

# CHAPTER SIX — PARTNERSHIPS, LIMITED PARTNERSHIPS, AND JOINT VENTURES

## Apparent Authority and the Joint Venture: Narrowing the Scope of Agency Between Business Associates

*This comment examines the inconsistent judicial treatment of apparent authority in the joint venture. It discusses the inadequacies and consequences of the three dissimilar approaches courts currently take. The author then proposes an equitable resolution which accommodates both third-party interests and the venturers' reasonable expectations of reduced exposure to liability for a co-venturer's unauthorized acts.*

### INTRODUCTION

Efficient and successful commercial ventures require utilization of agency.<sup>1</sup> The agency relation confers implied authority<sup>2</sup> upon business associates to act for each other in commercial transactions. By increasing the number of contacts a business may initiate, the law of agency expands the availability of busi-

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<sup>1</sup> "Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." 1 RESTATEMENT (SECOND) OF AGENCY § 1(1) (1958). See text accompanying notes 29-35 *infra*.

<sup>2</sup> "Authority is the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him." 1 RESTATEMENT (SECOND), *supra* note 1, at § 7.

ness opportunities. A corollary risk, however, is exposure to vicarious liability for an agent's unexpected acts.

The profile of this risk depends upon the legal scope of implied authority existing among associates. Entrepreneurs may be able to limit the extent of this authority and thus their liability by their choice of business vehicle. If they are *partners*,<sup>3</sup> any contractual act by one will bind the business if it is for apparently carrying on the business in the usual way.<sup>4</sup> If they are *joint venturers*,<sup>5</sup> however, a narrower scope of agency may exist.<sup>6</sup> The difference is significant—the narrower the scope of agency, the lower an entrepreneur's risk of liability for the unauthorized acts of an associate. Thus, the joint venture vehicle potentially offers entrepreneurs reduced exposure to vicarious liability.

Unfortunately, both courts and commentators disagree over the scope of agency in the joint venture. A minority of courts recognize a narrower scope of agency in the joint venture than that existing in the partnership.<sup>7</sup> The majority of jurisdictions,

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<sup>3</sup> "A partnership is an association of two or more persons to carry on as co-owners a business for profit." UNIFORM PARTNERSHIP ACT § 6(1), reprinted in 6 UNIFORM LAWS ANNOTATED 22 (West 1969) [hereinafter cited as U.P.A.].

<sup>4</sup> U.P.A. § 9(1), *supra* note 3, at 132. In both the partnership and joint venture the members are personally liable for the association's debts to the extent those debts exceed the association's assets. Partner liability is mandated by U.P.A. § 15. *Id.* at 174. Venturer liability results from the judicial requirement that venturers share in the association's losses. *See generally* notes 13-14 *infra*. This comment refers to association liability and individual liability interchangeably.

<sup>5</sup> A "joint venture," or "joint adventure," is "[a]n association of two or more persons to carry out a single business enterprise for profit." 2 R. ROWLEY & D. SIVE, ROWLEY ON PARTNERSHIP § 52.2, at 465 (2d ed. 1960). *See, e.g.*, Gurewitz v. Kinder, 96 Cal. App. 3d 460, 465, 158 Cal. Rptr. 102, 105 (1st Dist. 1979); Chalmers v. Eaton Corp., 71 App. Div. 2d 721, —, 419 N.Y.S.2d 217, 219 (1979). *See* text accompanying notes 11-25 *infra*. Decisions show a preference for the use of "venture" rather than "adventure." Nichols, *Joint Ventures*, 36 VA. L. REV. 425, 430 (1950).

As used throughout this comment, "joint venture" does not include the "joint enterprise" concept of tort law where the issue is the imputation of negligence.

<sup>6</sup> *See* text accompanying notes 45-107 *infra*.

<sup>7</sup> *See* Misco-United Supply, Inc. v. Petroleum Corp., 462 F.2d 75, 80 (5th Cir. 1972) (discussed in note 81 *infra*); Matanuska Valley Bank v. Arnold, 223 F.2d 778, 780 (9th Cir. 1955); Gertz v. Selin, 112 Ariz. 562, 563-65, 544 P.2d 1077, 1078-79 (1976); Hansen v. Burford, 212 Cal. 100, 111, 297 P. 908, 913 (1931); Stilwell v. Trutanich, 178 Cal. App. 2d 614, 619, 3 Cal. Rptr. 285, 289 (2d Dist. 1960); Foote v. Posey, 164 Cal. App. 2d 210, 216-17, 330 P.2d 651,

however, consider the joint venture to be similar to the partnership,<sup>8</sup> and therefore analogize to the Uniform Partnership Act to determine the applicable scope of agency. The difference between these two approaches becomes particularly significant when courts use apparent authority principles<sup>9</sup> of agency to determine joint venture liability for a member's unauthorized contracts.<sup>10</sup> This comment examines the circumstances under which co-venturers are liable for such contracts and suggests a unifying

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654-55 (1st Dist. 1958); *Sime v. Malouf*, 95 Cal. App. 2d 82, 96, 212 P.2d 946, 953-54 (2d Dist. 1949); *Block v. D. W. Nicholson Corp.*, 77 Cal. App. 2d 739, 744-45, 176 P.2d 739, 743 (1st Dist. 1947); *Keyes v. Nims*, 43 Cal. App. 1, 9, 184 P. 695, 698 (3d Dist. 1919); *Dolan v. Dolan*, 197 Conn. 342, 339, 140 A. 745, 748 (1928); *Isaacs v. Fletcher Am. Nat'l Bank*, 103 Ind. App. 246, 255, 198 N.E. 829, 833 (1935); *American Mut. Liab. Ins. Co. v. Hanna, Zabriskie & Daron*, 297 Mich. 599, 606-08, 298 N.W. 296, 299 (1941); *Wrenn v. Moskin*, 226 App. Div. 563, 566, 235 N.Y.S. 405, 409 (1929); *Priestley v. Peterson*, 19 Wash. 2d 820, 844, 145 P.2d 253, 264-65 (1944). *See generally* 2 R. ROWLEY & D. SIVE, *supra* note 5, §§ 52.55-52.56; Jaeger, *Partnership or Joint Venture*, 37 NOTRE DAME LAW. 138, 153 (1961); Taubman, *What Constitutes a Joint Venture*, 41 CORNELL L. Q. 640, 647 (1956); Comment, *Joint Venture or Partnership*, 18 FORDHAM L. REV. 114, 127 (1949); Note, 33 HARV. L. REV. 852, 854 (1920); and text accompanying notes 51-83 *infra*.

<sup>8</sup> *See Matter of Buchman*, 600 F.2d 160, 162 n.3 (8th Cir. 1979) (applying Florida law); *Singer Hous. Co. v. Seven Lakes Venture*, 466 F. Supp. 369, 376 (D. Colo. 1979); *Zeibak v. Nasser*, 12 Cal. 2d 1, 12, 82 P.2d 375, 380-81 (1938); *Medak v. Cox*, 12 Cal. App. 3d 70, 76-77, 90 Cal. Rptr. 452, 455 (2d Dist. 1970); *Orlopp v. Willardson Co.*, 232 Cal. App. 2d 750, 754, 43 Cal. Rptr. 125, 128 (5th Dist. 1965); *Grant v. Weatherholt*, 123 Cal. App. 2d 34, 46-47, 266 P.2d 185, 193-94 (2d Dist. 1954); *Modern Air Conditioning, Inc. v. Cinderella Homes, Inc.*, 226 Kan. 70, —, 596 P.2d 816, 822 (1979); *Wenzel Mach. Rental & Sales Co. v. Adkins*, 189 Kan. 435, 441, 370 P.2d 141, 144 (1962); *Lau v. Valu-Bilt Homes, Ltd.*, 59 Hawaii 283, 291, 582 P.2d 195, 200 (1978); *Bachewicz v. American Nat'l Bank & Trust Co.*, 75 Ill. App. 3d 252, 256, 393 N.E.2d 652, 655 (1979); *Baker Farmers Co. v. Harter*, 28 Ill. App. 3d 393, 396, 328 N.E.2d 369, 372 (1975); *Jensen v. Schreck*, 275 N.W.2d 374, 379 (Iowa 1979); *Geo. Burt. Cropper, Inc. v. Wisterco Invs., Inc.*, 284 Md. 601, 614, 399 A.2d 585, 592 (1979); *Al Johnson Constr. Co. v. Kosydar*, 42 Ohio St. 2d 29, 32, 325 N.E.2d 549, 552 (1975); *Gragg v. James* 452 P.2d 579, 587 (Okla. 1969); *Heinrich v. Wharton County Livestock, Inc.*, 557 S.W.2d 830, 833 (Tex. Ct. App. 1977); *Refrigeration Eng'r Co. v. McKay*, 4 Wash. App. 963, 973, 486 P.2d 304, 311 (1971); *Madrid v. Norton*, 596 P.2d 1108, 1118 (Wyo. 1979); *True v. Hi-Plains Elevator Mach., Inc.*, 577 P.2d 991, 996 n.2 (Wyo. 1978). *E.g.*, *Connor v. El Paso Natural Gas Co.*, 599 P.2d 247, 279 (Ariz. Ct. App. 1979). *See generally* Jaeger, *supra* note 7, at 141 n.20; Mechem, *The Law of Joint Adventures*, 15 MINN. L. REV. 644, 644 n.2, 666 (1931); Nichols, *supra* note 5, at 442 n.94.

<sup>9</sup> *See* text accompanying notes 45-50 *infra*.

<sup>10</sup> *See* text accompanying notes 51-107 *infra*.

and equitable approach to resolving issues of apparent authority in the joint venture setting.

### I. DESCRIPTION OF THE JOINT VENTURE

Of the organizational models available for the transaction of business by two or more people,<sup>11</sup> the joint venture is the least formal and the easiest to create.<sup>12</sup> The joint venture is a contractual<sup>13</sup> association formed to carry out a single business enterprise for profit.<sup>14</sup> Although there are numerous variations of this

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<sup>11</sup> For a discussion of business association models, see Mann & Roberts, *Unincorporated Business Associations: An Overview of Their Advantages And Disadvantages*, 14 TULSA L.J. 1 (1978).

<sup>12</sup> See *id.*; 2 R. ROWLEY & D. SIVE, *supra* note 5, § 52.14, at 483.

<sup>13</sup> An agreement is essential to the creation of a joint venture. However, in the absence of an express agreement, courts will infer the necessary intent from the parties' conduct or surrounding facts and circumstances. *Richardson v. Walsh Constr. Co.*, 334 F.2d 334, 336 (3d Cir. 1964); *Northern Lights Motel, Inc. v. Sweaney*, 561 P.2d 1176, 1187 (Alaska 1977); *Nelson v. Abraham*, 29 Cal. 2d 745, 749-50, 177 P.2d 931, 933 (1947); *Weinstock v. L.A. Carpet, Inc.*, 234 Cal. App. 2d 809, 813, 44 Cal. Rptr. 852, 854 (2d Dist. 1965); *Ellison v. Riddle*, 166 So. 2d 840, 841 (Fla. Dist. Ct. App. 1964); *Shinn v. Edwin Yee Ltd.*, 57 Hawaii 215, 218, 553 P.2d 733, 737 (1976); *Modern Air Conditioning, Inc. v. Cinderella Homes, Inc.*, 226 Kan. 70, —, 596 P.2d 816, 822 (1979); *Polikoff v. Levy*, 55 Ill. App. 2d 229, 235, 204 N.E.2d 807, 810 (1965); *Southwest Drayage Co. v. Crawford Moving Vans, Inc.*, 377 S.W.2d 293, 297 (Mo. 1964); *Soulek v. City of Omaha*, 140 Neb. 151, 154, 299 N.W. 368, 371 (1941); *Chalmers v. Eaton Corp.*, 71 App. Div. 2d 721, —, 419 N.Y.S.2d 217, 219 (1979); *O. K. Boiler & Welding Co. v. Minnetonka Lumber Co.*, 103 Okla. 226, 228, 229 P. 1045, 1047-48 (1924); *Madrid v. Norton*, 596 P.2d 1108, 1119 (Wyo. 1979).

<sup>14</sup> 2 R. ROWLEY & D. SIVE, *supra* note 5. See also note 5 *supra*. Professor Williston provides a more descriptive definition:

The joint venture is an association of two or more persons based on contract who combine their money, property, knowledge, skills, experience, time or other resources in the furtherance of a particular project or undertaking, usually agreeing to share the profits and the losses and each having some degree of control over the venture.

2 WILLISTON CONTRACTS § 318 (3d ed. Jaeger 1959).

The joint venture dates back to ancient Egypt, Babylonia, Phoenicia, and Syria. As commerce expanded the need for risk diffusion and greater concentration of capital gave rise to the joint venture; its main uses were in maritime trading operations. Jaeger, *supra* note 7, at 141; Nichols, *supra* note 5, at 426-27. As a legal concept with distinct consequences, however, the joint venture is of fairly modern origin. It is a creation of the American courts, dating from the early 1800's. See, e.g., *Hourquebie v. Girard*, 12 Fed. Cas. 593, 595 (C.C.D. Pa. 1808); cases cited note 128 *infra*. Professor Mechem argued that England does not recognize the joint venture. Mechem, *supra* note 8, at 644 n.2. But see

definition,<sup>15</sup> each requires the association of two or more people who combine either money, property, knowledge, or skill in the furtherance of a single business task. Further, every definition requires an agreement to share profits,<sup>16</sup> with each venturer possessing some degree of control over the venture's management.<sup>17</sup> A joint venture will not exist in the absence of any of these elements.<sup>18</sup>

The joint venture's key characteristic is its limitation to a single and specific business undertaking.<sup>19</sup> Common examples of

*Rank Xerox Ltd. v. Lane*, [1979] Ch. 113, 118; *Paul v. Constance*, [1977] 1 W.L.R. 527, 529 (1976); *Pearson v. Naydler*, [1977] 1 W.L.R. 899, 901; *BP Exploration Co. (Libya) Ltd. v. Hunt*, [1976] 3 All E.R. 879, 888 (1975); *Evans Marshall & Co. v. Bertola SA*, [1973] 1 W.L.R. 349, 378 (1972); *Mann v. D'Arcy*, [1968] 1 W.L.R. 893, 897.

