirely destroyed. ... [A]n omission [to include the power to sue in the by-laws] does not mean that the power is non-existent for, in situations requiring the exercise of such power to preserve and protect the interests of the corporation, it will be implied." This is certainly according the power by law, and not deriving it by factual implication.

181 Id. at 348, 160 N.E.2d at 624, 189 N.Y.S.2d at 866.

182 Id. at 351, 160 N.E.2d at 626, 189 N.Y.S.2d at 868.

183 See the critical conclusion reached in 34 St. John's L. Rev. 330, 338 (1960).
that "the corporation shall be managed by its board of directors, except when one member of the board, who happens to be president, disagrees with the majority, in which case it shall be managed by the president." This overstates the case. Limiting the analysis for the moment to the situation prior to suit, there is one simple and totally effective limit. The board can convene a special session and rescind the president's powers by explicit decree. Further, even after suit has commenced, the board can for good cause (in some states, without cause) strip him of his office, and recover damages for any breach of fiduciary duty involved, should the case be so extreme.

The one genuine forerunner of the West View Hills case, namely Colman v. West Virginia Oil & Oil Land Co., now becomes relevant. This opinion, hitherto neglected, is sound despite its age. A third party had won a verdict in a bitter law suit with the West Virginia Oil Company. The vice-president, who was acting president, ordered dismissal of an appeal. Appellate counsel, acting under a letter from one director who claimed that five of the nine directors wished the appeal prosecuted, refused to discontinue. After deciding that there was no evidence of fraud or collusion on the part of the vice-president, the

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184 6 N.Y.2d at 352, 160 N.E.2d at 627, 189 N.Y.S.2d at 869.
185 25 W. Va. 148 (1884). In Lucky Queen Mining Co. v. Abraham, 26 Ore. 282, 38 Pac. 65 (1894), the president of a corporation dormant since 1877 sued a director in the corporation's name in 1893. The defendant attacked the president's authority to sue with affidavits that all the surviving directors except the president opposed suit. The court held the president had nevertheless a "colorable right" to bring the action. The rationale seems to center more on a presumption of regularity, an idea previously discussed in this article, than on a formal imputation of inherent authority. Re Petrie Mfg. Co., [1923] 4 D.L.R. 60 (Ont. Sup. Ct.), aff'd, [1924] 4 D.L.R. 1308, 4 Can. Bankr. Ann. 311 (Sup. Ct.) is also worthy of mention. The president, after serious disputes among the directors, hired solicitors to advise on a total corporate reorganization. The president admitted he never informed the other directors because they would have opposed the measure. In a suit to recover the solicitors' fees, the court denied that the president had any power to hire them. In dicta it declared that the president could have engaged counsel to litigate or advise on matters in the normal scope of business, but, probably much influenced by evidence of serious bad faith and fraud on the part of the president, held that corporate reorganization was much too unusual a subject. The only tangible result was that the attorneys, whose good faith was not questioned, received no fees. To protect them a finding of inherent authority would have been warranted.
court ordered the appeal discontinued. Its opinion positively recognized an inherent power in the president to control litigation whenever the charter "is silent as to the duties and powers of its president, and he is entirely unrestrained by any action of the board of directors. . . ." 186

The purported opposition of a majority of the individual directors was assumed *arguendo* and disapproved as a valid objection. The court argued: "If a majority of the board of directors really disapproved . . . why have they not long since met as a board and expressed their disapproval." 187 This line of reasoning—at least limited to the pre-suit situation—seems eminently sensible. If the members of a board are really adamant in their objection to litigation, a meeting is readily possible. The directors may not really be that concerned over the merits of suit, or upon more mature reflection prior to, or during the course of, a board meeting may conclude that the president is right. It is quite conceivable that a director, opposed to suit for his own personal reasons, might find it a little hazardous to go on record in opposition in a formal board vote when his act can be objectively measured later in terms of his fiduciary responsibilities. In light of such possibilities, it seems sound to require a record vote prior to suit as the only means of legally ascertaining the opposition of the board. Short of that, the policy factors before discussed should prevail to enable the president, the operative head of corporate management, to exercise full control of corporate litigation.

