

Agency & Partnerships Outline

I Agency

- A) 3 Agency Problems to Watch for: 1) Liability of Principal (P) to 3rd Parties for Agent's (A's) Torts 2) P's Liability to 3rd Parties for Ks Entered into by A & 3) Duties A Owes to P
- B) Liability of P for A's Tortious Conduct: Vicarious Liability
- 1) 2 part test: "P will be liable for torts committed by the agent if 1) a principal-agent relationship exists AND 2) A's tort was committed in the scope of the Principal-agent relationship.
- (a) 1st Req: Principal-agent relationship requires: **Mnemonic: "ABC."**
- (i) Assent: Implied/express agreement bw a P w/contractual capacity + an agent (needs only min capacity)
 - (ii) Benefit: A's conduct is for P's benefit
 - (iii) Control: The P must have the right to control the A by having the power to supervise the manner of A's performance
 - (iv) Other fact patterns:
 - (1) sub-agent: No vicarious liability for subagent's tort unless "ABC" met (e.g., P hires A & A hires subagent who commits tort).
 - (2) Borrowed agents: No vicarious liability for borrowed agents unless "ABC" met – usually prb w/"C." E.g., ER 1 borrows ER 2's agent.
- (b) Independent Contractors
- (i) General Rule: No vicarious liability for tortious conduct of independent contractor (Distinction bw agent & ind contractor: P usually has no "C" over ind contractor) UNLESS (2):
 - (1) IC engaged in ultrahazardous activities
 - (2) Estoppel: ER estopped from denying vicarious liable for IC's tortious conduct where ER has "held out" the IC as the ER's agent + others have reasonably relied.
- (c) 2nd Req: Whether A committed the tort in the scope of the P-A relationship consider:
- (i) Whether A's conduct was of the kind A was hired to perform
 - (ii) Whether A's conduct occurred in the course of employment. Frolic v Detour. Frolic: new & independent journey; **Detour: mere departure from an assigned task.**
 - (iii) Whether A intended to benefit the principal
 - (1) E.g., "ER instructs," "drive across town to deliver," "On the way back to work," "in the parking lot of the dry cleaners." W/in scope
 - (iv) Intentional Torts generally considered outside scope of Agency UNLESS 1) P **specifically authorized them** 2) they flow naturally from the nature of employment (e.g., police, bouncer) or 3) "motive by a desire" to serve P (e.g., P says clear the crowd). **Tip: Imp**
- C) Liability of P for Ks Entered into by A
- 1) Blurb: P is liable for Ks entered into by her agent if P authorized the agent to enter into the K.
- (a) 4 types of authorization (**Tip: discuss all 4**).
- (i) Actual Express Authority: An A has actual express authority when P used words to express authority to agent. (Oral, no consideration, Private & Narrow, Revocation)

- (1) May be oral. No req to satisfy SOF. EXCEPTION: “equal dignities doctrines” – if K itself must be in writing to be enforceable under SOF, any express authorization must also be in writing (E.g., orally telling real estate agent to negotiate for sale of land violates)
 - (2) Consideratio not required
 - (3) May be private
 - (4) Words of express authorization narrowly construed
 - (5) Express Authority Easily Revoked by: 1) unilateral act of EITHER party OR 2) death/incapacity of P. (E.g., A searches everywhere for lost book for P w/express authority. Before A paid, P dies. Revoked & P’s estate not liable).
 - a. EXCEPTION: If P gives agent a “durable power of attorney” – a written expression of authority to enter into a K. Requires conspicuous express language. (Above, P’s estate liable even if P died/incapacitated).
- (ii) Actual implied authority: A’s authority implied from conduct or circumstances – such as:
- (1) Necessity: A has implied authority by necessity to do tasks reasonably necessary to accomplish the authorized task. E.g., wedding planner
 - (2) Custom: A has implied authority to do tasks “inherent” or customarily performed by one in A’s position
 - (3) Prior dealings bw P & A: A has implied authority to do tasks A reasonably believes have been authorized by P’s prior acquiescence
- (iii) Apparent Authority: A has apparent authority when 1) P has “cloaked” the agent w/the appearance of authority & 2) a 3rd party reasonably relies on A’s appearance of authority. I.e., P’s secret limiting instructions no effect
- (1) Lingering Authority: Even if P has terminated A’s actual authority, P may be liable for A’s later acts committed on behalf of P if A acted w/apparent authority (E.g., P terminates A’s actual authority; A uses apparent authority to defraud. P liable)
- (iv) Ratification: Authority may be granted to agent after the A has entered into a K on P’s behalf if 1) P has knowledge of K’s material terms & 2) P accepts its benefits.
- (1) Note: P must ratify the K as it is; can’t alter its terms. (E.g., P gives A power of attorney to purchase steel drums. A enters into K to purchase 10 wooden barrels. P looks over K & says “Great but I only need 10.” P personally liable for authorized K but can’t ratify it. 10
- 2) Consequences of Determining A acted with or w/o Authority:
- (a) If no authority → P not liable on K; A liable.
 - (b) If authority → p liable on K; A NOT. EXCEPTION
 - (i) Authorized agent may be liable if P’s identity partially disclosed/undisclosed. **TIP: TESTED**
- D) Duties A Owes to P:
- 1) Duty to exercise reasonable care
 - 2) Duty to obey P’s reasonable instructions
 - 3) Duty of loyalty: **Tip: tested.** 3 ways to breach:
 - (a) Self-dealing: A receives a benefit to P’s detriment
 - (b) Usurping P’s opportunity or
 - (c) Secretly profiting at P’s expense