<sup>15</sup> See *Nichols*, *supra* note 5, at 430-32; Annot., 138 A.L.R. 968 (1942); Annot., 48 A.L.R. 1055 (1927).

<sup>16</sup> An agreement to share losses is also an element of the joint venture. However, its absence will not preclude finding a joint venture since courts will imply such an agreement. *Gleason v. Metropolitan Mortgage Co.*, 15 Wash. App. 481, 495, 551 P.2d 147, 156 (1976).

<sup>17</sup> See note 18 *infra*.

<sup>18</sup> *Sasportes v. M/V Sol De Copacabana*, 581 F.2d 1204, 1209 (5th Cir. 1978) (absence of profit sharing and mutual control precludes existence of joint venture); *Institutional Management Corp. v. Translation Systems, Inc.*, 456 F. Supp. 661, 668 (D. Md. 1978) (to same effect); *Connor v. Great W. Sav. & Loan Ass'n*, 69 Cal. 2d 850, 863, 447 P.2d 609, 615, 73 Cal. Rptr. 369, 375 (1968) (absence of profit sharing precludes existence of a joint venture).

One venturer, however, may agree to relinquish control. *Eagle Star Ins. Co. v. Bean*, 134 F.2d 755, 758 (9th Cir. 1943); *Stilwell v. Trutanich*, 178 Cal. App. 2d 614, 619, 621, 3 Cal. Rptr. 285, 288-89, 290 (2d Dist. 1960); *United States Fidelity & Guar. Co. v. Dawson Produce Co.*, 200 Okla. 540, 544, 197 P.2d 978, 982 (1948); Comment, *The Joint Venture: Problem Child of Partnership*, 38 CALIF. L. REV. 860, 862 (1950); Jaeger, *Joint Ventures: Recent Developments*, 4 WASHBURN L.J. 9, 34 (1964).

<sup>19</sup> *Misco-United Supply Inc. v. Petroleum Corp.*, 462 F.2d 75, 78 n.1 (5th Cir. 1972); *Crest Constr. Co. v. Insurance Co. of N. America*, 417 F. Supp. 564, 568 (W.D. Okla. 1976); *Brewer v. Central Constr. Co.*, 241 Iowa 799, 806, 43 N.W.2d 131, 136 (1950); *Gordon v. Rothberg*, 213 S.C. 492, 503, 50 S.E.2d 202, 207 (1948); 2 R. ROWLEY & D. SIVE, *supra* note 5, § 52.14, at 482. See also cases cited in notes 5, 7 & 8 *supra*.

Other decisions indicate that partnerships may also exist for single undertakings. *Westcott v. Gilman*, 170 Cal. 562, 569, 150 P. 777, 780 (1915) (association to trade in fruit termed joint venture but governed by partnership law); *Brown v. Fairbanks*, 121 Cal. App. 2d 432, 441, 263 P.2d 355, 360 (4th Dist. 1953)(dicta); *Thompson v. O. W. Childs Estate Co.*, 90 Cal. App. 552, 554, 266 P. 293, 294 (2d Dist. 1928) (agreement to operate oil lease held partnership);

joint ventures include agreements to purchase specific parcels of

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Garber v. Whittaker, 36 Del. 272, 276, 174 A. 34, 36 (1934)(dicta); Harmon v. Martin, 395 Ill. 595, 612-13, 71 N.E.2d 74, 82-83 (1947) (partnerships for single transactions are termed joint ventures but governed by partnership law); Marshall v. Bennett, 214 Ky. 328, 331, 283 S.W. 115, 116-17 (1926) (agreement to purchase option on gravel land for subsequent sale held partnership for task); Real Estate-Land Title & Trust Co. v. Stout, 117 N.J. Eq. 37, 43, 175 A. 128, 131 (1934) (dicta); Blair v. Scimone, 26 App. Div. 2d 751, 752, 272 N.Y.S.2d 75, 77-78 (1966) (agreement to purchase tract of land held partnership or joint venture); Schneider v. Brenner, 134 Misc. Rep. 449, 450, 235 N.Y.S. 55, 56 (1929) (partnership may exist for single transaction in real estate); Chowning v. Graham, 74 Okla. 232, 235, 178 P. 676, 678-79 (1918)(same); First Nat'l Bank v. Chambers, 398 S.W.2d 313, 316 (Tex. Ct. App. 1965) (dicta); Allison v. Campbell, 117 Tex. 277, 283, 298 S.W. 523, 525 (1927)(dicta). *See generally* U.P.A. §§ 23(1), 31(1)(a), *supra* note 3, at 322, 376; Mechem, *supra* note 8, at 659 n.49. These cases, however, either merely stated dicta, *e.g.*, *Brown*, *Garber*, *Real Estate-Land Title & Trust Co.*, *First Nat'l Bank*, *Allison*; or failed to discuss or distinguish joint ventures, *e.g.*, *Thompson*, *Garber*, *Schneider*, *Chowning*, *Allison*; or concluded, expressly or impliedly, that no significant difference in consequences exists between partnerships and joint ventures and therefore such a distinction is unnecessary, *e.g.*, *Brown*, *Westcoff*, *Harmon*, *Blair*; or involved actions *inter se*, not requiring any distinction to be made because joint venture law parallels that of partnerships as to most matters *inter se*, *e.g.*, *Brown*, *Marshall*, *Blair*, *Schneider*, *Chowning*.

Still other cases present a contrary conclusion—undertakings limited to a single transaction are joint ventures, not partnerships. *Copland v. Commissioner*, 41 F.2d 501, 503 (7th Cir. 1930)(in determining tax consequences of a gift of an interest in the association, an agreement for particular undertaking of stock speculation held to be a joint venture, not a partnership); *Jones v. Gould*, 209 N.Y. 419, 426, 103 N.E. 720, 721-22 (1913) (agreement to acquire railroad, extend it, build a separate road, and acquire, for marketing, adjacent coal lands, held to be a joint venture, not a partnership); *Walker, Mosby & Calvert v. Burgess*, 153 Va. 779, 787, 151 S.E. 165, 167 (1930) (agreement to finance and construct residential dwellings on three lots held to be a joint venture, not a partnership); *Insurance Co. of N. America v. Department of Indus.*, 45 Wisc. 2d 361, 365, 366, 173 N.W.2d 192, 195 (1970) (association for single undertaking is a joint venture, not a partnership). *See generally* text accompanying notes 123-127 *infra*.

Courts infrequently find partnerships for a task; when they do it is unclear why. More commonly an undertaking for a single transaction is held to be a joint venture, but then held to be governed by partnership law. *See, e.g.*, cases cited note 8 *supra*. Under such an analysis the distinction is largely immaterial; this likely accounts for the lack of cases comparing the joint venture to the partnership for a task. However, the distinction is important in that the partnership label would compel the application of the Uniform Partnership Act. Despite this fact, no case found has dealt with the distinction between the associations when it affects a conclusion concerning the application of apparent authority principles.

real estate for speculation,<sup>20</sup> to jointly speculate in securities<sup>21</sup> or goods,<sup>22</sup> to develop production under particular oil leases,<sup>23</sup> or to undertake large construction projects.<sup>24</sup> It is typical in these joint ventures for one venturer to provide capital while the other provides the necessary skills.<sup>25</sup>

The limited nature of the joint venture association often produces a reduced feeling of confidence among the venturers.<sup>26</sup>

<sup>20</sup> See, e.g., *Matter of Buchman*, 600 F.2d 160 (8th Cir. 1979); *Gertz v. Selin*, 112 Ariz. 562, 544 P.2d 1077 (1976); *Hansen v. Burford*, 212 Cal. 100, 297 P. 908 (1931); *McClung v. Saito*, 4 Cal. App. 3d 143, 84 Cal. Rptr. 44 (2d Dist. 1970); *Foote v. Posey*, 164 Cal. App. 2d 210, 330 P.2d 651 (1st Dist. 1958); *Nels E. Nelson, Inc. v. Tarman*, 163 Cal. App. 2d 714, 329 P.2d 953 (1st Dist. 1958); *Hayward's v. Nelson*, 143 Cal. App. 2d 807, 299 P.2d 1013 (2d Dist. 1956); *Refrigeration Eng'r Co. v. McKay*, 4 Wash. App. 963, 486 P.2d 304 (1971). See generally A. ARONSOHN & L. KASTER, *JOINT VENTURES IN REAL ESTATE* (Practising Law Institute No. 26, 1970).

<sup>21</sup> See, e.g., *Kelley Inv. Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 386 F.2d 595 (8th Cir. 1967); *Wrenn v. Moskin*, 226 App. Div. 563, 235 N.Y.S. 405 (1929).

<sup>22</sup> See, e.g., *Wood v. Western Beef Factory, Inc.*, 378 F.2d 96 (10th Cir. 1967); *Lindner v. Friednash*, 160 Cal. App. 2d 511, 325 P.2d 612 (2d Dist. 1958); *Robertson v. Lyons*, 553 S.W.2d 754 (Tenn. Ct. App. 1977).

<sup>23</sup> See, e.g., *Misco-United Supply, Inc. v. Petroleum Corp.*, 462 F.2d 75 (5th Cir. 1972); *Southern Coast Corp. v. Natural Gas Pipeline Co.*, 337 F.2d 158 (5th Cir. 1964); *Isaacs v. Fletcher Am. Nat'l Bank*, 103 Ind. App. 246, 198 N.E. 829 (1935).

<sup>24</sup> See, e.g., *Fluor Corp. v. United States ex rel. Mosher Steel Co.*, 405 F.2d 823 (9th Cir. 1969); *Dubuque Stone Prods. Co. v. Fred L. Gray Co.*, 356 F.2d 718 (8th Cir. 1966); *Bushman Constr. Co. v. Air Force Academy Hous., Inc.*, 327 F.2d 481 (10th Cir. 1964); *Ingalls Iron Works Co. v. Fehlhaber Corp.*, 327 F. Supp. 272 (S.D.N.Y. 1971); *Joseph W. O'Brien Co. v. Highland Lake Const. Co.*, 9 Ill. App. 3d 408, 292 N.E.2d 205 (1972); *American Mut. Liab. Ins. Co. v. Hanna, Zabriskie & Daron*, 297 Mich. 599, 298 N.W. 296 (1941); *Al Johnson Constr. Co. v. Kosydar*, 42 Ohio St. 2d 29, 325 N.E.2d 549 (1975); *State v. Frank D. Malone Constr. Co.*, 81 S.D. 1, 129 N.W.2d 900 (1964); *Hammer v. Gibbons & Reed Co.*, 29 Utah 2d 415, 510 P.2d 1104 (1973).

<sup>25</sup> For a discussion of the various types of joint ventures commonly entered into, see Jaeger, *supra* note 7, and Jaeger, *Joint Ventures: Membership, Types and Termination*, 9 AM. U. L. REV. 111, 117-27 (1960). For a collection of cases illustrating fact patterns that have led to the finding of a joint venture, see Annot., 63 A.L.R. 909 (1929); Annot., 48 A.L.R. 1055 (1927).

<sup>26</sup> See H. REUSCHLEIN & W. GREGORY, *HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP*, § 266, at 442-43 (1979). For example, during World War II construction and engineering organizations were called upon to construct many large factories and military installations. Many of the projects were beyond the limited physical and financial capacity and specialized experience of individual contractors. "In the interests of speed and efficiency several of these contrac-

This lack of complete trust results in frequent attempts by venturers to limit the authority of a single member to contract for the others without prior approval.<sup>27</sup> Whether a court will validate these efforts depends in part upon whether the court applies common law principles of agency or a variant thereof.<sup>28</sup>

## II. AGENCY AND THE CONTRACTUAL LIABILITY OF THE JOINT VENTURE

A judicial determination of agency<sup>29</sup> imposes third-party liability on a defendant even though the defendant did not physically perform the acts giving rise to the liability. Agency confers authority<sup>30</sup> upon the agent to act for and bind the principal.<sup>31</sup> In the contractual setting the agent frequently acts as the principal's spokesperson, making and accepting offers.<sup>32</sup> A third-party who wishes to impose liability on the principal must establish the agent's authority to enter the contract.<sup>33</sup> This authority is divisible into two types, real and apparent.<sup>34</sup> These are separate grounds upon which to hold members of a joint venture liable on

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tors would unite . . . for the purpose of handling one of these contracts. It was an agreement to pursue one venture, one project. *There was not the slightest desire on the part of the joint contractors to make this relationship any more intimate or comprehensive or to have it last any longer than was necessary.* . . . In many instances they were actually business competitors joined together temporarily by the exigencies of the times." (Emphasis added.) Comment, *supra* note 7, at 119-20.

<sup>27</sup> These efforts can take the form of express restrictions, *see, e.g.*, *Hansen v. Burford*, 212 Cal. 100, 297 P. 908 (1931); *Medak v. Cox*, 12 Cal. App. 3d 70, 90 Cal. Rptr. 452 (2d Dist. 1970); *American Mut. Liab. Ins. Co. v. Hanna, Zabriskie & Daron*, 297 Mich. 599, 298 N.W. 296 (1941); *State v. Frank D. Malone Constr. Co.*, 81 S.D. 1, 129 N.W.2d 900 (1964); or after-the-fact assertions at trial; *see, e.g.*, cases cited note 7 *supra*.

<sup>28</sup> The variant courts most frequently apply is the application, by analogy, of Section 9(1) of the UNIFORM PARTNERSHIP ACT. *See* text accompanying notes 84-107 *infra*. For discussion as to why this approach is inappropriate, *see* text accompanying notes 119-141 *infra*.

<sup>29</sup> *See* note 1 *supra*.

<sup>30</sup> *See* note 2 *supra*.

<sup>31</sup> "The 'principal' is the party who authorizes another to undertake to act for him and under his control. The 'agent' is the one so authorized." W. SELL, AGENCY § 1, at 1 (1975).