*Recorded Opposition of the Board*

Assume the board of directors by record vote opposes the instigation or defense of an action before the president has had opportunity to act. Clearly his express or implied authority terminates, but does his inherent authority? There is no case in point. It does not seem probable at this time that a court will create power in the office of president as

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186 25 W. Va. at 169.
187 *Id.* at 166.
such to enable him to ignore the board action. The discussion of record action by the board prior to suit as a check on the president's power in the last paragraphs was based on this evaluation.

Certainly, if courts have been willing to impute power to the president to act despite tacit opposition of the board, they could also impute inherent authority to act despite formalized board objection. The motive again would be to protect the independent interests of the corporation as such, and the circumstances would undoubtedly have to be extreme, as when the board vote constitutes a clear cover-up for fraudulent dealings, grave breach of trust, or the like. It is impossible to deny that a future court, confronted with an open case of board misbehavior or even unusual obtuseness, may feel impelled to extend West View Hills to allow suit. But it is doubtful that any court today would (or should) go that far. The availability of shareholder derivative and director's statutory suits would probably be deemed adequate to protect corporate interests in such circumstances, a fortiori so where the dispute between the board and president is merely one as to the advisability of suit, without overtones of fraud or misconduct. To recognize in the president a power to disregard an existing board mandate appears too radical a reorganization of corporate powers.

But what if the president, as in the West View Hills situation, sues, and then the board by formal record vote demands the withdrawal of suit. The clash of interests becomes acute indeed. On the one hand, if the president be allowed to continue the suit, the board of directors has wholly lost control of the corporation in this matter. There is no direct way the board may then check the dishonest or irresponsible president. On the other hand, if the board can so easily block the suit, West View Hills has been rendered largely ineffectual. What value is the presidential power to sue to protect corporate interests if the board can so quickly and effectively vitiate the action? The power becomes illusory, and the recognition of an independent corporate interest a meaningless gesture.
In fact, the story of the West View Hills corporation did not end with the Court of Appeals decision. The board of directors did promptly meet, remove the president from office, and order withdrawal of suit. As West View was a Connecticut corporation, the president then sued in that jurisdiction for an injunction to prevent the board from withdrawing the original action. The Connecticut Supreme Court of Errors in *Zaubler v. West View Hills, Inc.*,\(^{188}\) unanimously barred the board from halting the suit. The holding rested simply on the need to avoid nullifying the protection granted the corporation by the New York decision: "Obviously, West View’s right to institute an action is of little efficacy or value if the trial of the action can thus be thwarted."\(^{189}\) Doctrinally, this outcome of *Zaubler* reinforces the conclusion that the presidential power is inherent. The president’s authority to sue on behalf of the corporation not only subsists in the face of record adverse vote of the board, but even after the board has sought to remove the president from office. The ex-president, says *Zaubler*, when no one else moves to protect the corporate rights, does not lack the requisite interest to do so.\(^{190}\) This represents a startling inroad on the traditional authority of the board to manage the corporation.

A 1926 Louisiana case, *St. Bernard Trappers’ Ass’n v. Michel*,\(^{191}\) came to the opposite conclusion. The board of directors had leased certain valuable corporation trapping rights. After a public meeting of various indignant stockholders, the president sued to set aside the lease. The board met, accepted the president’s resignation (which he later endeavored to retract), and ordered the end of the suit. The Louisiana Supreme Court upheld the board. The president’s power to sue, even though imputed to him

\(^{188}\) 148 Conn. 540, 172 A.2d 604 (1961) (hereinafter referred to as *Zaubler*, to avoid confusion with the New York West View Hills opinion).

