

AGENCY

3 agency problems:

1. liability of principal to 3rd parties for torts of an agent
2. liability of principal to 3rd parties for contracts entered by an agent
3. duties that agents owe to principals

1) **Respondeat superior** or vicarious liability - liability of principal for torts of agent

- a) Issue: whether the principal will be vicariously liable for torts committed by agent.
- b) **Test:** principal will be liable for torts committed by agent if:
 - i) **Principal-agent relationship, and**
 - ii) Tort was **committed** by the agent **within the scope** of that relationship.

c) **Principal-agent relationship**

- i) Requires: ["ABC"s of agency]
 - (1) Assent
 - (a) An informal agreement between principal who has capacity and the agent.
 - (2) Benefit
 - (a) The agent's conduct must be for the principal's benefit.
 - (3) Control
 - (a) The principal must have the right to control the agent by having the power to supervise the manner of the agent's performance.
- ii) Sub-agents
 - (1) Will the principal be vicariously liable if the agent gets the help of a sub-agent and the sub-agent commits the tort?
 - (a) The principal will be liable for a sub-agent's tort if there is assent, benefit, and control.
 - (i) If any of these are missing, no vicarious liability to principal.
 - (ii) Clue – on bar, you likely won't find assent.
- iii) Borrowed agents
 - (1) Will a principal who borrows another principal's agent be vicariously liable for the borrowed agent's tort?
 - (a) The principal will be liable for a borrowed agent's tort if there is assent, benefit, and right to control the tortfeasor.
 - (b) Clue – on bar, here you are likely to find assent and benefit, but not the right of control.

- iv) Contrast agents with independent contractors
 - (1) Key distinction – no right to control an independent contractor because there is no power to supervise the manner of its performance.
 - (2) **Rule** for independent contractor torts: No vicarious liability for independent contractor's torts. (No right to control.)
 - (a) **Exceptions:**
 - (i) Ultrahazardous activities – if the ind. contractor's tort occurs during this, then principal is vicariously liable.
 - (ii) Estoppel – if you “hold out” your ind. contractor with appearance of agency, you will be estopped from denying vicarious liability for that tort.
- v) Example: T went to the gas station to have her brakes repaired. Station had an independent contractor arrangement with Brake Repairer. Brake Repairer tortiously repaired T's brakes, resulting in an accident. Is gas station liable?
 - (1) Give rule: As a rule, there is no vicarious liability for the independent contractor tort, except for 1) ultrahazardous activities, and 2) estoppel.
 - (a) In this case, brake repair is an ultrahazardous activity and therefore, the station will be held vicariously liable.
 - (b) Moreover, gas station will have held out its brake repairer with the appearance of agency. Therefore, the station will be estopped from denying vicarious liability.
- d) **Scope of principal-agent relationship factors**
 - i) The tort must occur within the scope.
 - ii) **Test:**
 - (1) **Was the conduct “of the kind” the agent was hired to perform?**
 - (a) If the conduct was within the job description, it is likely to be within the scope.
 - (2) **Did the tort occur “on the job?”**
 - (a) Frolic v. detour
 - (i) Frolic is a new and independent journey. Outside the scope of agency.
 - (ii) Detour is a mere departure from an assigned task. Still within the scope of agency.
 - (b) This is the most important factor.
 - (3) **Did the agent intend to benefit the principal?**
 - (a) If the agent, even in part, intended to benefit the principal, this is enough to be within the scope.
 - (b) Partial benefit is enough.

- iii) Example: Employer instructs employee [this is a true agent-principal relationship] to drive across town to deliver files to a branch office. On the way back, employee stops to pick up shirts at the dry cleaner for work the next day. In the parking lot of the dry cleaner, employee hits a pedestrian. Is employer liable for that tort?
 - (1) First, the principal will be liable for the torts of its agent within the scope of agency.
 - (2) In this case, the agent was on a detour, a mere departure from an assigned task because the tort occurred on the way back to work. Therefore, employee was still within the scope and the employer will be vicariously liable.
- e) **Intentional torts**
 - i) **Rule:** Intentional torts are generally outside the scope of agency.
 - ii) **Exception:** Intentional torts are within the scope if the conduct was:
 - (1) Authorized by the principal, or
 - (2) Natural from the nature of their employment, or
 - (3) Motivated by a desire to serve the principal.
 - iii) Example – a bouncer in a bar who batters a customer while ejecting. All 3 show up in the fact pattern.
- 2) **Liability of principal for contracts entered by agents**
 - a) Issue: whether the principal is liable for contracts entered into by its agent.
 - b) **Rule:** principal is liable for contracts entered into by its agent if the principal authorized the agent to enter the contract.
- c) **Types of authority**
 - i) **Actual express authority:** principal used words to express authority to the agent.
 - (1) Rule: actual express authority can be oral and private, but it is narrowly construed.
 - (a) Can be a whisper. The words used are narrowly interpreted.
 - (2) Exception:
 - (a) If the contract involves a conveyance of an interest in land lasting more than 1 year, the authorization must be in writing. (cannot be oral)