<sup>32</sup> H. REUSCHLEIN & W. GREGORY, *supra* note 26, § 95, at 158.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* § 194, at 289. For a discussion of unrelated types of authority (e.g., authority by necessity) *see id.*, § 14E, at 38.



a given contract.<sup>35</sup>

### A. *Real Authority*

Real<sup>36</sup> authority exists whenever an agent has the principal's express or implied consent.<sup>37</sup> *Express* real authority exists when there is explicit consent to the performance of a particular act. *Implied* real authority<sup>38</sup> is broader; that is, the principal impliedly "consents" to the agent performing all acts which are physically necessary, recognized by custom or usage, or legally required to complete the assigned task.<sup>39</sup> The nature of the joint venture's business activity thus determines the scope of each member's *implied* real authority. The law presumes that each venturer has authority to bind co-venturers to those contracts *reasonably necessary* to carry out the business project.<sup>40</sup>

<sup>35</sup> Courts frequently state that each venturer is both agent and principal for the joint venture. See *Connor v. El Paso Natural Gas Co.*, 599 P.2d 247, 249 (Ariz. Ct. App. 1979); *Modern Air Conditioning, Inc. v. Cinderella Homes, Inc.*, 226 Kan. 70, —, 596 P.2d 816, 822 (1979); *Bachewicz v. American Nat'l Bank & Trust Co.*, 75 Ill. App. 3d 252, 256, 393 N.E. 2d 652, 655 (1979); *Hammer v. Gibbons & Reed Co.*, 29 Utah 2d 415, 417, 510 P.2d 1104, 1105 (1973). *But see Dolan v. Dolan*, 107 Conn. 342, 349, 140 A. 745, 748 (1928) (dicta). However, the scope of that agency is unclear; see text accompanying notes 51-107 *infra*.

<sup>36</sup> "Real" authority is sometimes referred to as "actual" authority. See H. REUSCHLEIN & W. GREGORY, *supra* note 26, § 14.

<sup>37</sup> *Id.* at 36. It is immaterial whether a third party knows of this authority when contracting since liability is premised upon the principal's consent to the act. Thus, a principal is liable under this approach even though his or her existence is undisclosed to the third party. *Id.* Compare the result reached under an apparent authority analysis, in text accompanying notes 67-73 *infra*.

<sup>38</sup> Some writers argue the term "implied" is of minimal utility and prefer the use of "incidental." H. REUSCHLEIN & W. GREGORY, *supra* note 26, § 15, at 37, 40. As used here implied authority means authority to do those acts incidental to or necessary, usual, or proper to perform the main authority expressly delegated to the agent. *Institute for Business Planning Inc. v. Standard Life & Accident Ins. Co.*, 242 F. Supp. 100, 106 n.1 (W.D. Okla. 1965).

<sup>39</sup> W. SELL, *supra* note 31, § 40, at 31, § 42, at 32.

<sup>40</sup> Thus, by establishing the necessity of a contract, a third-party establishes implied authority. See *Fluor Corp. v. United States ex rel. Mosher Steel Co.*, 405 F.2d 823, 827-28 (9th Cir. 1969); *Bushman Constr. Co. v. Air Force Academy Housing, Inc.*, 327 F.2d 481, 484-85 (10th Cir. 1964); *Rogers v. Edwards*, 413 F. Supp. 933, 937 (D. Minn. 1975), *aff'd. per curiam*, 547 F.2d 1056 (8th Cir. 1977); *Smalley v. Baker*, 262 Cal. App. 2d 824, 836-37, 69 Cal. Rptr. 521, 530 (1st Dist. 1968); *Lindner v. Friednash*, 160 Cal. App. 2d 511, 519, 325 P.2d 612, 616-17 (2d Dist. 1958); *Block v. D. W. Nicholson Corp.*, 77 Cal. App. 2d 739, 744-45, 176 P.2d 739, 743 (1st Dist. 1947); *Carlson v. Boryla*, 490 P.2d 700,

Whether a particular contract is reasonably necessary to the project is a question for the factfinder; third-party perceptions are not determinative.<sup>41</sup>

Partnership law parallels that of the joint venture in the area of implied real authority. Section 9(1) of the Uniform Partnership Act makes every partner an agent of the partnership "for the purpose of its business," and a partner's act will bind the partnership if "for apparently carrying on in the usual way the business of the partnership."<sup>42</sup> As in the joint venture, third-party perceptions do not determine whether this standard is met.<sup>43</sup> The only difference in real authority between the two associations is the joint venture's narrower scope of *implied* real authority resulting from the more limited nature of its undertaking.<sup>44</sup> A much greater difference may exist, however, when

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703 (Colo. Ct. App. 1971); *Baker Farmers Co. v. Harter*, 28 Ill. App. 3d 393, 396, 328 N.E.2d 369, 372 (1975); *Joseph W. O'Brien Co. v. Highland Lake Constr. Co.*, 9 Ill. App. 3d 408, 413, 292 N.E.2d 205, 209 (1972); *Davidson v. State*, 42 Mich. App. 80, 84, 201 N.W.2d 296, 298 (1972); *Al Johnson Constr. Co. v. Kosydar*, 42 Ohio St. 2d 29, 32, 325 N.E.2d 549, 552-53 (1975); *Robertson v. Lyons*, 553 S.W.2d 754, 757 (Tenn. Ct. App. 1977); *Hammer v. Gibbons & Reed Co.*, 29 Utah 2d 415, 417, 510 P.2d 1104, 1105 (1973); *Refrigeration Eng'r Co. v. McKay*, 4 Wash. App. 963, 973, 486 P.2d 304, 311 (1971); *James W. Thomas Constr. Co. v. City of Madison*, 79 Wisc. 2d 345, 354, 255 N.W.2d 551, 555 (1977); 2 Z. CAVITCH, *BUSINESS ORGANIZATIONS*, § 41.10[1], at 1164 (1979); H. REUSCHLEIN & W. GREGORY, *supra* note 26, § 266, at 445; 2 WILLISTON, *supra* note 14, § 318B, at 605-06.

But if the contracting member exceeds any limitation on his or her authority, co-venturers who are undisclosed at the time of contracting will not be liable on the contract merely because it relates to the business of the joint venture. *Hansen v. Burford*, 212 Cal. 100, 111, 297 P. 908, 913 (1931); *Block v. D. W. Nicholson Corp.*; *Priestley v. Peterson*, 19 Wash. 2d 820, 844, 145 P.2d 253, 264-65 (1944). Thus, if real authority is absent liability must be premised upon the remaining theory of agency—apparent authority.

<sup>41</sup> See generally cases cited note 40 *supra*.

<sup>42</sup> U.P.A. § 9(1), *supra* note 3, at 132.

<sup>43</sup> See, e.g., *Ellis v. Mihelis*, 60 Cal. 2d 206, 384 P.2d 7, 32 Cal. Rptr. 415 (1963); *Douglas Reservoirs Water Users Ass'n v. Maurer & Garst*, 398 P.2d 74 (Wyo. 1965). In each case the court concluded, with no reference to the third-parties' actual or possible beliefs, that the acts in question did not satisfy the test for partnership liability.

<sup>44</sup> See H. REUSCHLEIN & W. GREGORY, *supra* note 26, § 266, at 445. This difference parallels the agency distinction between a general agent and a special agent. A general agent is analogous to a partner; he or she is authorized to conduct a series of transactions involving a continuity of service. See F. MECHEM, *OUTLINES OF THE LAW OF AGENCY* § 17, at 6 (4th ed. P. Mechem

there is no real authority and the third-party relies upon apparent authority principles to impose venture liability.

### *B. Apparent Authority*

Apparent authority<sup>45</sup> allows a third-party to hold the principal liable even though the agent's acts are unauthorized. Resort to the doctrine is therefore necessary only if real authority is absent. Unlike real authority,<sup>46</sup> apparent authority is not premised on consent. Rather it is based on the impressions of third-parties that the principal creates through his or her conduct.<sup>47</sup> Liability results when such conduct reasonably and honestly leads the third-party to believe the agent possesses real authority for the transaction.<sup>48</sup>

Apparent authority issues most often arise in circumstances where an agent would have implied authority, but the principal has expressly prohibited the conduct.<sup>49</sup> Entering a joint venture

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1952); 1 RESTATEMENT (SECOND), *supra* note 1, at § 3, comment (a); H. REUSCHLEIN & W. GREGORY, *supra* note 26, § 97, at 162; W. SELL, *supra* note 31, § 109, at 100-01. A special agent is analogous to a joint venturer; he or she is authorized to conduct merely a single transaction or series of transactions not involving continuity of service. *Id.* A general agent possesses greater implied real authority than a special agent in that the former does not require separate authorization for each transaction; the principal is liable for the general agent's acts incidental to an otherwise authorized transaction. *See* 1 RESTATEMENT (SECOND) *supra* note 1, § 3, at comment (a); H. REUSCHLEIN & W. GREGORY, *supra* note 26, § 97, at 162. This result obtains even if real authority is absent, that is, even though the particular acts were prohibited. *Id.* A special agent's inherent power to deliver the liability of the principal is more limited. *See id.* In *Swanson v. Webb Tractor & Equip. Co.*, 24 Wash. 2d 631, 649, 167 P.2d 146, 155 (1946), the court stated that in the case of a special partner (agent) the normal presumption of authority granted a general partner (agent) is reversed, and a third-party seeking to hold other members liable must prove the authority to so bind. The court found the special versus general distinction to have grown out of the difference between a trading and non-trading partnership. *See* text accompanying notes 149-75 *infra*.

<sup>45</sup> *See* text accompanying notes 67-73 *infra*.

<sup>46</sup> *See* text accompanying notes 36-44 *supra*.

<sup>47</sup> *See* text accompanying notes 67-73 *infra*.

<sup>48</sup> W. SELL, *supra* note 31, § 47, at 36. *See* H. REUSCHLEIN & W. GREGORY, *supra* note 26, § 23, at 57. Apparent authority is sometimes referred to as "ostensible" authority. *Id.* *See generally* text accompanying notes 67-73 *infra*.

<sup>49</sup> Apparent authority can arise in other ways; for example, when the agent shows a third party a power of attorney executed by the principal, or when the agent is known to have acted for a certain principal in the past with the principal's knowledge and without any indication of the principal's dissent. W. SELL,

for the purchase, subdivision and sale of real estate, for example, would normally imply authority in any venturer to contract for the surveying and subdivision of the tract. One venturer, however, could condition his or her participation in the project upon an intra-venture agreement not to do business with a certain surveying firm. Such a restriction removes implied authority to contract with that firm. Thus, if the other venturer nonetheless contracts with the proscribed firm, liability can rest only upon a claim of the acting venturer's "apparent authority" to contract.<sup>50</sup>

Courts are confused about the application of apparent authority principles to joint ventures. At least three analytical approaches exist. Courts may hold that apparent authority does not apply to joint ventures,<sup>51</sup> that common law apparent authority principles apply,<sup>52</sup> or, finally, that the apparent authority principles embodied in the U.P.A. apply.<sup>53</sup> Because the U.P.A.'s language makes it significantly easier to establish "apparent authority" liability than is true at common law,<sup>54</sup> a venturer's risk of liability for a co-venturer's unauthorized contracts differs substantially depending upon the approach followed. This difference necessitates a discussion of the consequences that flow from the application of each approach.

### 1. No Apparent Authority

The most restrictive theory of joint venture agency is that, in the absence of real authority, apparent authority is not available to impose vicarious liability on co-venturers.<sup>55</sup> Under this the-

*supra* note 31, § 35, at 26. See generally H. REUSCHLEIN & W. GREGORY, *supra* note 26, § 23, at 61-62.

<sup>50</sup> See note 116 *infra*. The venture is not liable if the surveying firm has notice of the restriction on the venturer's authority. H. REUSCHLEIN & W. GREGORY, *supra* note 26, § 98, at 164; W. SELL, *supra* note 31, § 110, at 102. See, e.g., *Cohen v. Frank Developers, Inc.*, 118 N.H. 512, 389 A.2d 933 (1978) (applying rule to joint venture). Apparent authority could not exist because such notice precludes an honest belief that the venturer has implied real authority to enter the contract. See text accompanying notes 67-70 *infra*.

<sup>51</sup> See text accompanying notes 55-66 *infra*.

<sup>52</sup> See text accompanying notes 67-83 *infra*.

<sup>53</sup> See text accompanying notes 84-107 *infra*.

<sup>54</sup> See text accompanying notes 84-94 *infra*.

<sup>55</sup> See *Matanuska Valley Bank v. Arnold*, 223 F.2d 778, 780 (9th Cir. 1955); *Stilwell v. Trutanich*, 178 Cal. App. 2d 614, 3 Cal. Rptr. 285, 289 (2d Dist. 1960), *Sime v. Malouf*, 95 Cal. App. 2d 82, 96, 212 P.2d 946, 953-54 (2d Dist. 1949); *Keyes v. Nims*, 43 Cal. App. 1, 9, 184 P. 695, 698 (3d Dist. 1919); *Dolan*

ory, venturers can eliminate all risk of unexpected contractual liability by simply prohibiting members from contracting without the consent of all venturers.

The leading case purportedly establishing this principle is *Wrenn v. Moskin*.<sup>56</sup> *Wrenn* stated that in a joint venture, "to find that one is [the] agent of the other, we should find that the authority so to act was given . . . by agreement, express or implied."<sup>57</sup> An examination of the *Wrenn* facts illustrates that this language has been misconstrued by courts and commentators. The court did not intend to assert that apparent authority could never be used to hold co-venturers liable.<sup>58</sup> Indeed, it impliedly

v. Dolan, 107 Conn. 342, 349, 140 A. 745, 748 (1928); *American Mut. Liab. Ins. Co. v. Hanna, Zabriskie & Daron*, 297 Mich. 599, 606-08, 298 N.W. 296, 299 (1941); *Wrenn v. Moskin*, 226 App. Div. 563, 566, 235 N.Y.S. 405, 409 (1929); Note, 33 HARV. L. REV., *supra* note 7, at 854.