\(^{189}\) Id. at —, 172 A.2d at 606.

\(^{190}\) Id. at —, 172 A.2d at 607.

\(^{191}\) 162 La. 366, 110 So. 617 (1926); cf. *Hertz v. Quinn & Kerns, Inc.*, 21 Misc. 2d 227, 195 N.Y.S.2d 907 (Sup. Ct. 1959) (director may not defend suit on promissory note in corporate name if majority of board has decided no valid defense exists).
in virtue of the Louisiana statute, could not withstand the recorded opposition of the board, "who are charged under the charter and under the law with the management of the affairs of the corporation."\(^{192}\) There is much to be said for this solution. It constitutes a complete check on the unscrupulous president; he loses his power. It retains the traditional weight of managerial power in the board. But, on the other side, it also constitutes a complete check on the honest president. And it precludes any protection by him of the independent interests of the corporation.

It is this decisive policy consideration which motivates *West View Hills* and *Zaubler*, and provides their justification: the theory that "a corporate entity has independent, separate legal rights. . . ."\(^{193}\) The *St. Bernard Trappers* opinion did not recognize such a distinct interest, identifying the board of directors with the corporation as "the real and only interested plaintiff" having control of the suit with "the right to discontinue it at any time. . . ."\(^{194}\) But in *West View Hills*, the president was allowed to sue precisely because he has the power and duty under law to preserve and protect the interests of the corporation. And the *Zaubler* opinion also goes to some pains to distinguish the interests of the corporation from those of the board or of the president, concluding that "the rights of West View, as a corporation, were a proper subject of equitable protection . . . ."\(^{195}\) It would seem, in the final analysis, that if the president be deemed empowered to sue to protect the corporate interests regardless of tacit board opposition, he ought to be allowed to continue that suit even after the board has formalized its opposition in vote. The same corporate interests should continue to be decisive.

The radical character of this inherent power may however be soundly limited by confining it to situations as in *Zaubler*. The court declared expressly that the reason why the directors could not bar the action was that an obvious

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\(^{192}\) 162 La. at 374, 110 So. at 619.
\(^{193}\) 6 N.Y.2d at 347, 160 N.E.2d at 624, 189 N.Y.S.2d at 865.
\(^{194}\) 162 La. at 375, 110 So. at 620.
\(^{195}\) 148 Conn. at —, 172 A.2d at 607.
conflict of interests existed. The directors were in effect the defendants, and as such should not be allowed "to avoid all liability, regardless of the merits of West View's claims, by the simple expedient of utilizing their power as directors to withdraw West View's suit against themselves." The implication is that the directors might well be able to bar pending suits in whose outcome they are not personally interested. Relevant here is the 1889 New York Court of Common Pleas opinion in Recamier Mfg. Co. v. Seymour. The president, who owned 968 of the 1,000 shares, filed suit to halt the majority directors from withdrawing money from the corporate till. The directors promptly met and voted to terminate the suit. The court ruled the president might still act in the name of the corporation since the board vote contributes to, or is in itself, a breach of trust.

Zaubler, as the logical extension of West View Hills, demonstrates the full force of this inherent power of the president over litigation. The president supplants the board of directors in managing the corporation pro tanto. Whether the need to protect the independent interests of the corporation as such warrants this new imbalance in the corporate structure remains a policy judgment. If limited to cases where the directors allegedly are guilty of breach of trust, or are simply involved in a conflict of interests, the dangers do not seem unduly great. But final decision on the merits will depend in the long run on how many presidents rationally use, and how many irresponsibly abuse, their inherent authority over litigation.

IV CONCLUSION

It is time to draw together the scattered threads of case law into an even doctrinal fabric. The practitioner will want to know the practical status of the law in his

196 Id. at —, 172 A.2d at 606.
197 15 Daly 245 [N.Y.C.P. 1889].
198 The conclusions as to the power of the corporate president to obligate the corporation by contract are presented supra and need not be repeated here.
drafting of a close corporation charter or in his advice to a president or board member. The student will want to possess a calculated prediction of the future evolution of the law.

