A. Agency Relationships

■ Creation of Agency Relationship

- An agent is a **person or entity that acts on behalf of another – the principal**. Agency is a fiduciary relationship, and exists if there is: **(1) assent** (a formal or informal agreement between the principal and the agent); **(2) benefit** (the agent’s conduct on behalf of the principal primarily benefits the principal); **AND (3) control** (the principal has the right to control the agent by being able to supervise the agent’s performance – the degree of control does not need to be significant). Whether an agency relationship exists depends upon the existence of the required elements above (the characterization of the relationship by the parties is irrelevant).

■ Types of Agency Relationships

- There are three types of agency relationships. A **universal agent** has **broad authority** to act on behalf of the principal, and is **authorized to perform ALL acts** the principal is allowed to perform. A **general agent** normally has authority to conduct a **series of transactions over a period of time** for a particular purpose, business, or operation (i.e. a manager of a restaurant). A **special agent** has limited authority to conduct: (a) a **specific act/transaction**; OR (b) certain actions over a **specified period of time**.

■ Termination of Agency Relationship

- An agency relationship terminates and the agent no longer has authority to act if: **(a) the principal or the agent manifests to the other that the relationship is terminated; (b) a specified term of the agent’s authority expired; (c) upon operation of law by the death of the principal or agent; OR (d) upon operation of law by the incapacity of the principal or agent** (except where a durable power of attorney exists).
  - Under the **common law**, an agent’s authority is revoked upon death, regardless of whether the third party has notice of the death. In some states, the authority is **not revoked** until the third party is notified of the principal’s death.
  - **Apparent authority continues** until the principal communicates the termination to third parties (even if the agency relationship was actually terminated). A principal may communicate termination by notifying third parties directly, making a public announcement, or by recovering from the agent any items indicating authority.
A. Creation of Partnerships

- **Creation of a General Partnership**
  - A General Partnership is created when **(1) two or more persons, (2) as co-owners, (3) carry on a business for profit**. No written agreement or formalities are required. A person’s intent to form a partnership or be partners is NOT required.
  - Part ownership or common ownership of property *alone* is NOT enough to create a partnership. Likewise, a joint venture DOES NOT automatically create a partnership.
  - A person who receives a share of the profits of the partnership business is *presumed to be a partner* of the business UNLESS the profits were received in payment: **(a) of a debt; (b) for wages** as an employee or independent contractor; **(c) of rent; (d) of an annuity or other retirement benefit; (e) of interest/loan charges; OR (f) for the sale of the goodwill of a business.**
  - Individuals may inadvertently create a general partnership despite their expressed subjective intent not to do so (i.e. when the required formalities to form a Limited Partnership or Limited Liability Partnership are *not* followed).

- **Formation of a Limited Partnership (LP)**
  - A Limited Partnership is a partnership composed of general and limited partners, and MUST have **at least one general partner**. It is formed upon the filing of a **Certificate of Limited Partnership** with the Secretary of State that includes: **(1) the name of the partnership; (2) the address of the partnership; (3) name and address of each partner; (4) whether the partnership is a Limited Liability Partnership; AND (5) it must be signed by a general partner.**
  - If the Certificate of Limited Partnership fails to meet the above requirements, then a General Partnership is created.
Normally, the bar examiners do not test all four elements of a contract at the same time, and instead focus the question on a specific element of contract formation (i.e. mutual assent or consideration). In one instance, the examiner’s model answer included the contract elements as a one-liner (see July 2010, Essay 2, Point One). Notwithstanding, you must know and keep in mind the contract formation elements when working through an essay question.

Requirements to Form a Valid Contract
A valid contract is formed when there is: (1) mutual assent (an offer and acceptance of that offer by the other party); (2) adequate consideration or a substitute; AND (3) no defenses to formation that would invalidate an otherwise valid contract entered into by the parties.

Apply Art. 2 of the UCC for all sales of goods contracts, and the common law for all other types of contracts (i.e. service or construction contracts).

Applicable Law
Article 2 of the Uniform Commercial Code (UCC) governs all contracts for the sale of goods. The Common Law governs all other contracts.

A. Formation of Contracts

- UCC Article 2 Governs Contracts for the Sale of Goods
  
  - Article 2 of the Uniform Commercial Code (UCC) governs all contracts for the sale of goods. Goods are defined as all things that are movable at the time of identification to the contract (other than the money), including crops and the unborn young of animals. Under the UCC, Common Law principles continue to apply, unless the UCC specifically displaces them.
  