<sup>56</sup> 226 App. Div. 563, 235 N.Y.S. 405 (1929). *Wrenn v. Moskin* was relied upon by the court in *American Mut. Liab. Ins. Co. v. Hanna, Zabriskie & Daron*, 297 Mich. 599, 606-08, 298 N.W. 296, 299 (1941), in turn relied upon in *Matanuska Valley Bank v. Arnold* 223 F.2d 778, 780 (9th Cir. 1955). *Dolan v. Dolan*, 107 Conn. 342, 349, 140 A. 745, 748 (1928) relied upon *Keyes v. Nims*, 43 Cal. App. 1, 9, 184 P. 695, 698 (3d Dist. 1919), which, along with *Sime v. Malouf*, 95 Cal. App. 2d 82, 96, 212 P.2d 946, 953-54 (2d Dist. 1949), simply contained unsupported dicta.

The following commentators have also relied upon *Wrenn v. Moskin* in their analyses of mutual agency in the joint venture: Jaeger, *Joint Ventures: Recent Developments*, 4 WASHBURN L.J. 9, 16 n.32 (1964); Jaeger, *supra* note 7, at 153 n.88; Nichols, *supra* note 5, at 447.

<sup>57</sup> *Wrenn v. Moskin*, 226 App. Div. 563, 566, 235 N.Y.S. 405, 409 (1929).

<sup>58</sup> Nor do the cases *Wrenn* relied upon support the literal reading of its language that only real authority can bind a joint venturer. See *Jones v. Gould*, 209 N.Y. 419, 426, 103 N.E. 720, 722 (1913); *Williams v. Gillies*, 75 N.Y. 197, 202 (1878); *Graham Bros. Aktiebolag v. St. Paul Fire & Marine Ins. Co.*, 127 Misc. 403, 404, 216 N.Y.S. 346, 347-49 (1926), *aff'd mem.*, 220 App. Div. 712, 221 N.Y.S. 828 (1927); *Kent v. Universal Film Mfg. Co.*, 200 App. Div. 539, 546, 193 N.Y.S. 838, 843 (1922); *Smith v. First Nat'l Bank*, 151 App. Div. 317, 322, 135 N.Y.S. 985, 989 (1912); *Badley v. Consolidated Bank*, [1888] 38 Ch. 238, 247 (C.A.); and *Strohschein v. Kranich*, 157 Mich. 335, 338, 122 N.W. 178, 179 (1909), cited in Note, 33 Harv. L. Rev., *supra* note 7, at 854, adopted by the *Wrenn* decision.

Dicta in *Jones* indicates that less agency exists between joint venturers than between partners. However the *Jones* court held that real authority existed on the facts before it. *Williams* held a co-venturer was not liable to a third-party because the parties to the transaction intended to have solely the signatory's individual liability; the question of agency was thus not at issue. *Graham Bros. Aktiebolag* indicated less agency exists in the joint venture than in the partnership, but the decision was not based on the existence of a joint venture.

relied upon the doctrine of apparent authority to sustain liability.

In *Wrenn*, three parties entered into a joint venture to speculate in stock. Moskin, one of the venturers, gave Brooks, another venturer, a written power of attorney authorizing Brooks to trade on Moskin's behalf.<sup>59</sup> Brooks showed this instrument to Wrenn Brothers and opened a trading account. After a period of trading, Moskin learned that Brooks was trading at what Moskin considered to be excessive volumes. Moskin then drew up a new power of attorney limiting the amount of authorized trading. Wrenn Brothers, however, never saw this new instrument.

Brooks continued his excessive trading and the account suffered severe losses, creating a large account debt. Wrenn Brothers thereafter sued Moskin, alleging that his status as a co-venturer made him jointly liable on the account debt. In defense, Moskin argued that Brooks lacked authority to trade at the higher levels. The court rejected this argument, holding that Wrenn Brothers was justified in relying upon the original power of attorney<sup>60</sup> because they were never given notice of the subsequent limitation upon Brooks' authority.<sup>61</sup>

The court did not discuss apparent authority, but it could not have reached the result it did without relying on the doctrine. Moskin's second power of attorney removed any real authority Brooks had for trading at "excessive" levels. Thus, Moskin's lia-

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Rather, the court held the mere sharing of profits from a transaction is not sufficient to render the parties mutual agents. In *Kent* the court held the defendant was neither a partner nor a joint venturer; joint venture agency was not at issue. *Smith* stated that liability among joint venturers can be based on either apparent or real authority, though indicating that joint venture agency was narrower than that in partnerships. In *Badley* the question was whether a partnership existed. The court held it did not, finding instead a debtor-creditor relationship; agency issues were not involved. *Strohschein* similarly did not involve a joint venture. The court, failing to find an agreement to share profits and an equal right of control, concluded that the relationship in question was one of joint ownership.

<sup>59</sup> The power of attorney was broadly drawn, stating in relevant part: "I hereby authorize Mr. Henry M. Brooks to buy or sell securities for cash or for margin for the account of Henry M. Brooks and Julius Moskin. This is to continue in force until notification in writing by me to the contrary." *Wrenn v. Moskin*, 226 App. Div. 563, 566, 235 N.Y.S. 405, 407 (1929).

<sup>60</sup> The original power of attorney placed no limits on the volume of authorized trading. *See id.*

<sup>61</sup> *Wrenn v. Moskin*, 226 App. Div. 563, 565-66, 235 N.Y.S. 405, 408 (1929).

bility could only rest upon the theory that Brooks had apparent authority to continue the trading. The arrangement satisfied the test for apparent authority<sup>62</sup> in that Moskin's original power of attorney reasonably misled Wrenn Brothers into honestly believing that Brooks had real authority to continue trading at the prior levels. If the court truly meant that only real authority can bind a co-venturer, Moskin's withdrawal of real authority would have insulated him from liability.

A second holding of *Wrenn* is similarly misleading. In addition to trading at high levels, Brooks withdrew securities from the venture's account and sold them at less than market price, apparently to Brooks' own personal accounts.<sup>63</sup> Moskin claimed that Wrenn Brothers was liable for those losses occasioned by Brooks' trading of venture securities for his personal advantage. In defense Wrenn Brothers argued that the relationship of joint venture automatically gave Brooks authority to trade on any terms. In rejecting this view, the court held that Moskin never granted authority, "actual or apparent," for Brooks to trade for other than the joint venture's benefit.<sup>64</sup> This language does not stand for the proposition that there can never be apparent authority in a joint venture. Rather the facts support the more basic conclusion that no authority existed, apparent or otherwise, for personal trading. In essence, the court concluded Wrenn Brothers could not reasonably have believed Brooks possessed authority to sell joint venture property for his personal benefit. Thus, one element of the common law test for apparent authority<sup>65</sup> was absent.

No court has expressly held that apparent authority is never available to hold co-venturers liable for a member's contracts.<sup>66</sup>

<sup>62</sup> See text accompanying note 48 *supra* and notes 67-73 *infra*.

<sup>63</sup> *Wrenn v. Moskin*, 226 App. Div. 563, 566, 235 N.Y.S. 405, 409 (1929).

<sup>64</sup> *Id.*, at 567, 235 N.Y.S. at 410.

<sup>65</sup> See text accompanying notes 67-70 *infra*.

<sup>66</sup> Cases cited for such a proposition are either unsupported on the facts, *see, e.g.*, *Matanuska Valley Bank v. Arnold*, 223 F.2d 778, 780-81 (9th Cir. 1955); *American Mut. Liab. Ins. Co. v. Hanna, Zabriskie & Daron*, 297 Mich. 599, 606-08, 298 N.W. 296, 299 (1941); or were merely stating dicta, *see, e.g.*, *Sime v. Malouf*, 95 Cal. App. 2d 82, 96, 212 P.2d 946, 953-54 (2d Dist. 1949); *Keyes v. Nims*, 43 Cal. App. 1, 9, 184 P. 695, 698 (3d Dist. 1919); *Dolan v. Dolan*, 107 Conn. 342, 349, 140 A. 745, 748 (1928). These latter three cases involved actions between joint venturers *inter se*; agency issues were not involved.

In *Matanuska Valley Bank*, the court stated: "The power of one joint venturer to bind another must be derived from express authority or by implication

In fact, courts have resorted to common law apparent authority or have analogized to the U.P.A. when called upon to determine venture liability for the unauthorized contracts of a single venturer.

## 2. Application of Common Law Principles of Apparent Authority

There are three common law prerequisites for establishing apparent authority.<sup>67</sup> First, the principal must manifest to a third-party consent to the agent's exercise of such authority, or knowingly permit the agent to exercise such authority.<sup>68</sup> Second, the third-party, acting in good faith, must reasonably believe the agent possesses real authority to act for a principal.<sup>69</sup> Finally, the third-party must actually be deceived and must rely upon

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from the nature of the agreement in the particular circumstances of each case." 223 F.2d at 780. Belying this statement, the court proceeded to consider whether apparent authority existed and concluded that it did not since the third-party knew the first venturer lacked authority. The court therefore declined to hold the second venturer liable. *Id.*, at 780-81.

In *American Mut. Liab. Ins. Co.*, two parties undertook to jointly construct a freeway, agreeing that neither had authority to bind the other absent the other's express consent. Without such consent, one venturer nonetheless contracted for workers' compensation insurance. Upon default in payment of the premiums, the insurance carrier brought suit against each venturer. The issue was whether the non-contracting venturer was liable on the insurance contract. The court held that he was not. In giving effect to the parties intra-venture limitation on each other's authority, the court relied upon *Wrenn*, stating: "[b]ecause there is a joint venture, it does not necessarily follow that there is a mutual agency even as to third parties." 297 Mich. at 606, 298 N.W. at 299. Analysis of the facts under common law agency principles produces the same result of non-liability. At the time of contracting, the insurance agent was unaware he was dealing with a joint venture. 297 Mich. at 607, 298 N.W. at 300. The agent, therefore, could not have formed a reasonable belief that the contracting party was acting on behalf of a co-venturer. Thus, the common law test for apparent authority was not met.

See discussion note 58 *supra*.

<sup>67</sup> *Institute for Business Planning, Inc. v. Standard Life & Accident Ins. Co.*, 242 F. Supp. 100, 107 (W.D. Okla. 1965). See *Jeff-Cole Quarries Inc. v. Bell*, 454 S.W.2d 5, 13 (Miss. 1970); *Boyd v. Leasing Assocs. Inc.*, 516 S.W.2d 485, 489 (Tex. Ct. App. 1974); *Walker v. Pacific Mobile Homes, Inc.*, 68 Wash. 2d 347, 351-52, 413 P.2d 3, 6 (1966); 1 RESTATEMENT (SECOND), *supra* note 1, at § 8, § 27; H. REUSCHLEIN & W. GREGORY, *supra* note 26, § 23, at 57-58; W. SELL, *supra* note 31, § 35, at 25-26.

<sup>68</sup> See note 67 *supra*.

<sup>69</sup> *Id.*



the appearance of authority.<sup>70</sup>

Apparent authority rests exclusively upon the acts or omissions of the principal. The agent's acts alone cannot establish his or her authority to act for the principal.<sup>71</sup> The principal's conduct justifies the principal's ultimate liability. By acquiescing in the appearance of the agent's authority the principal misleads third-parties. Thus, the principal should be liable as though the agent's acts were actually authorized.<sup>72</sup> In this way the law protects third-parties who honestly and reasonably rely on the principal's acts or omissions.<sup>73</sup>

In *Hansen v. Burford*<sup>74</sup> the California Supreme Court applied a common law apparent authority analysis to a joint venture and found no liability, even though the contract involved was "reasonably necessary"<sup>75</sup> to completion of the joint venture project.

<sup>70</sup> *Id.*

<sup>71</sup> *Karauos Compania Naviera S.A. v. Atlantica Export Corp.*, 588 F.2d 1, 10 (2d Cir. 1978), (Friendly, J.); *Walker v. Pacific Mobile Homes, Inc.*, 68 Wash. 2d 347, 351-52, 413 P.2d 3, 5 (1966). See 1 RESTATEMENT (SECOND), *supra* note 1, § 27, at comment (a), § 285; H. REUSCHLEIN & W. GREGORY, *supra* note 26, § 14, at 35, § 23, at 63.

<sup>72</sup> H. REUSCHLEIN & W. GREGORY, *supra* note 26, § 23, at 59. Liability thus rests upon a fault rationale: given the conduct of the principal and the third-party, the loss should be borne by the most culpable party. If the third-party's belief in an appearance of authority is unjustified, the third-party bears the loss. If, however, the principal is responsible for a third-party's reasonable belief in authority, the principal bears the loss.

<sup>73</sup> An undisclosed principal, however, frequently escapes liability because nondisclosure generally precludes apparent authority; that is, if the third-party is unaware of the principal, he or she could not reasonably rely on a belief that the agent is acting for that principal. 1 RESTATEMENT (SECOND), *supra* note 1, § 8, at comment (a). See, e.g., *Misco-United Supply, Inc. v. Petroleum Corp.*, 462 F.2d 75 (5th Cir. 1972); *Hansen v. Burford*, 212 Cal. 100, 297 P. 908 (1931). See generally F. MECHEM, *supra* note 44, at § 285; note 191 *infra*.

<sup>74</sup> 212 Cal. 100, 297 P. 908 (1931).

<sup>75</sup> A venturer is ordinarily presumed to have implied authority to bind co-venturers on contracts reasonably necessary to further the joint venture. But if the contracting member exceeds his or her real authority in making the contract, co-venturers unknown to the third party at the time of contracting are not liable on the contract merely because it relates to the business of the joint venture. *Id.* at 111, 297 P. at 913; *Block v. D. W. Nicholson Corp.*, 77 Cal. App. 2d 739, 744-45, 176 P.2d 739, 743 (1st Dist. 1947); *Priestley v. Peterson*, 19 Wash. 2d 820, 844, 145 P.2d 253, 264-65 (1944). As a result courts must resort to apparent authority principles to determine liability. In contrast, under the U.P.A. a contract's apparent necessity to the business is sufficient to produce partnership liability, notwithstanding an intra-partnership prohibition against

In *Hansen* various parties agreed to develop a real estate project. Two participants, Cole and Owen, furnished the land. The Burfords provided the financing and a final participant, Nowling, supervised the construction.<sup>76</sup> Nowling subsequently purchased lumber for the project. When Nowling failed to pay for the lumber, the lumber company sued the joint venture. The trial court found all members of the joint venture liable; Cole and Owen appealed this decision.