In the absence of factors of division or deadlock, the case law pronouncedly favors the power of the president over litigation. There is no need to spell it out in any charter or by-law provision. If any qualms exist in a given jurisdiction prone to a narrow view of presidential powers, the easiest solution is a clear board resolution. On the other hand, if the president is intended to possess only nominal status with the actual managerial authority in another, it may be prudent in a broad rule jurisdiction to deny expressly the power over litigation. Except where such a limitation of power exists and is brought to his attention, any attorney whose services are sought by a corporate president can rest secure in the well-founded opinion that the corporation will not be later able to renege on his contract for employment. Adverse litigants will have to find more substantial grounds for an exception than alleged want of authority on the part of the president to retain counsel, and victorious adversaries need not fear a concealed defect of authority will render their judgment illusory.

In most situations, the courts will continue to use, with justification, language of implied or apparent authority. The reference to inherent authority or powers *ex virtute officiis* will probably become more widespread, but it is essentially immaterial whether this really occurs. The result of finding authority is what counts, not the label. Since courts are apt to continue to use familiar language, as implied or presumptive authority, even when the operative rationale can be nothing other than inherent authority, the sensible attorney will employ the same language, but be careful to keep his own conceptualizations clear.

For attorneys of corporations composed of equal shareholder and director interests, the imputation of power in the president to sue in deadlock, whether tacit or actual, is on the march. It is virtually certain if the president is also general manager, has conducted suits in the past, or can demonstrate a reasonable jeopardy of some substantial
corporate asset. In New York since *West View Hills*, the president will have authority whenever the board has not actually met. Whether the *Sterling* rule barring suit after an actual board deadlock will survive is a moot proposition. Every element of its *ratio decidendi*—the absence of presumptive power, the undesirability of invading managerial prerogatives, the alternative of the shareholder's derivative suit—has been rejected by *West View Hills*. The only distinction left is the fact of meeting and reaching a tie vote, as opposed to the president's knowledge of the certainty of a tie—a distinction rightly termed "an intolerable formalism." A prediction of the ultimate burial of *Sterling* would hardly be startling, but then intolerable formalisms have been known to survive in the law before.

For counsel drafting a close corporation charter for parties who seek even numbers of directors, the lesson is plain. If the deadlock is desired to be absolute, write in a specific clause to that effect. Of course, this may create more problems than it solves. Counsel really concerned for his client's welfare should better advise never entering such a close corporation at all, if the parties must be so suspicious from the start. It would be more realistic to work out some form of joint venture in contractual form, or, if the close corporation is indispensable, at the very least to write in provisions for arbitration in case of deadlock over litigation.

In New York, any attorney advising a president who feels he has serious cause to sue or defend on behalf of his corporation, but knows or suspects that a majority of the individual directors are opposed, can reassure him as to his power to act nonetheless. *West View Hills* and *Zaubler* are unlikely to be reversed in the near future, if ever. Whether other jurisdictions will follow is less certain—both cases represent an extremely generous view of presidential integrity as well as authority. Since it fits in as the logical conclusion of the trend toward presidential

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authority in general, it seems quite likely that the rule will spread. Even so, discreet counsel will advise the president to be very sure of his justification for suit—any action many directors oppose certainly could use some soul-searching appraisal. A prudent respect for the wrath (and imaginative ingenuity) of a judge confronted with a flagrant abuse of this power is always a desirable commodity. In reciprocal manner, counsel for an individual director opposed to suit should advise him to think twice about where the corporation's interests really lie, and if still convinced, to convene the board at once. The board as a whole can then take appropriate action not only to bar the suit, but also to remove for cause or otherwise curb the over-zealous (or ill-motivated) president. If a showing of *mala fides* can be made, an action for damages would certainly be available. If the president has already begun suit, only these latter remedies are available, but they should normally suffice.

