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| AGENCY |
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– 3 Principle Agency Problems

- A. Liability of Principal to 3rd Party for Torts of an Agent
- B. Liability of Principal to 3rd Party for Contracts entered by an Agent
- C. Duties which Agent owe to Principals

I. Tort Liability – *Respondeat Superior* or *Vicarious Liability*

- Principal will be vicariously liable for torts committed by agent if: (i) a ***principal-agent relationship exists***, and (ii) the tort was committed by the agent ***within the scope*** of that relationship
- A. Principal-Agent Relationship** – requires ABC
 - 1. ***Assent*** – *informal agreement* between principal & agent
 - 2. ***Benefit*** – agent’s conduct must be for *principal’s benefit*
 - 3. ***Control*** – principal must have the *right to control the agent* by having the power to supervise the manner of the agent’s performance
 - a. Sub-agents – NO vicarious liability for sub-agent’s tort UNLESS there’s (i) assent, (ii) benefit & (iii) control of sub-agents
 - b. Borrowed agents – NO vicarious liability for borrowed agent’s tort UNLESS there’s (i) assent, (ii) benefit & (iii) control of borrowed agent
 - c. ***Contrast Agent with Independent Contractors***:
 - (i) Factors – whether right to supervise the manner of an independent contractor’s performance,
 - (ii) Rule – NO vicarious liability for torts committed by an independent contractor UNLESS:
 - (a) ***Ultra-hazardous Activities***
 - (b) ***Estoppel*** – if you “hold out” an independent contractor with the appearance of agency, you’ll be estopped from denying vicarious liability
- B. Scope of Principal-Agent Relationship (3 factors):**
 - 1. ***Conduct “of the kind”*** agent was hired to perform – was the conduct within the job description
 - 2. ***Tort occur “on the job”***
 - a. ***Frolic*** – a new independent journey
 - b. ***Detour*** – a mere departure from an assigned task – within scope of agency
 - 3. Agent *intend to benefit the principal* – partial benefit is enough for scope
- C. Intentional Torts**
 - 1. Rule – intentional torts are outside the scope of agency UNLESS:
 - 2. Exceptions
 - a. ***Specifically authorized***
 - b. ***Natural*** from the nature of employment (e.g. bouncer)
 - c. ***Motivated*** by a desire to serve the principal (e.g. employee apprehends shoplifter)

II. Contract Liability

- Principal will be vicariously liable for contracts entered into by agent if: (i) a *principal-agent relationship exists*, and (ii) the principal ***authorized*** the agent to enter the contract (there are 4 types of authority)
- A. Types of Authority**
 - 1. **Actual Express Authority** – principal used words to express authority to agent
 - a. Rule – can be (i) oral, or (ii) private
 - EXCEPT – if the contract involves the *conveyance of interest in land*, must be in writing
 - b. ***Revocation*** – express authority will be revoked by:
 - (i) ***Unilateral act*** of either party; or
 - (ii) ***Death*** or incapacity of principal
 - EXCEPT, revocation can’t be revoked if there’s a *durable power of attorney* (i.e., a written expression of authority to enter into a contract) – needs conspicuous survivor language
 - 2. **Actual Implied Authority** – authority which agent reasonably believes the principal has given, because:
 - a. ***Necessity*** – there is implied authority to do all tasks which are *necessary* to accomplish an express task
 - b. ***Custom*** – there is implied authority to do all tasks *customarily performed* with the agent’s title or position
 - c. ***Prior dealings*** between principal & agent – there is implied authority to do all tasks which the agent *reasonably believes* to have been authorized based upon prior practice with the principal

3. Apparent Authority:

- a. 2-part test – (i) principal “*cloaked*” agent with the appearance of authority, & (ii) 3rd party reasonably relies on the appearance of authority (estoppel is virtually the same & requires 3rd party reliance)
 - b. Fact patterns establishing apparent authority
 - (i) **Secret limiting instruction** – agent has actual authority, but principal has secretly limited that authority; agent acts beyond the scope of the limitation
 - (ii) **Lingering apparent authority** – actual authority has been terminated; afterwards, agent continues to act on principal’s behalf; 3rd parties may continue to rely upon the lingering appearance of authority until they receive notice of termination
 - c. NOTE: *death or incompetency* terminates all authority of the agent without notice to either the agent or 3rd parties – there is a limited exception for a bank honoring transaction for a customer’s account until it learns of the customer’s death or incompetency & has a reasonable time to act (see Commercial Paper)
4. **Ratification** – authority can be granted after the contract has been entered into, if:
- a. Principal has **knowledge** of all material facts regarding the contract, AND
 - b. Principal adopts the contract by expressly or impliedly **accepting its benefits**
 - c. BUT (NY rule), ratification **cannot alter** the contract (principal must ratify the *entire* contract)