The court found that Nowling lacked real authority to purchase the lumber.<sup>77</sup> It then considered whether Cole and Owen were liable under apparent authority principles. In reversing the trial court, the court held that no apparent authority existed since the third-party seller was unaware, at the time of contracting, that Cole and Owen were involved.<sup>78</sup> Although it may have been an omission for Cole and Owen to place Nowling in charge of the construction,<sup>79</sup> the seller could not have reasonably believed that Nowling had real authority to act for them when their existence was unknown; thus the second element of the apparent authority test<sup>80</sup> was not satisfied and the undisclosed venturers avoided liability.<sup>81</sup>

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entering the contract. See text accompanying notes 84-107 *infra*. Thus, applying the U.P.A. eliminates any need to resort to those apparent authority principles in text accompanying notes 67-71 *supra*.

<sup>76</sup> *Hansen v. Burford*, 212 Cal. 100, 102-04, 297 P. 908, 909-10 (1931).

<sup>77</sup> The court held the joint venture agreement authorized only those purchases that could be paid out of mortgage loan advances. Nowling's purchases exceeded this level and real authority was therefore absent. *Id.* at 110, 297 P. at 910.

<sup>78</sup> *Id.* at 111-112, 297 P. at 913.

<sup>79</sup> See generally test in text accompanying notes 67-70 *supra*.

<sup>80</sup> See text accompanying note 69 *supra*.

<sup>81</sup> The Fifth Circuit Court of Appeals reached a similar result in *Misco-United Supply, Inc. v. Petroleum Corp.*, 462 F.2d 75 (5th Cir. 1972). As in *Hansen*, the plaintiff was a supplier of materials to a joint venture, here comprised of a Mr. Pinner and the Petroleum Corporation (Petco). Pinner and Petco were held to be joint venturers as to one oil well but not as to other wells. *Id.* at 77, 80. Pinner purchased certain equipment in order to complete the project, but did not pay the seller. Petco sought to avoid liability by arguing it had withdrawn from the venture prior to the delivery of the equipment. Plaintiff argued that withdrawal did not affect Petco's liability because Petco gave no notice of its action. The court agreed that the withdrawal was ineffective to avoid liability absent notice, but found Petco free of liability because the plaintiff was unaware, at the time of contracting, that Petco was involved in the venture. *Id.* at 80. As in *Hansen*, the seller's lack of knowledge of the

By focusing upon the potential defendant's<sup>82</sup> conduct,<sup>83</sup> the common law gives each venturer some control, through regulation of personal conduct, over his or her exposure to liability on unauthorized contracts. If a contract is beyond the real authority of a member, co-venturers will be liable only when the third-party establishes that he or she reasonably and honestly believed the contracting member had authority to bind the others. However, some courts avoid this inquiry into conduct and beliefs by resorting to the U.P.A. to determine venture liability for unauthorized contracts.

### 3. Application of U.P.A. Rules of Apparent Authority

The U.P.A. modified the common law in several respects.<sup>84</sup> In contrast to the common law rules regarding association liability,<sup>85</sup> the U.P.A. requires merely that the third-party prove that the act in question was "for apparently carrying on in the usual way the business of the partnership."<sup>86</sup> The U.P.A., therefore, does not focus on the principal's conduct or on third-party impressions;<sup>87</sup> rather it focuses upon the *character* of the contract

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undisclosed venturer's participation precluded any honest belief that Pinner had real authority to bind Petco.

Other cases following a common law analysis in determining joint venture liability to third parties are: *Gertz v. Selin*, 112 Ariz. 562, 563-64, 544 P.2d 1077, 1079 (1976); *Foote v. Posey*, 164 Cal. App. 2d 210, 216-17, 330 P.2d 651, 654 (1st Dist. 1958). In each case the third-party had knowledge of the absent venturer's existence, the common law test for apparent authority was satisfied, and the court thus held all venturers liable. *See generally* *Etzkorn v. Levy*, 159 N.Y.S. 801, 802 (App. T. 1916) (denying recovery to third-party because an intra-venture restriction on authority precluded venture liability absent a "holding out" of the contracting venturer as an agent of the co-venturer); *Roegge, Talbot & Zinman, Real Estate Equity Investments and the Institutional Lender: Nothing Ventured, Nothing Gained*, 39 *FORDHAM L. REV.* 579, 594-95 (1971) (stating view that a venturer's power to bind co-venturers is governed by ordinary agency rules).

<sup>82</sup> Under an agency analysis this would be the principal. *See generally* text accompanying notes 67-71 *infra*.

<sup>83</sup> *See* text accompanying notes 71-73 *supra*.

<sup>84</sup> *But see* H. REUSCHLEIN & W. GREGORY, *supra* note 26, § 194, at 226.

<sup>85</sup> *See* text accompanying notes 45-48 and 67-73 *supra*.

<sup>86</sup> U.P.A. § 9(1), *supra* note 3, at 132. If a partner actually lacks authority to do an act, the partnership is not bound to third-parties who had notice of that restriction. *Id.* Subsections (3) and (4) place certain limitations, not relevant here, upon the authority granted in subsection (1).

<sup>87</sup> Compare the common law standard in text accompanying notes 67-70

involved.<sup>88</sup> Liability results from membership status<sup>89</sup> as long as the contract is objectively "for apparently carrying on in the usual way the business of the partnership."<sup>90</sup> Thus, an undisclosed partnership can be bound by the acts of a single partner.<sup>91</sup> The plaintiff no longer must establish that a reasonable and prudent person would have believed that the acting partner had authority to contract.<sup>92</sup> The plaintiff must simply show that the contract in question was objectively<sup>93</sup> "for apparently carrying on" the partnership business. The plaintiff can prove this by relying upon either the conduct of the partnership involved or that of similar partnerships.<sup>94</sup>

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*supra*.

<sup>88</sup> See notes 92-94 and accompanying text *infra*.

<sup>89</sup> Orlopp v. Willardson Co., 232 Cal. App. 2d 750, 754-55, 43 Cal. Rptr. 125, 128-29 (5th Dist. 1965) (applying rule to joint venture).

<sup>90</sup> U.P.A. § 9(1), *supra* note 3, at 132. See notes 92-94 and accompanying text *infra*.

<sup>91</sup> Orlopp v. Willardson Co., 232 Cal. App. 2d 750, 755, 43 Cal. Rptr. 125, 128-29 (5th Dist. 1965); Gardenhire v. Ray, 302 Ill. App. 268, 275, 23 N.E.2d 927, 930 (1939)(dicta); Bowman & Steadman v. Farmers' State Bank, 168 Minn. 221, 223-24, 209 N.W. 863, 864 (1926). Compare the result under the common law approach, note 73 *supra*.

<sup>92</sup> See, e.g., Ellis v. Mihelis, 60 Cal. 2d 206, 384 P.2d 7, 32 Cal. Rptr. 415 (1963); Douglas Reservoirs Water Users Ass'n v. Maurer & Garst, 398 P.2d 74 (Wyo. 1965). In each case the court concluded, with no reference to the third parties actual or possible beliefs, that certain acts failed to satisfy the "for apparently carrying on" test.

Whether the third party was misled does present an issue, but only by way of an affirmative defense. Section 9 states the partnership will not be liable to a third-party who has "knowledge" the partner with whom he or she is dealing has no authority. U.P.A., *supra* note 3, at 132. See, e.g., De Santis v. Miller Petroleum Co., 29 Cal. App. 2d 679, 683-84, 85 P.2d 489, 491 (2d Dist. 1938) (construing CAL. CIV. CODE § 2403, current version at CAL. CORP. CODE § 15009 (West 1977) [U.P.A. § 9]. Section 3(1) of the U.P.A. defines knowledge as "actual knowledge . . . [or] knowledge of such other facts as in the circumstances shows bad faith." U.P.A. § 3(1), *supra* note 3, at 14. Thus, to preclude liability the partnership can allege that the third-party had sufficient information relating to the partner's (agent's) lack of authority so as to render the act of entering the contract one of bad faith. The issue of the third-party's good faith is thus removed from the plaintiff's case-in-chief and its negation becomes an affirmative defense.

<sup>93</sup> See initial cases note 92, *supra*.

<sup>94</sup> The plaintiff third-party may meet the "for apparently carrying on" test by proving the act is "usual" in either this particular partnership (e.g. by proving past similar conduct), or in other firms of a similar business. Burns v. Gonzalez, 489 S.W. 2d 128, 131 (Tex. Ct. App. 1969). "The case law under the

*Medak v. Cox*<sup>95</sup> reflects the judicial tendency to analogize to U.P.A. principles when determining joint venture contract liability.<sup>96</sup> Plaintiff, an architect, sued a real estate development joint venture, comprised of a corporation and a partnership, for payment for services rendered under contract. The only signatories to the contract were the plaintiff and the president of the corporate venturer.<sup>97</sup> However, the joint venture agreement provided that no obligation was to be undertaken without the consent of all venturers.<sup>98</sup> Thus, the members of the partnership venturer argued that the contract was unauthorized and therefore not binding on them.<sup>99</sup> Assuming the validity of the restrictive clause, the court found that plaintiff had no notice of the restriction.<sup>100</sup> Analogizing to California's enactment of Section 9(1) of the U.P.A.,<sup>101</sup> it held that the defendant venturers were liable because the contract was "reasonably necessary to carry out the enterprise."<sup>102</sup> The court provided no justification or reasoning for its approach, apparently failing to see any material distinc-

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U.P.A. generally interprets the phrase broadly so that conduct of similar partnerships controls rather than that of the specific partnership." H. REUSCHLEIN & W. GREGORY, *supra* note 26, § 196, at 295 (footnote omitted). Professors Reuschlein and Gregory argue this is the "better view" in that it "protects . . . creditors from the burden of ferreting out novel or unique practices." *Id.*

Compare this to the joint venture setting. Given its temporal nature, the joint venture probably has no history of conduct. Plaintiffs must then hope the joint venture they seek to hold liable is standardized, e.g., real estate or oil development ventures, so that proof of conduct in similar ventures is available.

<sup>95</sup> 12 Cal. App. 3d 70, 90 Cal. Rptr. 452 (2d Dist. 1970).

<sup>96</sup> See, e.g., *id.*; *Rayonier, Inc. v. Polson*, 400 F.2d 909, 914-15 (9th Cir. 1968); *Wood v. Western Beef Factory, Inc.* 378 F.2d 96, 99 (10th Cir. 1967); *Gluskin v. Atlantic Sav. & Loan Ass'n*, 32 Cal. App. 3d 307, 316-17, 108 Cal. Rptr. 318, 324-25 (2d Dist. 1973); *Smalley v. Baker*, 262 Cal. App. 2d 824, 836-37, 69 Cal. Rptr. 521, 530 (1st Dist. 1968); *Orlopp v. Willardson Co.*, 232 Cal. App. 2d 750, 754-55, 43 Cal. Rptr. 125, 128-29 (5th Dist. 1965); *Carlson v. Boryla*, 490 P.2d 700, 703 (Colo. Ct. App. 1971); *State v. Frank D. Malone Constr. Co.*, 81 S.D. 1, 4, 129 N.W.2d 900, 901-02 (1964); *Heinrich v. Wharton County Livestock, Inc.*, 557 S.W.2d 830, 833 (Tex. Ct. App. 1977).

<sup>97</sup> *Medak v. Cox*, 12 Cal. App. 3d 70, 75, 90 Cal. Rptr. 452, 454 (2d Dist. 1970).

<sup>98</sup> *Id.* at 76, 90 Cal. Rptr. at 455.

<sup>99</sup> *Id.* at 75-76, 90 Cal. Rptr. at 454-55.

<sup>100</sup> *Id.* at 76, 90 Cal. Rptr. at 455.

<sup>101</sup> CAL. CORP. CODE § 15009(1) (West 1977).

<sup>102</sup> *Medak v. Cox*, 12 Cal. App. 3d 70, 76, 90 Cal. Rptr. 452, 455 (2d Dist. 1970) (quoting *Smalley v. Baker*, 262 Cal. App. 2d 824, 837, 69 Cal. Rptr. 521, 530 (1st Dist. 1968)).

tion between partnership and joint venture law.<sup>103</sup>

In analogizing to the U.P.A. to determine joint venture liability, courts focus on whether the unauthorized contract was necessary to complete the project.<sup>104</sup> If it was, all venturers are liable regardless of any agreements restricting liability *inter se*,<sup>105</sup> unless the third-party had notice of the restriction.<sup>106</sup> This focus

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<sup>103</sup> See generally cases cited note 8 *supra*.