  - A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.
MEE TIP: When & How to Discuss Relevance

If a question asks whether certain evidence is “admissible”, be sure to discuss Relevance. In recent essays, relevancy has been discussed briefly for each item even though relevance wasn’t the primary rule tested. For example, on the July 2018 MEE (Essay 5), Relevance was briefly discussed at the beginning of Point One, Two, Three(a), and Four.

For this type of brief analysis: First, state “Evidence is relevant if it has any tendency to make a fact more probable or less probable than it would be without the evidence.” Then, write one sentence on why the evidence is relevant. Remember to state the rule and analysis very briefly (unless a greater analysis of Relevance and the Rule 403 exclusions is warranted).

B. Policy Exclusions

- Subsequent Remedial Measures

Subsequent remedial measures are measures taken that would have made an earlier injury or harm less likely to occur. Under the FRE, evidence of subsequent remedial measures is NOT admissible to prove: (a) negligence; (b) culpable conduct; (c) a defect in a product or design; OR (d) a need for a warning or instruction.
A. Getting Married

- **Marriage Requirements (State of Mind & Procedural)**
  
  - A valid marriage requires: (1) consent from both parties; (2) a marriage license; **AND** (3) that the marriage is solemnized in a ceremony by a judicial officer or church.
  
  - Courts interpret the consent requirement differently. Some courts find consent if the parties participate in a marriage ceremony and **sought some benefits of marriage**. While other courts find consent **only if** the parties consented to the obligations of marriage.

- **Common Law Marriage**
  
  - A valid common law marriage creates marital rights and obligations **identical** to a ceremonial marriage. A common law marriage generally requires that the spouses: (1) **live together** for a specified amount of time; (2) be **legally able to marry**; (3) have a present agreement that the two parties are married; **AND** (4) **hold themselves out as being married**. Once formed, a common law marriage can only be dissolved through divorce or annulment.
  
  - Most states will **honor a valid common law marriage** established in another state **(even if** not recognized within the state). However, a court may refuse to honor a common law marriage when the spouses and the marriage have limited contacts to the state where the common law marriage was allegedly established.

- **Bigamous Marriage**
  
  - A person CANNOT be married to **more than one person at the same time**. Thus, a marriage is NOT valid if entered into when one of the parties is still married (i.e. before the dissolution of an earlier marriage).
  
  - However, a bigamous marriage (when a person is married to more than one person at the same time) may be saved under either: (a) the equity doctrine; **OR** (b) the Uniform Marriage and Divorce Act (UMDA).
HOW TO USE THE PRIORITY OUTLINE

Rule Layout

Each rule in the SmartBarPrep Essay Priority Outline is presented as shown in the sample below.

SAMPLE

The title of the rule will be in bold (ex: Bylaws).

The Rule Statement (ex: The Bylaws are the rules and regulations adopted by ...) will be in one or more bullet points under the Rule Title.

The right sidebar lists the exams that the rule was tested. The right sidebar is also ideal for note taking when reviewing the outline.
## Guide to the Frequency & Priority Ratings

### Frequency Ratings

To the left of the Rule Statement is the frequency in which the rule was tested on past Multistate Essay Exams (ex: 1 of 51 exams).

### Priority Ratings

In addition, a priority rating (HIGH, MED, or LOW) will be listed in the color-coded circle next to each rule.

- **HIGH** = High Priority (these are the most important and frequently tested rules)
- **MED** = Medium Priority (these rules are tested slightly less frequently, but are still important)
- **LOW** = Low Priority (these rules have been tested the least)

The purpose of providing the **HIGH/MED/LOW** priority rating and the frequency is so you can see how often each rule has been tested compared to the other rules at a glance, and **prioritize your studying to focus on the most important and frequently tested rules first and foremost** before moving onto the less important ones.