B. Rules of Liability on the Contract:

1. General Rules
 - a. If agent has NO authority – *principal is NOT liable* on the contract, & the agent is liable
 - b. If agent has authority – *principal IS liable*, & the agent is not liable
2. Undisclosed Exception Rule (NY Rule)
 - a. Generally: if principal is disclosed (existence & identity of the principal is known to the 3rd party) – the principal is liable, & the agent is NOT liable
 - b. EXCEPTION: if principal is **partially disclosed** (principal’s existence is known but identity is withheld) or **undisclosed** (neither identity nor existence is disclosed) – both principal and/or agent may be liable
 - (i) 3rd party can elect to sue either or both principal & agent
 - (ii) NOTE: the type of principal (disclosed, partially disclosed or undisclosed) is relevant ONLY when you are considering whether the agent is liable, NOT when discussing the principal’s liability

III. Duties Agent Owes to Principal

- A. Duties
 1. Duty to exercise *reasonable care*
 2. Duty to *obey reasonable instructions* (i.e. not break law)
 3. Duty of **loyalty**
 - a. **Self-dealing** – agent cannot receive a benefit to the detriment of the principal;
 - b. **Usurping** the principal’s opportunity; OR
 - c. **Secret profits**
- B. Remedies – principal may **recover losses** caused by breach, & may **disgorge profits** made by the breaching agent

PARTNERSHIP

- 4 Issue Areas
 - A. Partnership Formation
 - B. Liabilities of Partners to 3rd Parties
 - C. Rights and Liabilities between Partners
 - D. Partnership Dissolution

I. Partnership Formation

A. General Partnership

1. *Definition* – an association of 2 or more persons who are carrying on as co-owners a business **for profit**
2. *Formalities* – **NO formalities required** (no filing necessary)
3. *Sharing of Profits* – parties contribute money or services in return for share of the profits, if any, is a prima facie evidence of a general partnership

B. Other Forms

| | <i>Limited Partnership</i> | <i>Registered Limited Liability Partnership (RLLP)</i> | <i>Limited Liability Companies (LLC)</i> |
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| <i>Definition</i> | Partnership composed of at least <i>1 general partner & 1 limited partner</i> | Limited liability partnership available for <i>professional services</i> activities | Entity taxed like partnership but offers members limited liability |
| <i>Formalities</i> | File <i>limited partnership certificate</i> | File a <i>certificate of registration</i> (include profession to practice) | File articles or organization (may adopt <i>operating agreement</i>) |
| <i>Characteristics</i> | Statute created (need compliance) | Statute created (need eligibility) | <ul style="list-style-type: none"> - Limited <i>tax, liability, life</i> - Limited <i>liquidity</i> (interests not freely transferred) - Member control (but may delegate to managers) |

II. Liabilities of Partners to Third Parties

A. Partnership Liability – agency principles apply

1. General partners are *agents of the partnership* for *carrying on usual partnership business*
2. *Partnership is bound by torts* committed by partners in scope of partnership business
3. *Partnership is bound by contract's* entered into by partners with authority (actual or apparent)

B. Partners' Liability

1. General partners are personally liable for debts of partnership
 - a. **Incoming partner's liability** – generally, an incoming partner is NOT liable for prior, pre-existing debts/obligations; except for any contributions to the partnership may be used for any purpose (including satisfying prior debts/obligations)
 - b. **Outgoing partner's liability** – retains liability on future debts/obligations UNTIL notice of withdrawal has been given to all known, & potential creditors
 - But, liability for future debt/obligations are terminated upon death of the outgoing partner
2. *Nature of liability*
 - a. *Joint & several liability* (ONE OR MORE partners may be sued) – for torts & breaches of trust
 - b. *Joint liability* (ALL partners MUST be sued) – for all other debts & obligations
3. *Extent of liability* – each partner is *personally and individually liable* for entire the amount of partnership debts & obligations, and for partnership

| <i>Limited Partnership</i> | <i>Registered Limited Liability Partnership (RLLP)</i> | <i>Limited Liability Companies (LLC)</i> |
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| <i>General Partners</i> – liable for all debt/obligations (but, may exercise substantial control) | NO partners will be liable for all debt/obligations (but, always personally liable for wrongdoing) | Members of LLC, who are owners, are NOT liable for all debt/obligations |
| <i>Limited Partners</i> – NOT liable beyond contribution (but, limited control; must pay full consideration) | | |