<sup>104</sup> Courts appear to be using the U.P.A. § 9(1) "for apparently carrying on in the usual way" standard interchangeably with the "reasonably necessary" standard traditionally applied to joint ventures. See *Gluskin v. Atlantic Sav. & Loan Ass'n*, 32 Cal. App. 3d 307, 316, 108 Cal. Rptr. 318, 324-25 (2d Dist. 1973); *Medak v. Cox*, 12 Cal. App. 3d 70, 76 n.2, 90 Cal. Rptr. 452, 455 n.2 (2d Dist. 1970); *Smalley v. Baker*, 262 Cal. App. 2d 824, 836-37, 69 Cal. Rptr. 521, 530 (1st Dist. 1968). Originally there was a material difference between the two. Under the U.P.A. § 9(1) standard, the fact the contract relates to the association's business produces liability, notwithstanding an intra-association agreement prohibiting the act (unless the third party has notice of the restriction). See U.P.A. § 9, *supra* note 3, at 132. The original statement of the "reasonably necessary" test, however, stated that if there was an intra-venture agreement removing real authority for the act in question, undisclosed venturers would not be liable merely because the contract related to the joint venture's business; the restriction, however, would not be a defense if the venturer's existence was disclosed. See *Hensen v. Burford*, 212 Cal. 100, 111, 297 P. 908, 913 (1931); *Block v. D. W. Nicholson Corp.*, 77 Cal. App. 2d 739, 744-45, 176 P.2d 739, 743 (1st Dist. 1947); *Priestley v. Peterson*, 19 Wash. 2d 820, 844, 145 P.2d 253, 264-65 (1944). That portion of the rule pertaining to undisclosed venturers inexplicably disappeared from subsequent references. See *Taylor v. Brindley*, 164 F.2d 235, 241 (10th Cir. 1947); *Orlopp v. Willardson Co.*, 232 Cal. App. 2d 750, 755, 43 Cal. Rptr. 125, 128-29 (5th Dist. 1965); *Rae v. Cameron*, 112 Mont. 159, 173, 114 P.2d 1060, 1066 (1941); *State v. Frank D. Malone Constr. Co.*, 81 S.D. 1, 4, 129 N.W.2d 900, 901 (1964). See generally *Rayonier, Inc. v. Polson*, 400 F.2d 909, 914 (9th Cir. 1968); *Wood v. Western Beef Factory, Inc.*, 378 F.2d 96, 99 (10th Cir. 1967); *Bushman Constr. Co. v. Air Force Academy Hous., Inc.*, 327 F.2d 481, 484-85 (10th Cir. 1964); *Gluskin; Medak; Smalley; Carlson v. Boryla*, 490 P.2d 700, 703 (Colo. Ct. App. 1971). Cf. *Lindner v. Friednash*, 160 Cal. App. 2d 511, 519, 325 P.2d 612, 616-17 (2d Dist. 1958) (recognizing earlier statement of rule but nonetheless adopting new view that as a general rule undisclosed venturers are liable on contracts considered "reasonably necessary"); *Engineering Serv. Corp. v. Longridge Inv. Co.*, 153 Cal. App. 2d 404, 415-16, 314 P.2d 563, 569-70 (2d Dist. 1957) (to same effect).

<sup>105</sup> See *Medak v. Cox*, 12 Cal. App. 3d 70, 76-77, 90 Cal. Rptr. 452, 455 (2d Dist. 1970); *State v. Frank D. Malone Constr. Co.*, 81 S.D. 1, 4, 129 N.W.2d 900, 901-02 (1964).

<sup>106</sup> U.P.A. § 9(1), *supra* note 3, at 132; *Rayonier, Inc. v. Polson*, 400 F.2d 909, 914 (9th Cir. 1968) (applying Washington law). See *Taylor v. Brindley*, 164 F.2d 235, 242 (10th Cir. 1947); *Ingalls Iron Works Co. v. Fehlhaber Corp.*, 327

on the character of the contract differs significantly from the common law apparent authority requirement that the third-party establish a reasonable belief that the contracting venturer had real authority to act.<sup>107</sup> This difference in required proof highlights the importance of adopting a balanced approach to apparent authority in the joint venture.

### III. A SUGGESTED VIEW OF APPARENT AUTHORITY IN THE JOINT VENTURE

The present inconsistent treatment of joint venture agency<sup>108</sup> is unwarranted. The uncertainty inherent in three conflicting approaches confuses venturers and jeopardizes the commercial vitality of the joint venture as a vehicle for business. The application of one rule would provide needed stability and predictability. Ideally, such a rule would strike a proper balance between the venturers' interests in reduced liability<sup>109</sup> and third-parties' reliance interests. Of the three current theories, two fail to achieve this goal.<sup>110</sup> The remaining theory, common law agency, most appropriately balances the interests of all parties.

#### A. *Deficient Theories of Apparent Authority In The Joint Venture*

The "no apparent authority" rule<sup>111</sup> and the U.P.A. rule<sup>112</sup> both tip the balance of interests too far in one direction. The U.P.A. rule is too solicitous of third-party rights and, further, is not clearly intended to govern joint ventures.<sup>113</sup> The "no apparent authority" rule, on the other hand, fails to even minimally protect creditors or other third-parties.<sup>114</sup> While these two theories address relevant concerns, they fail to properly weigh these

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F. Supp. 272, 284 (S.D.N.Y. 1971). Notice includes both actual knowledge and knowledge of such circumstances that shows the third-party should have known of the limits. *Rayonier, Inc. v. Polson*, 400 F.2d at 914. Notice also produces non-liability under common law. See note 50 *supra*.

<sup>107</sup> See text accompanying notes 67-70 *supra*.

<sup>108</sup> See text accompanying notes 51-107 *supra*.

<sup>109</sup> See text accompanying notes 26-28 *supra*.

<sup>110</sup> See text accompanying notes 111-141 *infra*.

<sup>111</sup> See text accompanying notes 55-66 *supra*.

<sup>112</sup> See text accompanying notes 84-107 *supra*.

<sup>113</sup> See text accompanying notes 119-132 *infra*.

<sup>114</sup> See text accompanying notes 115-118 *infra*.

concerns against one another. The result is that the "no apparent authority" rule is inequitable, while the U.P.A. rule is inappropriate to the joint venture setting.

### 1. Inequity of the "No Apparent Authority" Rule

The literal reading of *Wrenn v. Moskin*,<sup>115</sup> that no apparent authority exists in the joint venture, is inherently unfair to third-parties. In recognizing only real authority,<sup>116</sup> the rule validates only those contracts which are both reasonably necessary to the business and not made in contravention of an intra-venture agreement. If real authority is expressly restricted *inter se*, the venture escapes liability regardless of the extent of third-party reliance on the appearance of authority. Third-parties thus have only one means of protection—they must ask all joint venture agents about the scope of their authority and must contact the agents' principals, the other venturers, to verify the representations. The *Wrenn* rule thus inadequately considers legitimate third-party reliance interests<sup>117</sup> and creates an unreasonable duty of inquiry. This imbalance renders the rule unviable.<sup>118</sup>

### 2. Inappropriateness of the U.P.A. Rule

The application of U.P.A. Section 9's liability standard is

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<sup>115</sup> 226 App. Div. 563, 235 N.Y.S. 405 (1929). See text accompanying notes 56-65 *supra*.

<sup>116</sup> Express authority will always create vicarious liability. See text accompanying notes 36-37 *supra*. In the absence of express authority liability can often be premised on implied authority. Thus, if a contract is reasonably necessary to a venture the law presumes that implied authority exists to enter it. See text accompanying notes 38-41 *supra*. A restriction among venturers prohibiting such conduct destroys implied authority by removing the analytical underpinning of the theory—consent. The only possible theory remaining for venture liability is apparent authority. If unavailable, as is true under this rule, the venture is not liable. For example, A could enter a store, inform the third-party seller that the P & A joint venture is engaged in constructing a housing development and proceed to charge the cost of building materials to the joint venture's account. Even though the seller, in extending credit, relies upon P's participation in the venture, the "no apparent authority" rule allows P to escape liability if an intra-venture restriction, unknown to the seller, negated A's otherwise existing implied real authority to make the purchase.

<sup>117</sup> See 2 R. ROWLEY & D. SIVE, *supra* note 5, § 52.55, at 539.

<sup>118</sup> See note 66 and accompanying text *supra*.



similarly flawed. Section 9 validates all contracts made "for apparently carrying on" the venture's business "in the usual way."<sup>119</sup> This approach weighs too heavily in favor of third-parties and disregards the valid commercial need for an informal business model possessing a reduced risk of vicarious liability. Further, courts adopting this approach unthinkingly assume that the U.P.A. was intended to govern joint ventures.

In spite of the joint venture's diverse commercial applications,<sup>120</sup> the apparent similarity between it and the partnership often results in a failure to distinguish the two associations. The numerous parallels of joint venture and partnership law<sup>121</sup> facilitate judicial laxity in this regard. Further, some commentators argue that the joint venture is, and should be treated as, a partnership.<sup>122</sup> However, it is incorrect to apply the U.P.A. to joint ventures since the U.P.A. definition of "partnerships" excludes joint ventures.

Under the U.P.A., a partnership is "an association of two or more persons to *carry on* as co-owners a *business* for profits."<sup>123</sup> The act defines "business" as "every trade, occupation, or profession."<sup>124</sup> Since a person's trade, occupation or profession is generally one's livelihood,<sup>125</sup> it strains the language to interpret 'carrying on a business' as encompassing associations of a more limited nature such as single commercial ventures.<sup>126</sup> The lan-

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<sup>119</sup> U.P.A. § 9(1), *supra* note 3, at 132. See text accompanying notes 84-107 *supra*.

<sup>120</sup> See text accompanying notes 20-24 *supra*.

<sup>121</sup> See generally 2 R. ROWLEY & D. SIVE, *supra* note 5, § 52.14, at 481-83; Jaeger, *supra* note 7, at 143-50.

<sup>122</sup> See Mechem, *supra* note 8; Nichols, *supra* note 5; Comment, *The Business Joint Venture in Louisiana*, 25 TUL. L. REV. 382 (1951); Comment, *The Joint Venture: Problem Child of Partnership*, 38 CALIF. L. REV. 860 (1950); Comment, 35 MICH. L. REV. 297 (1936).

<sup>123</sup> U.P.A. § 6(1), *supra* note 3, at 22 (emphasis added).

<sup>124</sup> U.P.A. § 2, *supra* note 3, at 12.

<sup>125</sup> Comment, *supra* note 7, at 118.

<sup>126</sup> In *Walker, Mosby & Calvert, Inc. v. Burgess*, 153 Va. 779, 151 S.E. 165 (1930) the court agreed, refusing to find a partnership on grounds, *inter alia*, that the transaction was for a single act, stating: "'Carrying on' a business is a well-defined term, and means the conduct of a business for a sustained period for the purposes of livelihood or profit, and not merely the carrying on of some single transaction." *Id.* at 787, 151 S.E. at 167. See 2 R. ROWLEY & D. SIVE, *supra* note 5, § 52.14, at 481-84; Note, 33 HARV. L. REV., *supra* note 7, at 853-54; cf. *Cooper Mfg. Co. v. Ferguson*, 113 U.S. 727, 733-34 (1885) (the performance of a single act within a state does not constitute the conduct of business

guage of the U.P.A. indicates that its drafters contemplated a continuing, stable business relationship rather than the joint venture, which is a single, limited undertaking.<sup>127</sup>

The uniform act's failure to account for joint ventures raises a strong inference that the U.P.A. was not intended to affect the law regarding joint ventures. The drafters of the act certainly were aware of the joint venture; numerous cases distinguishing or recognizing the association existed when the U.P.A. was drafted.<sup>128</sup> The inference is buttressed by the fact that only one of the forty-nine states adopting the U.P.A.<sup>129</sup> amended the act to expressly include joint ventures.<sup>130</sup> Moreover, the joint ven-

such that state corporation code applies); *Home Lumber Co. v. Hopkins*, 107 Kan. 153, 162, 190 P. 601, 605 (1920)(to same effect).

Courts have indicated that partnerships may exist for single undertakings. *See* note 19 *supra*. This conclusion, however, is generally unsupported by the facts of such cases. *See id.*

<sup>127</sup> The joint venture, in contrast to the partnership, does not involve continuity—a joint venture is an association to carry out a *single business enterprise* for profit. *See* note 5 *supra*. The parties' association is temporary, *see* note 26 *supra*, and venturers often have separate business interests. Comment, *supra* note 7, at 122.

<sup>128</sup> The model U.P.A. was drafted between 1902 and 1914. 1 BARRETT & SEAGO, *PARTNERS AND PARTNERSHIPS: LAW AND TAXATION* § 4, at 14 (1956). The following joint venture cases existed at that time—*McCreery v. Green*, 38 Mich. 172, 179 (1878); *Cooper v. Frierson*, 48 Miss. 300, 310 (1873); *Davis v. Richardson & May*, 45 Miss. 499, 508; *Toof, Phillips & Cirode v. Duncan*, 45 Miss. 48, 56 (1871); *Jackson v. Hooper*, 76 N. J. Eq. 185, 197, 74 A. 130, 135-36 (1909); *Jones v. Gould*, 209 N.Y. 419, 426, 103 N.E. 720, 722 (1913); *Williams v. Gillies*, 75 N.Y. 197, 202 (1878); *China & Japan Trading Co. v. Provand*, 155 App. Div. 171, 176, 140 N.Y.S. 79, 83 (1913); *Smith v. First Nat'l Bank of Albany*, 151 App. Div. 317, 322, 135 N.Y.S. 985, 989 (1912); *Rice v. Peters*, 128 App. Div. 776, 778, 113 N.Y.S. 40, 41 (1908); *Weldon v. Brown*, 84 App. Div. 482, 485, 82 N.Y.S. 1051, 1053 (1903); *Burkardt v. Walsh*, 49 App. Div. 634, 635, 64 N.Y.S. 779, 780-81 (1900); *O'Hara v. Harman*, 14 App. Div. 167, 171, 43 N.Y.S. 556, 558 (1897); *Thacke v. Hershheim*, 115 N.Y.S. 216, 218 (App. T. 1909).

<sup>129</sup> The forty-nine states that have enacted the U.P.A. are listed in 6 U.L.A., *supra* note 3, at 1 (West Cum. Supp. 1980). Louisiana is the only state that has not enacted the U.P.A. *See id.*

<sup>130</sup> *See* HAW. REV. STAT. § 425-106(1) (Supp. 1975): "A partnership is an association (including a joint venture) of two or more persons to carry on as co-owners a business for profit." Legislatures are certainly aware of joint ventures. In California, for example, "joint venture" appears in at least six separate codes, but not within the state's version of the U.P.A. *Compare* CAL. CORP. CODE § 15006 (West 1977) *with* CAL. BUS. & PROF. CODE § 7029 (West 1975); CAL. CORP. CODE §§ 207(h), 317(a), 7140 (j) (West. Cum. Supp. 1979); CAL. FIN.

ture continues to exist in judicial opinions<sup>131</sup> as an entity with numerous distinct legal rules.<sup>132</sup>

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CODE § 113 (West 1968); CAL. PUB. RES. CODE § 3316.1 (West 1972); CAL. REV. & TAX. CODE § 6005 (West 1970); CAL. UNEMP. INS. CODE § 1057, 1058 (West 1972).