- (b) Example: Agent tells Principal that she is an expert in negotiating real estate transactions. P whispers into A's ear at a party that P wants A to see Greenacres Farm. A sells Greenacres Farm for P. Is P bound on the sale?
 - (i) The general rule is that the principal will be liable only on its authorized contracts.
 - (ii) In this case, because the contract involved the conveyance of an interest in land lasting more than 1 year, the authorization must have been in writing. Therefore, the oral private whisper did not authorize this contract and P will not be liable on this unauthorized transaction.

- (3) Express authority will be **revoked** by:
 - (a) Unilateral act of either the principal or the agent, or
 - (b) Death of the principal [automatically terminates express authority]
- (c) Example: P collects rare books. She hires A to find a rare book to complete her collection. A searches everywhere for it. As A is about to pay for the book, P dies. Is P's estate bound by the contract?
 - (i) The general rule is that the principal will be liable only on its authorized contracts.
 - (ii) In this case, actual express authority terminated upon the death of P. Therefore, P's estate will not be liable on this unauthorized contract. A becomes personally liable to pay for the book, because she is an unauthorized agent.

- (4) **Incapacity** of the principal
 - (a) In NY, express authority will survive the incapacity of the principal, if the principal gives the agent a power of attorney, unless it expressly terminates upon incapacity.
 - (i) Power of attorney: written expression of authority to enter into a transaction.

- ii) **Actual implied authority:** authority that the principal gives the agent through conduct or circumstance.
 - (1) Necessity – there is implied authority to do all tasks that are necessary to accomplish an expressly authorized task.
 - (2) Custom – there is implied authority to do all tasks that are customarily performed by persons with the agent's title or position.
 - (a) Title of lawyer allows lawyer to do tasks that a lawyer customarily does.
 - (3) Prior dealings between principal and agent – there is implied authority to do all tasks that the agent believes to have been authorized to do from prior acquiescence from the principal.

iii) **Apparent authority**

- (1) Test:
 - (a) Principal cloaked agent with the appearance of authority, and
 - (b) A third party reasonably relies on appearance of authority
- (2) Not actual authority, just appearance, but the principal is still liable.
- (3) Example: C owns an antique store. A shipment of antique clocks arrives from London. C tells his employee D not to sell a special grandfather clock. C goes to lunch. D sells the clock. Is C bound on the sales contract?
 - (a) The principal will be liable on its authorized contracts. In this case, there was no actual express or implied authority to sell the clock. After all, C told him not to sell the clock.
 - (b) Nonetheless, there was apparent authority because 1) C did “cloak” D with the appearance of authority, since he was the one in the store selling the clock, and 2) the third party buyer may reasonably rely on the appearance of authority. Therefore, C is liable based on apparent authority.

iv) **Ratification**

- (1) Authority can be granted after the contract has been entered if:
 - (a) Principal has knowledge of all the material facts regarding the contract, and
 - (b) Principal accepts its benefits.
- (2) Exception: ratification cannot alter the terms of the contract.
 - (a) The entire contract must be ratified as is, no changes.
- (3) Example: P gives A a power of attorney to purchase steel drums. A enters into a contract to purchase 11k wooden barrels. P tells A “great job. I love wooden barrels, but I only need 10k.” Is P bound?
 - (a) The principal will be liable only on its authorized contracts.
 - (b) In this case, there was no express or implied authority to buy wooden barrels or even apparent authority to do so. The power of attorney instructed her to buy steel drums and the words are narrowly construed.
 - (c) Nonetheless, P arguably ratified the contract through knowledge plus acceptance of its benefits. However, in NY, ratification is not valid because P tried to change the terms of the contract. There is no valid ratification and without any authority, P is not liable for this unauthorized contract.