For the serious student of agency or corporation law, the doctrinal development is worthy of searching appraisal. This power of the president over litigation is a new species of inherent authority, masquerade though it may in implied or presumptive authority guise. It is imputed in virtue of a concept of the president as an operative instrumentality on behalf of the corporation as such, and not on behalf of interests of third parties. It is possible that the courts will find the concept, though not necessarily the actual term, inherent authority more and more useful to expand corporate rights and obligations through the president or managing officer. In terms of theory of corporate structure, decisions such as *West View Hills* and *Zaubler* suggest that the law is beginning to place less emphasis on its hallowed dogma that directors manage corporations, and more on the real resources of the office of president. Whether in the long run there will develop a total shift of the balance of power, so that the president's organic powers will more and more outweigh his derivative authority, remains as yet a matter of speculative interest.

A final word on the policy of this trend toward recognizing increased presidential authority. There need be little
fear that the president is becoming the petty dictator of the corporate entity. At any time prior to suit, his powers can be appropriately circumscribed by an alert and functioning board. At most, in providing some exit from the paralysis of deadlock where the issue is to litigate or not, the law is promoting the economic interests of society in having a functional corporate entity at the expense of the parties' putative past implied bargain for deadlock. Altogether, this trend seems to be but a further accommodation of the law to the facts of corporate life. Today it is almost universally true that the president or general manager, assisted by other officers, manages the corporation, and the directors simply set long term patterns of growth or fiscal management, especially with regard to stock interests. So long as the law does not lower its standards for proper corporate conduct, so long as it continues to hold the president to the sternest of fiduciary obligations, there is no cause to criticize such a mirroring of objective reality.

APPENDIX

This Appendix is a survey of all jurisdictions possessing statutes or case law in point or closely tangential to the issue of the powers of the corporate president over litigation. In the states of California, Louisiana, Massachusetts, Missouri, New York and Texas, there were too many cases for a complete survey, so from those jurisdictions the definitive decisions have been selected.

**FEDERAL COMMON LAW:** President has authority. Regal Cleaners & Dyers, Inc. v. Merlis, 274 Fed. 915 (2d Cir. 1921) (even in deadlock, to defend corporate assets); Blue Goose Mining Co. v. Northern Light Mining Co., 245 Fed. 727 (9th Cir. 1917) (president-general manager); Davis v. Memphis City Ry., 22 Fed. 883 (C.C.W.D. Tenn. 1885).

**ALABAMA:** A federal court has assumed Alabama law would grant the president authority. Ingalls Iron Works Co. v. Ingalls, 177 F. Supp. 151 (N.D. Ala. 1959), aff'd mem., 280 F.2d 423 (5th Cir. 1960).

**ARKANSAS:** Bank president has authority. Sebastian State Bank v. Holland, 130 Ark. 59, 196 S.W. 482 (1917) (dictum); Dent v. Peoples' Bank, 118 Ark. 157, 175 S.W. 1154 (1915) (dictum).

**CALIFORNIA:** President-general manager, but not the president as such, has authority. Pacific Bank v. Stone, 121 Cal. 202, 53 Pac. 634 (1898) (president has no authority even in emergency); Streeten v. Robinson, 102
Cal. 542, 36 Pac. 946 (1894) (vice-president-general manager has authority); Burns v. Valley Bank, 94 Cal. App. 254, 271 Pac. 107 (1928) (alternative holding) (president-general manager has authority). See also Campbell v. Hanford, 67 Cal. App. 155, 227 Pac. 234 (1924) (president of close corporation has authority if he has effectual shareholder control).

COLORADO: Managing officers have authority. New Mexico Potash & Chem. Co. v. Oliver, 123 Colo. 268, 276, 228 P.2d 979, 983 (1951) (dictum).