The argument that the U.P.A. does not apply to joint ventures is undercut slightly by the fact that "persons," as used in the partnership definition section of § 6(1), *see* text accompanying note 123 *supra*, is defined by § 2 of the act to include "individuals, partnerships, corporations, and other associations." U.P.A. § 2, *supra* note 3, at 12 (emphasis added). In addition, the drafter of the uniform act has expressed the view that "partnership" encompasses all business associations except those that are statutory in origin. Lewis, *The Uniform Partnership Act*, 24 YALE L.J. 617, 622 (1915). Since the formation of a joint venture is not dependent upon the occurrence of a statutory event such as incorporation, this view impliedly holds joint ventures to be partnerships.

<sup>131</sup> *See* cases cited in notes 7 & 8 *supra*.

<sup>132</sup> Various legal distinctions between the joint venture and partnership are recognized. For example, partners generally must seek an accounting as a condition precedent to suing one another for breach of a partnership agreement. *Pilch v. Milikin*, 200 Cal. App. 2d 212, 222, 19 Cal. Rptr. 334, 339-400 (2d Dist. 1962). No such requirement exists for joint ventures. 2 R. ROWLEY & D. SIVE, *supra* note 5, § 52.45, at 520 n.94. Partnerships are subject to dissolution at will or upon the death of a partner. U.P.A. § 31, *supra* note 3, at 376. A joint venture, on the other hand, is generally held to continue until its purpose is accomplished or manifestly cannot be accomplished. *San Francisco Iron & Metal Co. v. American Milling & Indus. Co.*, 115 Cal. App. 238, 248, 1 P.2d 1008, 1012 (1st Dist. 1931); 2 R. ROWLEY & D. SIVE, *supra* note 5, § 52.36, at 509 n.14. A further difference lies in the fiduciary duty which partners and joint venturers owe *inter se*. While joint venturers, like partners, owe each other a fiduciary duty as to matters relating to the specific undertaking, *Ditis v. Ahlvin Constr. Co.*, 408 Ill. 416, 428, 97 N.E.2d 244, 250 (1951); *see, e.g. Himoff Industries Corp. v. Srybnik*, 19 N.Y.2d 273, 278-79, 225 N.E.2d 756, 759 (1967); or in the formation of the association, *Herring v. Offutt*, 266 Md. 593, 597, 295 A.2d 876, 879 (1972); the fiduciary duty is less with respect to outside and possibly competing interests. "[I]n a partnership the fiduciary duty prevents any competition by a partner with the partnership business; in the joint venture it is understood at the outset that the individual business pursuits of the members are not thus to be restricted by the mere union of the parties in an isolated venture." Comment, *supra* note 7, at 122; *see* 2 R. ROWLEY & D. SIVE, *supra* note 5, § 52.23, at 495-96 (see discussion of cases therein). *But see Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545 (1928) where the court concluded a fiduciary relationship existed between joint venturers involved in a real estate venture. Thus, the court held one venturer to be a constructive trustee for the real estate venture of a separately acquired lease. *Id.* at 466-67, 164 N.E. at 547-48. Professor Mechem, however, argued that the case actually involved a partnership in that the purpose of the association was to conduct a business for a least twenty years. Mechem, *supra* note 8, at 666 n.65.

For discussions concerning other distinctions, *see generally*, Jaeger, *supra*

The joint venture provides an elasticity attractive to investment capital undertakings. It diffuses risk by allowing parties to combine their separate resources to complete a limited task.<sup>133</sup> Moreover, it offers parties a limited and informal<sup>134</sup> association; venturers need not merge their business or financial resources except to the extent necessary to complete the project.<sup>135</sup> Thus, use of the joint venture model allows venturers the freedom to conduct separate, and perhaps competing, businesses.<sup>136</sup> To the extent these desires dictate the business model utilized, application of the U.P.A.'s Section 9 would remove much of the incentive to use the joint venture. If a real estate owner, for example, is liable for *any* unauthorized contract a co-venturer builder enters that is "for apparently carrying on"<sup>137</sup> the venture's real estate development,<sup>138</sup> that owner may be reluctant to enter the venture. Similarly, if an oil company is liable for *any* contract that a co-venturer driller enters which is "for apparently carrying on"<sup>139</sup> the venture,<sup>140</sup> the oil company may refuse financial backing and the exploration will not occur.

The continued judicial use of the joint venture designation evidences a reluctance to subsume the joint venture into partnership law. This judicial reluctance mirrors the commercial insistence that a business vehicle of limited scope exist. Although it maximizes third-party protection, applying the U.P.A.'s Section 9 may well eliminate projects typically conducted as joint ventures.<sup>141</sup> Thus, considering the need for an informal business vehicle with limited liability, the application of the U.P.A. strikes

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note 7; Mechem, *supra* note 8; Comment, *supra* note 7.

<sup>133</sup> Nichols, *supra* note 5, at 428-29. See note 26 *supra*.

<sup>134</sup> For example, there is no need for a suit for accounting or winding-up to terminate a joint venture. Jaeger, *supra* note 56, at 43-44. See discussion note 132 *supra*.

<sup>135</sup> Comment, *supra* note 7, at 120. See generally note 26 *supra*.

<sup>136</sup> See generally note 132 *supra*.

<sup>137</sup> U.P.A. § 9(1), *supra* note 3, at 132. See text accompanying notes 84-107 *supra*.

<sup>138</sup> See generally cases cited note 20 *supra*.

<sup>139</sup> U.P.A. § 9(1), *supra* note 3, at 132. See text accompanying notes 84-107 *supra*.

<sup>140</sup> See generally cases cited note 23 *supra*.

<sup>141</sup> See text accompanying notes 133-140 *supra*.

the balance too far in favor of third-party protection.

*B. Common Law Rules of Agency: An Equitable Approach*

Common law agency concepts, developed in commercial transactions over the last several centuries, can provide guidelines for the joint venture that properly balance all interests. Under common law principles, reasonable third-party reliance on the appearance of authority is protected while the venturers' desire for a lowered risk of liability is recognized. Granting the joint venture a lessened profile of liability parallels the historical tendency to grant a narrow scope of liability to personal<sup>142</sup> and business<sup>143</sup> associations of a limited nature.

In individual transactions, agency law follows that trend by differentiating between a general and a special agent.<sup>144</sup> The lowered profile of risk accorded the special agency flows from its limited nature. A *general* agent is one authorized to conduct a series of transactions involving continuity of service.<sup>145</sup> A *special* agent, on the other hand, is authorized to conduct merely a single transaction, or a series of transactions not involving continuity of service.<sup>146</sup> Thus, a general agent's implied authority is greater than a special agent's. Moreover, a general agent's authority is presumed, whereas a special agent's authority must be proven.<sup>147</sup> This authority can be proven by recourse to actual authority or to customs which justify reliance upon an impression of authority.<sup>148</sup>

In business associations, the common law distinguished between agency in trading partnerships and that in non-trading partnerships on the basis of the limited nature of the latter.<sup>149</sup> A

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<sup>142</sup> See text accompanying notes 144-148 *supra*.

<sup>143</sup> See text accompanying notes 149-158 *infra*.

<sup>144</sup> See note 44 *supra*.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> See *Matanuska Valley Bank v. Arnold*, 223 F.2d 778, 780 (9th Cir. 1955); *Los Angeles Nat'l Bank v. Wallace*, 101 Cal. 478, 481, 36 P. 197, 199 (1894); *Judge v. Braswell*, 76 Ky. (13 Bush) 67, 74, 75 (1877); *Cooper v. Frierson*, 48 Miss. 300, 309-10 (1873); *Davis v. Richardson & May*, 45 Miss. 499, 507, 508 (1871); *Toof, Phillips & Cirode v. Duncan*, 45 Miss. 48, 56 (1871); *Boonville Nat'l Bank v. Thompson*, 399 Mo. 1049, 1065, 99 S.W.2d 93, 102 (1936); *Reid v. Linder*, 77 Mont. 406, 418, 251 P. 157, 161 (1926); *First Nat'l Bank v. Farson*,

trading<sup>150</sup> partnership was one involved in the purchase and resale of goods.<sup>151</sup> In a trading partnership, any partner could bind the others to contracts relating to, or appearing to relate to, the partnership business.<sup>152</sup> A legal presumption of authority existed.<sup>153</sup> A different rule, however, governed non-trading<sup>154</sup> part-

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226 N.Y. 218, 222, 123 N.E. 490, 491 (1919); *Burns v. Gonzalez*, 439 S.W.2d 128, 132-33 (Tex. Ct. App. 1969); *Swanson v. Webb Tractor & Equip. Co.*, 24 Wash. 2d 631, 649-50, 167 P.2d 146, 155 (1946); *Hyland v. City Garbage & Contracting Co.*, 9 Wash. 2d 163, 168, 114 P.2d 153, 155 (1941); *Rue v. Merrill*, 42 Wyo. 497, 506-08, 297 P. 375, 377 (1931); *Mandelberg v. Adams & Anor*, [1931] 31 N.S.W. 50 (Dist. Ct. App.); *Higgins v. Beauchamp* [1914] 3 K.B. 1192; *Yates v. Dalton*, [1858] 118 Rev. R. 896; *Hedley v. Bainbridge*, [1842] 3 Q.B. 316, 114 Eng. Rep. 527; *Bunarsee Dass v. Gholam Hossein*, [1870] 13 Moo. Ind. App. 358, 20 Eng. Rep. 585 (P.C. 1870)(India); text accompanying notes 150-158 *infra*.

It would appear enactment of the U.P.A. may have abrogated the common law distinction between trading and non-trading partnerships. *See Jacobson v. Lamb*, 91 Cal. App. 405, 411, 267 P. 114, 116 (1st Dist. 1928). Yet certain cases recognizing the distinction were decided after enactment of the U.P.A. *See Burns* (Texas enacted the U.P.A. in 1961; *see chart*, 6 U.L.A., *supra* note 3, at 1 (West Cum. Supp. 1980)); *Swanson* (Washington enacted the U.P.A. in 1945; *see id.*); *Rue* (Wyoming enacted the U.P.A. in 1917; *see id.*). Only *Jacobson* expressly held that enactment of the U.P.A. abrogated the distinction.

Enactment of the U.P.A. may not be determinative. The trading versus non-trading partnership distinction grew out of the law merchant. *See Judge, First Nat'l Bank, Swanson, Rue*. Because the U.P.A. expressly provides that any case not provided for in the act shall be governed by, *inter alia*, the law merchant (*see* U.P.A. § 5, *supra* note 3, at 19) the distinction may thus still be valid.

<sup>150</sup> A trading partnership also known as a "mercantile" or "general" partnership. *See Swanson v. Webb Tractor & Equip. Co.*, 24 Wash. 2d 631, 649-50, 167 P.2d 146, 155 (1946).

<sup>151</sup> *Reid v. Linder*, 77 Mont. 406, 418, 251 P. 157, 161 (1926); *Burns v. Gonzalez*, 439 S.W.2d 128, 132 (Tex. Ct. App. 1969); *Hyland v. City Garbage & Contracting Co.*, 9 Wash. 2d 163, 168, 114 P.2d 153, 155 (1941); *Higgins v. Beauchamp* [1914] 3 K.B. 1192, 1195; *Wheatley v. Smithers*, [1907] 2 K.B. 684, 684 (C.A.).

<sup>152</sup> *Judge v. Braswell*, 76 Ky. (13 Bush) 67, 74-75 (1877); *Cooper v. Frierson*, 48 Miss. 300, 310 (1873); *Boonville Nat'l Bank v. Thompson*, 339 Mo. 1049, 1065, 99 S.W.2d 93, 102 (1936); *First Nat'l Bank v. Farson*, 226 N.Y. 218, 222, 123 N.E. 490, 491 (1919); J. SMITH, A HANDY BOOK ON THE LAW OF PRIVATE TRADING PARTNERSHIPS 30 (Rev. ed. Effingham Wilson & Co., London 1888).

<sup>153</sup> *Los Angeles Nat'l Bank v. Wallace*, 101 Cal. 478, 481, 36 P. 197, 199 (1894); *Toof, Phillips & Cirode v. Duncan*, 45 Miss. 48, 56 (1871). *See Judge v. Braswell*, 76 Ky. (13 Bush) 67, 74-75 (1877); *Cooper v. Frierson*, 48 Miss. 300, 310 (1873); *Davis v. Richardson & May*, 45 Miss. 499, 508 (1871); *Boonville Nat'l Bank v. Thompson*, 339 Mo. 1049, 1065, 99 S.W.2d 93, 102 (1936); *Swan-*

nerships. The legal presumption regarding a non-trading partnership was that authority to contract for the partnership did not exist.<sup>155</sup> This distinction was premised upon the limited nature of the non-trading partnership. The non-trading partnership was not involved in the sale and resale of goods<sup>156</sup> and thus had fewer contacts with third-parties. The greater marketplace activity of the trading partnership, on the other hand, justified a rule allowing third-parties to assume the partnerships agent had authority to contract.<sup>157</sup> Commercial necessity required that third-party reliance, based upon continuing contact with the partnership, be protected.<sup>158</sup>

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son v. Webb Tractor & Equip. Co., 24 Wash. 2d 631, 649-50, 167 P.2d 146, 155 (1946); Hyland v. City Garbage & Contracting Co., 9 Wash. 2d 163, 168, 114 P.2d 153, 155 (1941); Rue v. Merrill, 42 Wyo. 497, 506-08, 297 P. 375, 378 (1931). This presumption existed even though the partners expressly restricted each other's authority. J. SMITH, *supra* note 152.

<sup>154</sup> The non-trading partnership was also known as a "non-mercantile" or "special" partnership. See Swanson v. Webb Tractor & Equip. Co., 24 Wash. 2d 631, 649-50, 167 P.2d 146, 155 (1946).