- (i) E.g., P hires A to buy diamonds. A spots choice diamonds. Secretly buys them for self for 1 M & resells them for 2 M. Self dealing, usurping & secretly profiting.
- 4) P's Remedies: (2)
 - (a) Recover losses caused by breach AND
 - (b) disgorge profits made by breaching party

II Partnerships

A) Step 1: Partnership Formation:

- 1) Definition: A partnership is an association bw 2+ persons to **carry on as co-owners** a business for profit (E.g., persons may mean "entities," trust, corp etc); it has an identity that is legally distinct from its partners.
- 2) Formalities: No formalities required to form, no filings & no writings. May be formed by conduct of parties. Cts consider objective intent.
 - (a) **Sharing of profits: Contribution of Money OR services in return for share of profits creates presumption that a general partnership exists.**

B) Step 2: Liabilities of General Partners to Third Parties:

- 1) Agency Principles apply
 - (a) Partners are agents of the partnership for carrying on usual partnership business
 - (b) Partnership is bound by torts committed by partners in scope of partnership business
 - (c) Partnership is bound by Ks entered into by partners w/authority (ABC)
- 2) General Partners are personally liable for debts of the partnership
 - (a) Incoming partner's liability for pre-existing debts: Generally incoming partner NOT liable for pre-existing debts BUT any money paid in by the incoming partnership may be used to satisfy debts
 - (b) Dissociating/withdrawing P's liability for subsequent debts: A dissociating partner retains liability for subsequent future debts UNTIL 1) actual notice of dissociation is given to creditors OR 2) until 90 days after filing notice of dissociation with the state **Tip: ESSENTIAL**
- 3) General Partnership Liability by Estoppel:
 - (a) Rule: One who represents to a third party that a general partnership exists will be liable as if a general partnership existed if the 3rd party reasonably relies on the representation. **TIP: ESSENTIAL.** E.g., 2 friends make a lending agreement. Then one friend, F1, represents to a 3rd party that they're in a partnership & that 3rd party lends them money. F1 personally liable for all partnership obligations, including co-partner torts under estoppels

C) Formation & Liability Within Other Unincorporated Business Organizations

- 1) Limited Partnerships
 - (a) Definition: a partnership in which there is at least 1 general partner & 1 limited partner.
 - (b) Formation: requires filing a limited partnership certificate that includes names of all general partners
 - (c) Liability & Control:
 - (i) General partners personally liable for all partnership obligations but have right to manage partnership
 - (ii) Limited Partners: have limited liability in not being liable for obligations of limited partnership BUT may not manage w/o forfeiting LP status