- d) Rules of liability on the contract
 - i) **General rule:** the principal is liable on its authorized contracts and therefore, as a rule, **an authorized agent is not liable on its authorized contracts.**
[principal is liable]
 - ii) **Exception:** the undisclosed principal.
 - (1) If the principal is partially disclosed (only the identity of the principal is concealed) or undisclosed (fact of principal is concealed), authorized agent may nonetheless be liable at the election of the third party.
 - (a) But no double recovery.

3) Duties Agent owes to Principal

- a) In return for reasonable compensation and reimbursement of expenses, agents owe principals:
 - i) Duty of reasonable care.
 - ii) Duty to obey instructions that are reasonable.
 - iii) Duty of loyalty.
 - (1) The agent may **never** do any of the following:
 - (a) Self-dealing: agent cannot receive a benefit to the detriment of the principal.
 - (b) Usurping the principal's opportunity.
 - (c) Secret profits: making a profit at the principal's expense without disclosure.
- b) Example: P authorizes A to buy diamonds. A spots choice diamonds and secretly buys them for herself for \$1mill. A then resells the diamonds for \$2mill.
 - i) What duties, if any, has A breached?
 - (1) A has breached the duty of loyalty by engaging in: 1) self-dealing by benefiting herself to P's detriment, and 2) usurping P's opportunity at the diamonds, and 3) making a quick secret profit at the expense of P.
 - ii) What remedies, if any, does P have against A?
 - (1) P may 1) recover losses caused by the breach and 2) disgorge profits made by the breaching agent.

PARTNERSHIP

5 issues areas:

1. General partnership formation
2. Liabilities of general partners to third parties
3. Rights and liabilities between general partners
4. General partnership dissolution
5. Alternative unincorporated business organizations

1) General Partnership Formation

- a) Formalities
 - i) None. There is no filing needed to becoming a general partnership.
- b) Definition: general partnership = an association of 2 or more persons who are carrying on as co-owners of a business for profit.
 - i) Sharing of profits is key!
 - (1) Contribution of money (capital) or services in return for a share of profits is prima facie evidence of a general partnership.
 - (a) Not in return for wage (employment) or fixed interest (loan).

2) Liabilities of general partners to third parties

- a) Agency principles apply
 - i) Partners are agents of the partnership for apparently carrying on usual partnership business.
 - ii) Therefore, the general partnership is liable for each partner's torts in the scope of partnership business and for each partner's authorized contracts.
- b) Each general partner is personally liable for all debts of the partnership and for each co-partner's torts.
 - i) Incoming partner's liability for pre-existing debts
 - (1) Incoming partners are generally not liable for prior debts any money (capital contribution) paid to the partnership by an incoming partner can be used by the partnership to pay pre-existing debts.
 - ii) Withdrawing partner's liability for subsequent debts
 - (1) Dissociating partners retain liability on future debts until they die unless actual notice of their withdrawal is given to known creditors and publication notice is given to potential creditors.
- c) General partnership liability by estoppel
 - i) One who represents to a third party that a general partnership exists will be liable as if a general partnership exists.