The priority ratings are based upon how often that rule has been tested in the past for that particular subject area. Generally, the ratings are based on the following methodology:

<table>
<thead>
<tr>
<th>Subject</th>
<th>Frequency &amp; Priority</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 - Agency</td>
<td>HIGH = 4+ exams</td>
</tr>
<tr>
<td>2 - Partnerships</td>
<td>MED = 2 or 3 exams</td>
</tr>
<tr>
<td>3 - Corporations &amp; LLC's</td>
<td>LOW = 0 or 1 exams</td>
</tr>
<tr>
<td>4 - Civil Procedure</td>
<td>These subjects have been tested on 51 exams.</td>
</tr>
<tr>
<td>10 - Family Law</td>
<td>HIGH = 3+ exams</td>
</tr>
<tr>
<td>12 - Secured Transactions</td>
<td>MED = 2 exams</td>
</tr>
<tr>
<td>14 - Trusts &amp; Future Interests</td>
<td>LOW = 0 or 1 exams</td>
</tr>
<tr>
<td>15 - Wills &amp; Estates</td>
<td>Conflict of Laws has been tested on 51 exams.</td>
</tr>
<tr>
<td>5 - Conflict of Laws</td>
<td></td>
</tr>
<tr>
<td>Subject</td>
<td>Frequency &amp; Priority</td>
</tr>
<tr>
<td>---------------------------------</td>
<td>----------------------</td>
</tr>
<tr>
<td>6 - Constitutional Law</td>
<td>HIGH = 2+ exams</td>
</tr>
<tr>
<td>7 - Contracts</td>
<td>MED = 0 or 1 exams</td>
</tr>
<tr>
<td>8 - Criminal Law &amp; Procedure</td>
<td>These subjects have been tested on 26 exams.¹</td>
</tr>
<tr>
<td>9 - Evidence</td>
<td></td>
</tr>
<tr>
<td>11 - Real Property</td>
<td></td>
</tr>
<tr>
<td>13 - Torts</td>
<td></td>
</tr>
</tbody>
</table>

Although a rule with the rating of LOW or MED has shown up either zero or only a few times in the past, that rule may still show up on future bar examinations. Therefore, such rules should NOT be ignored, and if you have enough time it should be memorized.

The **HIGH, MED**, or LOW designation is NOT A PREDICTION OF WHAT RULES WILL APPEAR ON ANY GIVEN EXAM. Instead, we have given each rule a priority designation based on how often that particular rule has shown up on past Multistate Essay Exams.

For example, whenever a Civil Procedure question appeared we found that approximately forty (40%) percent of the time a component of the question dealt with the “Subject Matter Jurisdiction: Diversity of Citizenship” rule. Since this rule is tested frequently, it makes sense to spend more time memorizing it than, say, the rule of “Depositions”, which appeared only once in the last 25 years.

The purpose of providing the **HIGH/MED/LOW** priority rating and the frequency with which rules have appeared is so you can see how often each rule has been tested as compared to the other rules at a glance, and prioritize your studying to focus on the most important and frequently tested rules first before moving onto the less important ones. Ultimately, this method promotes efficiency in studying for the bar exam.

Best of luck on the exam!

– The SmartBarPrep Team

¹ The subject of Sales (UCC Article 2) was tested on a few exams prior to July 2007; these rules have been included in the Contracts subject.
A. Agency Relationships

H) Creation of Agency Relationship

Definition – Agency is a fiduciary relationship, where a person or entity (the agent) acts on behalf of another (the principal).

Elements – An agency relationship exists if there is:
1) Assent – a formal or informal agreement;
2) Benefit – the conduct primarily benefits the principal; AND
3) Control – the principal has the right to control the agent (control doesn’t need to be significant).

*The characterization of the relationship by the parties is irrelevant.

L) Types of Agency Relationships

- Universal Agent – has broad authority, authorized for ALL acts the principal can perform.
- General Agent – has authority to conduct a series of transactions over a period of time.
- Special Agent – has limited authority either for a specific act/transaction OR a specified period of time.

M) Termination of Agency Relationship

An agency relationship terminates by:

a) A manifestation by either party that the relationship is terminated;
b) Expiration of a specified term of authority;
c) Death of principal or agent (by operation of law); OR
d) Incapacity of the principal or agent (by operation of law) – except if a durable power of attorney exists.

Death of Principal:

Common Law → agency is terminated regardless of whether the third-party has notice of principal’s death.
Some States → NOT terminated until the third-party has notice of the death.

Agency Contracts – Principal can terminate the agent at any time.

- BUT, principal may be liable for damages if agent is terminated prior to the expiration of a contract (unless the agent materially breached contract).