- 2) Registered Limited Liability Partners (RLLP):
 - (a) Formation: must file a statement of qualification
 - (b) Liability: A partner is not personally liable for obligations of partnership – even general partner- but remains personally liable for own wrongful acts
- 3) Limited Liability Companies (LLC):
 - (a) Original Purpose: Members are not personally liable for obligations of partnership but liability similar to SHs liability in a corp. Receive the same benefits of partnership tax treatment (i.e., no double taxation prior to SH profits)
 - (b) Formation: Must file Articles of Organization + operating agreement
 - (c) Characteristics:
 - (i) Members control but Articles may delegate control to managers
 - (ii) Limited liquidity: Members' interests are not freely transferable (e.g., can't devise, sell voting rights)
 - (iii) Limited Life: Events of dissolution
- D) Step 3: Rights & Liabilities Between Partners
 - 1) Fiduciary Relationship: General Partners are fiduciaries of each other AND the partnership. Thus they owe:
 - (a) Duty of loyalty similar to duty owed by A to P (no self dealing, usurping etc). If duty breached, general partner has remedy to bring Action for Accounting: Partnership may recover 1) losses caused by the breach and 2) disgorge profits by requiring breaching party to surrender them
 - 2) Partners' Rights in Partnership Property:
 - (a) 3 different forms of partnership property: reasons for illiquidity of assets (only profits & surplus transferable)
 - (i) Specific Partnership Assets: Land, leases, or equipment are owned only by the partnership. No partner may transfer these assets w/o partnership's authority
 - (ii) Share of Profits and Surplus: Personal property owned by individual partners. Therefore, individual partners may transfer their share of profits & surplus to a third party
 - (iii) Share in management: Owned by general partners. An asset owned by the partnership itself. Therefore, no individual partner may transfer their share in management to a third party (e.g., can't sell right to vote/position on BODs)
 - (b) When there is a conflict between specific partnership assets and personal property: Deciding what's specific partnership asset v personal property: If the partnership's money was used to purchase X, X is partnership property v if individual partner used own money (E.g., If individual partner used own money to buy Newport Beach, it's personal property)
 - 3) Management: ABSENT an agreement, each P entitled to EQUAL control (e.g., vote). Doesn't matter if A, B & C agree to split profits 60-30-10
 - 4) Salary: ABSENT an agreement, Ps get no salary (e.g., working 80 hrs v none. 0 salary) EXCEPT: Partners receive compensation for helping to "wind" up partnership's business.
 - 5) Partner's Share of Profits and Losses: **Tip: ESSENTIAL**
 - (a) General Rules: **Tip: Memorize these rules separately.**
 - (i) Absent an agreement, Profits are shared Equally
 - (ii) Absent an agreement, Losses are shared like profits

(1) So if agreement is silent on BOTH: then both profits & losses shared equally. But if agreement says profit shared 60/40 then losses shared like profits, 60/40.

E) Step 4: Dissolution under RUPA (Revised Uniform Partnership Act)

- 1) Determine whether the partnership is at will or not
 - (a) Partnership at will/where there is NO agreement: dissolution occurs automatically upon notice of express will of ANY single general partner to dissociate (bc partnership destroyed)
 - (b) Partnership not at will – where there IS an agreement: dissolution occurs ONLY on the happening of an event specified in an agreement OR the majority vote of the partners to dissolve w/in 90 days of the dissociation of any single partner
- 2) Partners' Power to Bind Partnership After Dissolution: Until termination/partnership is "wound up," partnership continues
- 3) "Winding up" – the period bw the dissolution and the termination in which the remaining partners must liquidate the partnerships' assets to satisfy the partnerships' creditors
 - (a) Partners Receive compensation for winding up business of partnership (Exception to no salary rule)
 - (b) Partnerships liability for old v new business:
 - (i) Partnership & therefore individual general partners liable on all transactions w/existing creditors
 - (ii) Partnership & Therefore individual general partners liable for new transaction until actual notice of dissolution given to creditors OR 90 days after statement of dissolution filed w/state.
 - (c) Priority of distribution: **Tip – heavily tested.** Each level of priority must be fully satisfied before the next is
 - (i) Creditors must be paid: includes both outside non-partner trade creditors AND inside partners who have loaned \$ to the partnership
 - (ii) Capital contributions by partners (not loans but \$ paid for shares of contribution)
 - (iii) Profits & surplus, if any.
 - (1) All partners repaid loans, capital contributions + sh of profits or minus sh of losses.
 - a. Hypos: 1) A & D dissolve. 1 M. Partnership owns 600K to trade creditors, A gave 100K loan, B capital contributions 200K. 100K remaining: share profits equally.
 - b. Hypo: if only had 700K, then must **RECOUP/RECOVER the loss.** Individual general partners personally liable for loss (E.g., Both A & D will pay \$100K) to recover loss.