IDAHO: Uncertain. See Weil v. Defenbach, 36 Idaho 37, 208 Pac. 1025 (1922) (president can accept service on behalf of corporation).


IOWA: President has no authority. Ney v. Eastern Iowa Tel. Co., 162 Iowa 525, 144 N.W. 383 (1913) (suit against the corporation).


MAINE: Managing officers have authority, but the law is otherwise uncertain. Bangor Sav. Bank v. Wallace, 87 Me. 28, 32 Atl. 716 (1894) (bank treasurer); Inhabitants of New Gloucester v. Bridgham, 28 Me. 60 (1848) (municipal corporation officers). But see Chabot & Richard Co. v.
Maryland: A federal court has assumed Maryland would grant the president authority. Custer Channel Wing Corp. v. Frazer, 181 F. Supp. 197 (S.D.N.Y. 1959) (even in tacit deadlock).


Minnesota: President has authority. Dickinson v. Citizens' Ice & Fuel Co., 139 Minn. 201, 165 N.W. 1056 (1918) (alternative holding); Traxler v. Minneapolis Cedar & Lumber Co., 128 Minn. 295, 150 N.W. 914 (1915).

Missouri: President-general manager, managing officers, and probably the president as such all have authority. Leggett v. Mutual Commerce Cas. Co., 250 S.W.2d 995 (Mo. 1952) (per curiam) (president-general manager); Turner v. Chillicothe & D.M.C. R.R., 51 Mo. 501 (1873) (president); Becker v. National Ref. Co., 50 S.W.2d 670 (Mo. Ct. App. 1932) (managing officer).

Nebraska: Managing officers have authority. Fidelity & Cas. Co. v. Field, 2 Neb. 442, 89 N.W. 249 (1902).

Nevada: President has authority. Reno Water Co. v. Leete, 17 Nev. 203, 30 Pac. 702 (1882); Ricord v. Central Pac. R.R., 15 Nev. 167 (1880).

New Hampshire: Uncertain, but at least bank cashier has authority. Eastman v. Coos Bank, 1 N.H. 23 (1817).

New Jersey: President has authority. Elblum Holding Corp. v. Mintz, 120 N.J.L. 604, 1 A.2d 204 (Sup. Ct. 1938) (even in tacit deadlock); Beebe v. George H. Beebe Co., 64 N.J.L. 497, 46 Atl. 168 (Sup. Ct. 1900).


North Carolina: President by statute has authority to sue when the board of directors is deadlocked. N.C. GEN. STAT. § 55-34c (Supp. 1957).
OKLAHOMA: President-general manager, managing officer, and bank presidents have power to sue. Municipal Gas Co. v. Zachry, 146 Okla. 203, 294 Pac. 114 (1930) (president-general manager); Negim & Co. v. Harp, 98 Okla. 261, 223 Pac. 347 (1924) (acting general manager); National Bank v. Earl, 2 Okla. 617, 39 Pac. 391 (1895) (bank president).

OREGON: President-general manager has authority. Lucky Queen Min. Co. v. Abraham, 26 Ore. 282, 38 Pac. 65 (1894).


RHODE ISLAND: President-general manager has authority, and perhaps the president does also. Durfee & Canning, Inc. v. Canning, 78 R.I. 385, 82 A.2d 615 (1951) (president-general manager). See also De Pasquale v. Societa De M.S. Maria, 54 R.I. 399, 173 Atl. 623 (1934) (indicating that in a prior suit the president sued the other officers in the name of the society).


WISCONSIN: President and managing officers have authority, at least in emergency. Sigman v. General Drivers Union, 5 Wis. 2d 6, 92 N.W.2d 219 (1958) (president and general manager); Central Shorewood Bldg. Corp. v. Saltzstein, 245 Wis. 138, 13 N.W.2d 525 (1944) (general manager); Green Bay Fish Co. v. Jorgenson, 165 Wis. 548, 163 N.W. 142 (1917) (president).