B. Contractual Liability of Principal & Agent

H) Actual Authority – A principal is bound to a contract entered into by its agent if the agent had actual authority.

Two Types – occurs if:

Express Authority → by principal’s explicit directions to the agent (either orally or in writing).

Implied Authority → either:

a) Action is necessary to carry out the agent’s express authorized duties;
b) Agent acted similarly in prior dealings with the principal; OR
c) It’s customary for an agent in that position (silence/acquiescence can give rise to a reasonable belief of authority in the future).

An agent has actual authority when acting within their reasonable understanding of authority, even if the principal later shows the agent was mistaken.

H) Apparent Authority – A principal is bound to a contract entered into by its agent if the agent had apparent authority.

Apparent Authority exists when:

1) A third-party reasonably believes the agent has authority to act on behalf of the principal; AND
2) That belief is traceable from the principal’s manifestations (principal holds the agent out as having authority).

A principal holds the agent out as having authority when he:

a) gives a position or title indicating authority;
b) previously held the agent out and did not published a revocation; OR
c) cloaked the agent with the appearance of authority.

*Continues until the principal communicates termination to third-parties.

Apparent Authority is NOT applicable if:

a) the third-party had knowledge that the agent did not have actual authority; OR
b) the transaction was not within the ordinary usages of business.

Unidentified/Partially Disclosed Principal → Apparent Authority CAN exist.

Undisclosed Principal → Apparent Authority CANNOT exist.
PARTNERSHIPS

Definitions

Pship = Partnership
UPA = Uniform Partnership Act
RUPA = Revised Uniform Partnership Act
ULPA = Uniform Limited Partnership Act
RULPA = Revised Uniform Limited Partnership Act

A. Creation of Partnerships

General Partnership (GP) – is created when:
1) two or more persons;
2) as co-owners;
3) carry on a business for profit.
*Intent to form a partnership is NOT required.

A joint venture or sharing in gross profits DOES NOT automatically create a partnership.

Creditor vs. Partner – A person who receives a share of the profits is presumed to be a partner UNLESS the payment is received in payment:
- a) of a debt;
- b) for wages as an employee or independent contractor;
- c) of rent;
- d) of an annuity or retirement benefit;
- e) of interest/loan charges; OR
- f) for the sale of goodwill of a business.

Limited Partnership (LP) – is composed of limited partner(s) AND at least one general partner.

Formation – An LP is formed upon filing a Certificate of Limited Partnership with the Secretary of State, which must include:
1) name of Pship;
2) address of Pship;
3) name and address of each partner;
4) whether the Pship is an LLP; AND
5) signed by a general partner.

Limited Liability Partnership (LLP) – In an LLP, all partners have limited personal liability.

To Become an LLP:
1) It must be approved by the same vote necessary to amend the Pship Agreement; AND
2) A Statement of Qualification must be filed with the Secretary of State containing:
   i. name and address of Pship;
   ii. statement that the Pship elects to become an LLP; and
   iii. a deferred effective date (if any).

Filing DOES NOT create a new partnership (if a GP or LP existed prior to filing):
- The Pship remains liable for any obligations before it became an LLP.

Amending the Pship Agreement – Unless agreed otherwise, the Pship agreement may be amended at any time with a unanimous vote.

B. Power & Authority of Partners

Authority to Bind the Partnership – A partner is an agent of the Pship, and generally has authority to bind the Pship for its business (including contracts).
- To bind the Pship, the partner MUST have authority.

Express Actual Authority – A partner receives such authority from the partners.
- Acts within the ordinary course of business → must be approved by a majority of the partners.
- Acts outside the ordinary course of business → must be approved unanimously.
- If Pship Agreement is silent → a partner has authority for usual & customary matters UNLESS he knows: (a) other partners might disagree, or (b) that consultation is appropriate.

Ordinary Course of Business = normal and necessary for managing the business.

Implied Actual Authority (Incidental Authority) – A partner may take actions reasonably incidental or necessary to achieve the partner’s authorized duties.

Apparent Authority – A partner has apparent authority for acts:
- a) conducted within the ordinary course of the Pship business; OR
- b) of the kind carried on by the Pship.

BUT, a partner’s act will NOT bind the Pship when the:
1) Partner lacked authority; AND
2) Third-party knew (or received notice) of a lack of authority.