- ii) Example: Paula convinced her friend Peter to start a sailing school and agreed to lend Peter money to purchase a boat for that purpose. At a party, Paula told a wealthy friend “my partner Peter and I are starting a sailing school and we need a boat.” The friend offered to sell Paula and Peter a boat and agreed to allow Peter to take it for a test ride the next day. Later that night, however, Peter takes the boat for a ride and tortiously destroys the boat. May the wealthy friend sue Paula for the loss of the boat?
 - (1) 3 steps to analyze this question – formation, liability, estoppel
 - (2) As a rule, general partners are liable for all partnership obligations, including co-partner’s torts. In this case, however, Paula and Peter never formed a general partnership because theirs is a lending arrangement not based on sharing profits.
 - (3) Nonetheless, under estoppel, Paula will be liable because she has represented to that third party tort victim that she is a partner of Peter. Therefore, Paula will be liable as if she were a partner and consequently liable for Peter’s tort.
- 3) **Rights and liabilities between general partners**
 - a) General partners are fiduciaries of each other and the partnership.
 - i) Therefore, general partners owe each other and the partnership the **duty of loyalty**:
 - (1) General partners may never engage in self-dealing;
 - (2) Never usurp partnership opportunities;
 - (3) May never make a secret profit at the partnership’s expense.
 - ii) Remedy – action for accounting
 - (1) Partnership may recover losses caused by breach and also may disgorge profits made by the breaching partner.
 - b) Partner’s rights in partnership property and liquidity [???]
 - i) Specific partnership assets
 - (1) Land or leases or equipment that are owned only by the partnership may not be transferred by any individual partner without partnership authority.
 - ii) Share of profits and surplus
 - (1) Personal property owned as such by individual general partners may be transferred by individual partners to third parties.
 - iii) Share in management
 - (1) Assets owned only by the partnership itself may not be transferred by any individual partner to third parties.
 - iv) In order to determine if a fact pattern involves specific partnership assets or personal property, the test is:
 - (1) Whose money was used to buy the property. If partnership money was used, it becomes partnership property. If personal property was used, it becomes personal property.

- v) Example: J buys a car in J's own name with J's money, which J uses in the partnership business. J dies. Does J's spouse get the car or it is a specific asset of the partnership?
 - (1) In this case, because J bought the car with J's money, it is J's car. Therefore, he may leave that car to his spouse through inheritance.
- c) **Management**
 - i) Absent agreement, each partner is entitled to equal control (vote).
 - ii) Example: A, B, and C agree to contribute money and share profits 60-30-10. How do they vote?
 - (1) Absent agreement on control, each partner is entitled to equal control. Each partner gets one vote, so equally.
- d) **Salary**
 - i) Absent agreement, partners get no salary
 - ii) Example: A and B are partners. A works 96 hours/week. B sleeps all day. Does A get any salary?
 - (1) Absent an agreement regarding salary, A gets no salary.
 - iii) Exception: partners receive compensation for helping to wind up the partnership's business.
- e) **Share in profits and losses**
 - i) Rules:
 - (1) Absent agreement, profits are shared equally.
 - (2) Absent agreement, losses are shared like profits.
 - ii) Example: if agreement is silent on profits and losses?
 - (1) Spell out both rules separately.
 - (2) First, without an agreement on profits, profits are shared equally.
 - (3) Second, without an agreement on losses, losses are shared like profits.
 - (4) Therefore, they are both shared equally.
 - iii) Example: if agreement states that "profits are shared 60/40" but is silent on losses, how are losses shared?
 - (1) Absent an agreement on losses, they are shared like profits, so 60/40 as well.
 - iv) Example: if agreement states "losses are shared 60/40" but is silent on profits, how are profits shared?
 - (1) Absent an agreement on profits, they are shared equally.
 - v) Example: A puts up all the money. B does all of the work. C gives the partnership its fine name. D does nothing. How are profits shared?
 - (1) Absent an agreement on profits, profits are shared equally.

4) General partnership dissolution

a) Definitions

- i) **Dissolution** = In NY, a general partnership dissolves automatically upon any material change in the partnership caused by the death or withdrawal of any single general partner.
- ii) **Termination** = real end of the partnership
- iii) **Winding up** = the period between dissolution (change) and termination in which the remaining partners liquidate the partnership's assets to satisfy the partnership's creditors.

b) Partnership's liability

i) Old business

- (1) Partnership and general partners retain liability on all transactions entered into to wind up old business with existing creditors.

ii) New business

- (1) Partnership and general partners retain liability on brand new business transactions during winding up until actual notice of dissolution is given to known creditors and publication notice is given to potential creditors.

c) Priority of distribution

- i) Each level of priority must be fully satisfied before beginning the next level.

ii) Order of priority:

- (1) First, outside creditors must be paid.
 - (a) Trade creditors, suppliers, 3rd party creditors who are not partners.
- (2) Second inside creditors must be paid.
 - (a) Partners who have loaned money to the partnership.
- (3) Third, capital contributions by partners must be paid.
 - (a) Not loans made by partners.
- (4) Profits and surplus, if any.
 - (a) Absent agreement on profits, profits are shared equally.

iii) **Rule: each partner must be repaid his loans and capital contributions, plus that partner's share of the profits, or minus that partner's share of the losses.**

- iv) Example: A and B dissolve the partnership. In winding up, they liquidate the partnership assets and have a total of \$1mill to distribute. How should the amount be distributed if:

- (1) Partnership owes \$600k to outside trade creditors
- (2) A loaned the partnership \$100k
- (3) B made capital contributions of \$200k?
 - (a) First, all outside creditors must receive their \$600k. Second, A must be repaid his loan of \$100k. Third, B must receive \$200k in return for his capital contribution. Finally, A and B share equally in the remaining profit amount, \$50k each.