4. **Partnership liability by estoppel** – one who represents to a 3rd party that a partnership exists will be liable as if a partnership exists (fact pattern: liability – formation issue – liability by estoppel)

III. Rights and Liabilities Between Partners

- A. Fiduciary Duties** – partners are fiduciaries of each other & the partnership:
1. *Duty of loyalty*
 - a. Partner may never engage in self-dealing;
 - b. NO usurping partnership opportunities; and
 - c. NO secret profits
 2. **Action for accounting** (NY Rule) – the only form of action that can be filed by the partnership against its own partners and between partners;
 - a. Partnership may – (i) recover **losses** caused by a partner’s breach, & (ii) **disgorge profits** made by the breaching partner & put those profits into a constructive trust for the partnership’s benefit
 - b. Between partners – an equitable proceeding whereby the liabilities between each partner & the partnership are converted into liabilities between the partners individually (an action lies to recover the balance due any partner)
- B. Partnership property** – partner’s right
1. **Specific partnership assets** – no single partner may transfer those assets to another
– E.g. (i) land, (ii) leases, or (iii) equipment owned by the partnership
 2. **Share of profits & surplus** – partners share of profits IS *personal property* owned, as personal property, by each individual partner (can be transferred freely)
 3. **Share in management** (e.g., right to vote) – owned ONLY by the partnership; thus no individual partner may transfer his share in the management to another (not liquid)
 4. **Conflict between specific partnership assets & personal property** – depends on whose money was used to buy the property; if partnership money was used, it’s partnership property, & vice versa
- C. Management** – *absent an agreement*, the default rule is that each partner is entitled to **EQUAL control** (doesn’t matter how much money they contributed)
- D. Salary** – *absent an agreement*, partners get NO salary (doesn’t matter how many hours they work)
– EXCEPTION – partners get compensation for helping to “wind up” the partnership business
- E. Partner’s share of profits & losses:**
1. Absent an agreement, **profits are shared equally**, &
 2. Absent an agreement, **losses are shared like profits**

IV. Dissolution

- A. Definitions**
1. **Dissolution** – ANY material change in the partnership, including by (i) withdrawal, or (ii) death, of any **single** partner (dissolution terminates the authority of any partner to act as an agent for either the partnership or any other partner)
 2. **Winding up** – the period between dissolution & termination in which the remaining partners liquidate the partnership’s assets to satisfy the partnership’s creditors
 3. **Termination** – the real end
- B. Notice of dissolution**
1. Proper notice – to terminate the apparent authority of partners to bind the partnership after dissolution (personal notice and/or publication notice)
 2. Failure of notice – binds partners personally to 3rd parties who, while unaware of the dissolution, extended credit to the partnership
- C. Compensation and liability for winding up**
1. **Compensation** – partners who help wind-up receive compensation (exception to compensation rule)
 2. **Partnership’s liability for winding up**
 - a. Old business – partnership/partners retain liability on all transactions entered into to wind up partnership
 - b. New business – partnership/partners retains liability on new transactions UNTIL notice of dissolution is given to all known & potential creditors
- D. Priority of distribution**
1. Each level must be fully satisfied before beginning the next level in this order:
 - a. **Outside creditors** – any creditors other than a partner (e.g., trade creditor) must be paid first
 - b. **Inside creditors** – partners who have loaned money to the partnership must be fully repaid
 - c. **Capital contributions** by partners – partnership owes the full repayment of capital to its partners
 - d. **Profits & surplus**, if any – *absent agreement*, partners paid equally

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2. RULE: each partners must be repaid (i) his loans AND (ii) capital contributions (iii) PLUS either that partner's share of the profits OR MINUS that partner's share of the losses
 - a. Example 1 (with surplus) – liquidated asset \$1M to distribute; if (i) partnership owes 600K to trade creditors, (ii) partnership loaned 100K from A, & (iii) B made capital contributions of 200K?
 - (i) Outside creditors must be paid full 600K,
 - (ii) A is an inside creditor & should be paid 100K, &
 - (iii) B must be repaid the 200K he contributed to capital
 - (iv) Absent an agreement, surplus of 100K is then split between A & B equally
 - b. Example 2 (with loss) – liquidated asset \$700K to distribute; if (i) partnership owes 600K to trade creditors, (ii) partnership loaned 100K from A, & (iii) B made capital contributions of 200K?
 - (i) Outside creditors must be paid full 600K,
 - (ii) A is an inside creditor & should be paid 100K,
 - (iii) Partnership still owes capital contributions of 200K to B
 - (iv) Each partner owes back 100K (200K/2) so that the partnership can repay B