<sup>155</sup> See Judge v. Braswell, 76 Ky. (13 Bush) 67, 75 (1877); Cooper v. Frierson, 48 Miss. 300, 310 (1873); Davis v. Richardson & May, 45 Miss. 499, 508 (1871); Boonville Nat'l Bank v. Thompson, 339 Mo. 1049, 1065, 99 S.W.2d 93, 102 (1936); Swanson v. Webb Tractor & Equip. Co., 24 Wash. 2d 631, 649-50, 167 P.2d 146, 155 (1946); Hyland v. City Garbage & Contracting Co., 9 Wash. 2d 163, 168, 114 P.2d 153, 155 (1941); Rue v. Merrill, 42 Wyo. 497, 506-08, 297 P. 375, 378 (1931).

<sup>156</sup> See note 151 and accompanying text *supra*.

<sup>157</sup> See Swanson v. Webb Tractor & Equip. Co., 24 Wash. 2d 631, 649-50, 167 P.2d 146, 155 (1946); Rue v. Merrill, 42 Wyo. 497, 506-08, 297 P. 375, 378 (1931).

<sup>158</sup> Swanson v. Webb Tractor & Equip. Co., 24 Wash. 2d 631, 649-50, 167 P.2d 146, 155 (1946). Cases and commentators write in terms of a presumption of "implied" authority as to both the trading partnership, see text accompanying notes 152-153 *supra*, and the general agent, see text accompanying notes 144-148 *supra*. What they refer to as implied authority encompasses principles currently analyzed as apparent authority. If a trading partnership presumptively confers "implied" authority upon members to do those acts necessary to the business, Swanson, notwithstanding an intra-partnership agreement removing such authority, J. SMITH, *supra* note 145, this constitutes apparent authority. The restriction removes implied authority because implied authority is premised on consent. See text accompanying notes 38-41 *supra*. Liability therefore can only flow from apparent authority principles. See note 116 and text accompanying notes 45-50 *supra*. That cases actually are dealing with apparent authority is clear from the use of such terms as "reliance," such as in Swanson; or of a partner "holding out" another as possessing authority, such as in Burns v. Gonzalez, 439 S.W.2d 128, 132 (Tex. Ct. App. 1969). Reliance

The fewer number of contemplated acts characteristic of the special agent and the non-trading partnership is also characteristic of the joint venture.<sup>159</sup> The purpose of each is narrow. Unlike the contemporary partnership, none involve the conduct of a "business."<sup>160</sup> In conducting a business, the partnership's sanctioned purposes are necessarily broad. The scope of agency applied to partnerships parallels this breadth.<sup>161</sup> However, in associations contemplating fewer acts, the law has recognized that the intended scope of authority is limited. Thus, a legal presumption against the existence of authority applies to the special agent<sup>162</sup> and the non-trading partnership.<sup>163</sup> Similarly, a presumption against the existence of authority should apply to the joint venture.<sup>164</sup> Simply put, as the intended scope of permissible acts narrows, the legal scope of agency should narrow.<sup>165</sup> Ap-

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and estoppel concepts are irrelevant if consent is present, that is, if implied real authority exists.

The authorities on general and special agents, *see* note 44 *supra*, similarly use "implied authority" in a manner inclusive of apparent authority principles. Liability is thus based, as in the non-trading partnership, on a party's "reliance" upon the appearance of authority, *see Swanson*; or upon a principal "holding out" an agent as possessing authority, *see Burns*.

<sup>159</sup> *See* the definition of a joint venture in notes 5 & 14 and accompanying text *supra*.

<sup>160</sup> *See* text accompanying notes 123-127 *supra*.

<sup>161</sup> Thus in a partnership any act that is simply "for apparently carrying on" the business will bind the firm notwithstanding restrictions on real authority. *See* text accompanying notes 86-94 *supra*.

<sup>162</sup> *See* note 44 and text accompanying notes 144-148 *supra*.

<sup>163</sup> *See* text accompanying notes 149-158 *supra*.

<sup>164</sup> At least one jurisdiction equated the joint venture to the non-trading partnership and thus held that the joint venture possessed a limited scope of agency. *See Cooper v. Frierson*, 48 Miss. 300, 310 (1873); *Davis v. Richardson*, 45 Miss. 499, 508 (1871); *Toof, Phillips & Cirode v. Duncan*, 45 Miss. 48, 56 (1871). *See generally* note 44 *supra*. Historically, Germany followed a similar rule. An association of two persons combining funds for a single joint transaction was known as a non-mercantile partnership and its members possessed no implied authority to act for the others. E. SCHUSTER, *THE PRINCIPLES OF GERMAN CIVIL LAW* 51 (1907). *See also* Note, 58 U. PA. L. REV. 309, 310 (1910).

<sup>165</sup> In addition to the case of the special agent and the non-trading partnership, this principle is illustrated by the special treatment afforded mining partnerships. Distinguishing ordinary partnerships, the California Supreme Court has held that in the case of a mining partnership "something more will be required to raise the presumption of liability arising from persons holding themselves out to the world as partners than would be necessary in the case of an ordinary partnership. Such persons, in the absence of other circumstances,



plying common law rules of agency to the joint venture gives effect to this principle.<sup>166</sup>

The principle of according associations of a limited purpose a narrowed scope of agency was applied in the joint venture context in *Swanson v. Webb Tractor & Equipment Co.*<sup>167</sup> In *Swanson*, the court held that a client could not hold all members of a "special partnership" of attorneys—in essence a joint venture<sup>168</sup>—to a fee arrangement approved by just one member. Swanson, a Washington attorney, associated with an Idaho firm to prosecute two specific actions. After settlement, the client and the Idaho firm agreed on a fee arrangement purportedly covering the work of all attorneys, although Swanson was not a party to the agreement. Believing his share was unreasonably low, Swanson refused to abide by the agreement. Upon the client's refusal to pay Swanson the asserted value of his services, Swanson sued for his fees.

The defendant argued that the attorneys' association was a partnership and that the setting of fees by the Idaho firm, being an act within the apparent scope of the business,<sup>169</sup> therefore bound Swanson.<sup>170</sup> Rejecting this claim, the Washington Su-

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cannot fairly be presumed to have *intended* to render themselves liable to all the consequences of a commercial partnership." *Skillman v. Lachman*, 23 Cal. 198, 203 (1863) (emphasis added). *Accord* *Kahn v. Smelting Co.*, 102 U.S. 641, 646 (1880); *Thompson v. Crystal Springs Bank*, 21 F.2d 602, 604 (8th Cir. 1927). This limitation is now statutory in California. See CAL. PUB. RES. CODE § 2359 (West 1972). See also *McConnell v. Denver*, 35 Cal. 365, 370 (1868) (distinguishing "unincorporated ditch companies" from commercial partnerships, stating that a member of the former has no general authority to bind the association).

A further illustration lies in the judicial reluctance to impose full agency within law or medical partnerships of lengthy and unknown duration on grounds the members do not contemplate a general delegation of authority to all partners. H. REUSCHLEIN & W. GREGORY, *supra* note 26, § 195, at 291.

<sup>166</sup> See generally text accompanying notes 185-191 *infra*.

<sup>167</sup> 24 Wash. 2d 631, 167 P.2d 146 (1946).

<sup>168</sup> Although not so designated by the court, the arrangement possessed all the elements of a joint venture. The attorneys associated for a single business undertaking, each providing skill and knowledge, under an implicit agreement to share profits, with each member exercising some control over the project. *Id.* at 635-40, 167 P.2d at 149-54. See text accompanying notes 13-18 *supra* for discussion of the elements of the joint venture.

<sup>169</sup> See U.P.A. § 9(1), *supra* note 3, at 132.

<sup>170</sup> *Swanson v. Webb Tractor & Equip. Co.*, 24 Wash. 2d 631, 649-50, 167 P.2d 146, 154-55 (1946).

preme Court held that the association's limited purpose and nature<sup>171</sup> made it a "special or limited partnership" governed by different rules.<sup>172</sup> Analogizing to the non-trading partnership, the court held that the Idaho firm lacked implied authority to bind Swanson to the fee arrangement.<sup>173</sup> To bind Swanson, the court stated, the client must show that the Idaho firm was authorized to act for Swanson. The client could show either the express conferral of authority or authority implied from the customs of this or similar associations.<sup>174</sup> Since no express authority existed, the court held that the agreement did not bind Swanson because the client failed to prove a custom of behavior that would justify third-party reliance on the Idaho firm's purported authority.<sup>175</sup>

Like the special agent and the non-trading partnership,<sup>176</sup> the joint venture does not involve the continuing operation of a business.<sup>177</sup> Its limited nature should thus entail a similarly narrowed scope of agency. When applied to the joint venture, the above historical concessions assume contemporary analytical bases. By focusing on conduct instead of status, the common law is consonant with venturer desire for reduced vicarious liability. That is, each venturer can limit personal exposure to vicarious liability simply by regulating self-conduct. Thus, *P* is liable for the unauthorized contracts of *A* only when *P*'s acts or omissions cause a third-party to reasonably and honestly believe *A* possessed real authority to act for *P*.<sup>178</sup> This approach requires that the third-party rely on *P*'s participation in the venture rather than upon the character of *A*'s act. Common law agency rules thus protect reasonable and honest reliance but still provide venturers with greater protection from unexpected liability than does the U.P.A.<sup>179</sup> This approach is not unique; it simply carries into the present the historical distinction between trading and

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<sup>171</sup> The court found the association was solely for the purpose of prosecuting two particular actions. *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> See text accompanying notes 144-158 *supra*.

<sup>177</sup> See text accompanying notes 123-127 *supra*.

<sup>178</sup> See text accompanying notes 67-73 *supra*.

<sup>179</sup> Compare text accompanying notes 67-83 with text accompanying notes 84-107 *supra*.

non-trading partnerships,<sup>180</sup> and between general and special agents.<sup>181</sup>

Applying common law agency principles to the joint venture also provides a reasonable compromise<sup>182</sup> between the "no apparent authority"<sup>183</sup> rule and the U.P.A. rule<sup>184</sup> of vicarious liability. The consequences of this approach are simply stated. Absent a restriction on a venturer's real authority, all venturers would be liable on contracts "reasonable necessary" to complete the venture.<sup>185</sup> If, however, venturers expressly restrict any member's authority, that restriction is given effect unless the third party establishes two facts;<sup>186</sup> first, that he or she was unaware of the restriction, and, second, that the conduct of the non-acting venturers<sup>187</sup> reasonably and honestly misled the third-party into believing that the contracting venturer had real authority.<sup>188</sup> If third-parties cannot prove these two facts, the non-acting venturers are not liable, even if the contract is "reasonably necessary" to the project.<sup>189</sup> Non-acting venturers thus avoid liability regardless of whether their existence was disclosed.<sup>190</sup> As a practical matter, however, the above two-step test

<sup>180</sup> See text accompanying notes 149-158 *supra*.

<sup>181</sup> See text accompanying notes 144-148 *supra*.

<sup>182</sup> See 2 R. ROWLEY & D. SIVE, *supra* note 5, § 52.55, at 539.

<sup>183</sup> See text accompanying notes 55-66 *supra*.

<sup>184</sup> See text accompanying notes 84-107 *supra*.

<sup>185</sup> Establishing a contract's necessity to a venture establishes implied authority to enter the contract. See cases cited note 40 *supra*. Of course, express authority binds the venture regardless of the necessity of the act.

<sup>186</sup> The restriction removes implied authority, see note 116 *supra*; thus the third-party must rely on apparent authority principles to obtain the venture's liability. *Id.*

<sup>187</sup> This could encompass the act or omission of placing the contracting venturer in management of the project.

<sup>188</sup> See common law test for apparent authority in text accompanying notes 67-70 *supra*.

<sup>189</sup> See, e.g., cases discussed in note 81 *supra* and in text accompanying notes 74-81 *supra*.

<sup>190</sup> This might modify the general rule stated in cases cited note 75 *supra* and discussed note 104 *supra*. The rule asserted in those cases seems to be that the non-acting venturers are liable on contracts "reasonably necessary" to the project, notwithstanding an intra-venture restriction on authority, *unless* the non-acting venturers' existence is undisclosed. Under the suggested rule, disclosure alone would not be determinative. It would, however, affect the relative ease by which a third-party could satisfy the apparent authority test. See note 191 *infra*. Given this difference that disclosure has on the burden of proof, the

is more easily met by third-parties knowing of the joint venture's existence.<sup>191</sup> Thus, while creditors and other third-parties receive no benefit from the undisclosed existence of the joint venture, they generally can impose liability upon a known business venture.

### CONCLUSION

The joint venture is a commercial vehicle that brings together skills and capital for specific projects. It is shorter lived than a partnership and its members' motives more diverse than in a partnership. Accordingly, members of joint ventures desire that their associates have as little control over the members' personal liability as possible. Unfortunately, the response of the courts has been varied; no less than three theories regarding such vicarious liability exist.

In dealing with joint venture apparent authority, courts currently impose either the strict principles of the U.P.A., straight common law principles, or decline to impose liability based on apparent authority. The most equitable approach is to apply common law agency principles. Under this compromise approach, third-parties can obtain the liability of all venture members when they reasonably and in good faith rely on the participation of all venturers. At the same time, common law agency principles respect the commercial desires of venturers for reduced responsibility for the acts of their associates. The common law provides this reduced risk by protecting venturers from unexpected and unauthorized liability when a reasonable reliance interest does not exist.

By adopting this balanced and uniform approach, courts would remove existing confusion and encourage the continued use of the joint venture. Commercial interests could then act with greater certainty, creditors would receive justified protection, and business planners could utilize the joint venture to its

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original statement of joint venture liability, *see* notes 75 & 104 *supra*, may simply have been a poorly worded attempt to state ordinary agency principles.

<sup>191</sup> It is easier to prove that the act of a known principal engendered one's belief that an agent had authority to act for that principal than to trace the belief to the act of an unknown principal. This is true simply because if one is unaware of a person it is difficult to prove that an act by that person affected one's belief that the agent was authorized to act for that person.

fullest. All parties, as well as society in general, would thus be benefitted.

*James F. Brelsford*