- v) Example: what if the partnership has only \$700k to distribute?
 - (1) First, all outside creditors must receive their \$600k. Second, A must receive \$100k for his loan. Third, the partnership still owes B the repayment of \$200k for his capital contribution. A and B are liable for the missing liability amount of \$200k. Without an agreement, A and B must share equally in the losses. A must pay into the partnership \$100k and B must pay into it \$100k.

5) **Alternative unincorporated business organizations**

- a) **Limited partnerships** – a partnership with at least one general partner and one limited partner.
 - i) Formation
 - (1) File a limited partnership certificate that includes names of all general partners.
 - ii) Liability and control
 - (1) General partners
 - (a) Liable for all limited partnership obligations.
 - (b) Have right to manage the business.
 - (2) Limited partners
 - (a) Have limited liability. They are not liable for the limited partnership's obligations. Must pay full consideration for their interest.
 - (b) May not manage the business without forfeiting their limited liability status.
- b) **Registered Limited Liability Partnership (RLLP)**
 - i) Formation
 - (1) General partnership or limited partnership that is engaged in professional services (i.e. law firm) and is registered as such with the State.
 - ii) Liabilities
 - (1) No partner is liable for debts and obligations of the partnership itself, not even general partners.
 - (2) They are still liable for their own wrongdoing.
- c) **Limited Liability Company (LLC)** – hybrid between corporation and partnership where owners, called members, have the same rights and limited liabilities of shareholders of a corp. and also the benefits of partnership tax treatment.
 - i) Formation
 - (1) Organizers must file articles of organization with the Dept. of State and publish a summary of the articles at least once a week for 6 weeks in a row.
 - (2) Also, may adopt an operating agreement.
 - ii) Control

- (1) Members have the right to control but may delegate control to a team of managers.
- iii) Limited liquidity
 - (1) A full membership interest may not be transferred without unanimous consent of all members.
- iv) Limited life
 - (1) The articles of organization or operating agreement must set forth some event that will dissolve and end the LLC.
- v) Summary
 - (1) LLCs = limited liability + limited liquidity + limited life + limited tax

MINI REVIEW

- 1) Agency
 - a) Principal's liability for agent's torts
 - i) Assent, benefit, control + scope
 - ii) No vicarious liability for independent contractor's torts
 - iii) Intentional torts are generally outside the scope
 - b) Principal's liability for agent's contracts
 - i) Actual express authority – oral except for land, revocable upon death
 - ii) Implied authority – necessity, custom, or prior dealings
 - iii) Apparent authority – principal cloaks + 3rd party relies
 - iv) Ratification – knowledge + acceptance of benefits
 - v) Authorized agents are not liable unless undisclosed principal
 - c) Duties agent owes to principal
 - i) Care
 - ii) Obedience
 - iii) Loyalty (disgorge profits)
- 2) Partnership
 - a) Formation
 - i) No general partnership formalities
 - ii) Association, 2+ people, carrying on, co-owners, business, for profit
 - b) Liabilities to 3rd parties
 - i) General partners are liable for all partnership obligations
 - ii) Estoppel – representers are liable as if general partners
 - c) Relations between partners
 - i) Fiduciaries – accounting for profits
 - ii) Only the share of profits is liquid, transferable personal property. Nothing else is.
 - iii) Absent agreement, equal control, no salary, equal profits, and share losses as profits.

- d) Dissolution
 - i) Priority
 - (1) Outside creditors
 - (2) Inside creditors
 - (3) Capital contributions
 - (4) Profits, if any
 - ii) Distribution rule
 - (1) Each partner must be repaid their loans and capital plus their share of profits, minus their share of losses.
- e) Alternative unincorporated business organizations
 - i) Those with limited liability = limited partners + registered + limited liability partners + LLC members (??)