Review

A. Agency

1. **Principal's liability for Agent's torts:**
 - a. Assent, Benefit, Control + scope
 - b. NO vicarious liability for *independent contractors'* torts
 - c. *Intentional torts* – outside scope
2. **Principal's liability for Agent's contracts:**
 - a. *Express authority* – oral (except land), revocable (unless durable)
 - b. *Implied authority* – necessity, custom, or prior dealings
 - c. *Apparent authority* = principal cloaks + 3rd party relies
 - d. *Ratification* = knowledge + acceptance of benefits
 - e. Authorized agent NOT liable UNLESS undisclosed principal
3. **Duties agent owes principal:**
 - a. Care
 - b. Obedience
 - c. Loyalty (disgorge profits)

B. Partnership

1. **Formation:**
 - a. NO general partnership formalities
 - b. Definition – association of 2 or more persons who are carrying on as co-owners of a business *for profit* (prima facie)
2. **Relations with 3rd parties:**
 - a. Agency law applies
 - b. General partners are personally liable for all partnership obligations,
 - c. Estoppel – one who represents he's a partner will be liable as a partner
 - d. BUT, (i) limited partners & (ii) registered partners & (iii) LLC members are NOT personally liable for all partnership obligations
3. **Relations between partners:**
 - a. Fiduciaries – accounting action
 - b. Only the share of profits is personal property
 - c. Absent an agreement, (i) equal control, (ii) no salary, (iii) equal profits, (iv) losses like profits
4. **Dissolution:**
 - a. Definition – any material change
 - b. Priority – (i) outside creditors, (ii) inside creditors, (iii) capital contributions, (iv) profits, if any
 - c. Distribution rule – each partner must be repaid his losses & capital contributions + his share of profits/losses

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| AGENCY / PARTNERSHIP – ESSAY QUESTIONS |
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I. QUESTION – 4

- A. Issue for what debts a general partner is liable – all debts incurred by any partner in the course of business
- B. Issue for what debts a retired general partner is liable – remains liable until withdraws from the partnership and proper notice is given of withdrawal
- C. Issue of *partnership by estoppel* – whether someone *held out* as a partner
- D. Issue whether deceased partners are liable for future partnership debts; also surviving spouse issue – NO
- E. Liability of partnerships
- F. Whether agent is entitled to compensation – YES
- G. How losses are shared when the partnership agreement is silent – losses will be shared in the same proportion that profits are shared

II. QUESTION – 33 (& NY PRACTICE)

- A. Issue whether one transacting business in NY through an agent is subject to NY jurisdiction – YES

III. QUESTION – 34

- A. What are a partner's rights with respect to assigning his interest in the partnership to a 3rd party
 - 1. Partnership interest – assignable (because they are personal property)
 - a. Share in distribution of profits or surplus, proceeds upon dissolution
 - 2. *Interest in specific partnership property* – NOT assignable (because each partner holds interest as tenant in partnership)
 - 3. *Right to participate in partnership* – NOT assignable
- B. Whether new partner may sue the partnership on a claim that arose before new partner acquired his partnership interest
 - 1. General rule – partner may not sue (sole remedy is an action for accounting)
 - 2. One limited exception – concerns disputes over one fully completed, but unadjusted transaction (the new partner was dealt as a 3rd party when the transaction occurred)
- C. Liability for partnership obligations
 - 1. Partnership + partners are jointly liable on contractual obligations (for new partners, they may be liable up to their interests in the assets of the partnership)

IV. QUESTION – 43

- A. Whether employee stands in some special relationship to partnership, so that partnership will be responsible for employee's *negligence*
 - 1. Employee/employer relationship are master/servant relationship – Respondeat superior (master will be responsible for servant's tort acts made within the scope of employment)
- B. Whether doctrine of Respondeat superior extends to an employer's liability for his employee's *intentional tort*, committed within the scope of the employee's occupation
 - 1. Generally – employer NOT liable
 - 2. UNLESS – (i) force is authorized beforehand, (ii) employee furthers the employer's business by his acts
- C. Effect of a partner's death on partnership contracts
 - 1. Partnership dissolves on death of a partner, unless partnership agreement provides otherwise
 - 2. Contracts may by partner binds other partners and partnership
 - a. BUT, once partnership is dissolved, partner cannot bind anymore
 - b. EXCEPTION is when partner *does not have notice* of the dissolution, in which case the partner may continue to bind other partners' and the partnership (partner still has actual authority)
 - c. Once notified of the dissolution, partner does not have actual authority