Authority to Bind the Partnership After Dissolution – A partner’s authority is limited after dissolution.

Actual Authority → limited only to acts appropriate for winding up the business.
Definitions

BoD = Board of Directors
SH = Shareholder
RMBCA = Revised Model Business Corporation Act
RULLCA = Revised Uniform Limited Liability Company Act

A. Formation of a Corporation

Formation of a Corporation

Date of Corporate Existence → begins on the date the Articles of Incorporation are properly filed with the Secretary of State, unless a delayed effective date is specified.

- RMBCA → DOES NOT allow an earlier effective date.

De Jure Corporation = a properly formed corporation.

Articles of Incorporation – are filed to form a corporation, and MUST contain:
1) corporate name;
2) number of shares the corp. is authorized to issue;
3) corp.’s address and name of the initial registered agent; AND
4) name and address of each incorporator.

The Articles of Incorporation control if there is a conflict with the Bylaws.

Bylaws = rules and regulations adopted by the BoD that govern the internal operations of a corp.
- RMBCA → bylaws may contain any provision not inconsistent with the: (a) Articles of Incorporation; OR (b) law of the jurisdiction.

Amending the Bylaws:
Shareholders → may amend or repeal.
Board of Directors → may amend or repeal UNLESS:
  a) Articles of Incorporation exclusively reserve the power to SH’s; OR
  b) The SH’s (in amending a bylaw) expressly provide that the BoD cannot amend or reinstate that specific bylaw.

*If a bylaw deals with director nomination procedures, the BoD retains power to safeguard the voting process, BUT cannot repeal a shareholder approved bylaw.

Powers of a Corporation – A corp. has the power to do all things necessary or convenient to carry out its business and affairs.

- Includes → lawsuits, own/lease real property, contracts, borrow/loan money, make investments, involvement with other businesses, fix compensation/salaries, charitable donations, pay/engage in lobbying.

B. Formation of a Limited Liability Company

Formation of an LLC

Articles of Organization → An LLC is formed when the:
1) Articles of Organization (a.k.a. Certificate of Formation) is properly filed with the Secretary of State; AND
2) LLC has at least one member.

Operating Agreement → Governs: (1) the relations between the members and LLC; (2) the rights/duties of managers; (3) activities and affairs of the LLC; and (4) any means and conditions for amending the Operating Agreement.

C. Pre-Formation Contract Liability

Liability of Promoter → A promoter acts on behalf of a corp. that has not yet been formed.

A promoter is personally liable when:
1) he purports to act as or on behalf of a corp.; AND
2) knows no corp. was formed.

A promoter remains personally liable for a pre-corp. contract even if the corp. subsequently adopts the contract.
- BOTH the corp. and the promoter will be liable if adopted.

A promoter is NOT liable if:
  a) there is a subsequent novation; OR
  b) the contract explicitly provides that the promoter has no personal liability.

Liability of Corporation → A corp. is NOT liable on a contract made by a promoter UNLESS the corp. expressly or impliedly adopts the contract post-incorporation.
  - Express Adoption = BoD action or reference in corp.’s formation documents.
  - Implied Adoption = Corp. (1) knows / has reason to know the material terms of the contract; AND (2) accepts some benefit of the contract.
HOW TO USE THE SMART SHEETS

Priority Ratings Guide

A priority rating (H, M, or L) will be listed in the color-coded circle next to each rule.

<table>
<thead>
<tr>
<th>Priority Circle</th>
<th>Priority Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>H</strong></td>
<td><strong>High Priority</strong> – these are the most important and frequently tested rules.</td>
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<td><strong>L</strong></td>
<td><strong>Low Priority</strong> – these rules have been tested the least.</td>
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</table>

The priority ratings are based upon two primary factors:

- How often that rule has been tested in the past on the MEE essays for that particular subject area. This testing frequency data is also useful for prioritizing the MBE rules because both the MBE and MEE sections are drafted by the same entity (the National Conference of Bar Examiners).
- The testing frequency for each topic in the official MBE Subject Matter Outline released by the National Conference of Bar Examiners.

There are no LOW priority ratings for six subjects¹ because these subjects have only been tested on the MEE since July 2007, and the pool of exams to pull data from was more limited. As such, we felt many important rules would receive an unwarranted LOW designation.

The purpose of providing the **HIGH/MEDIUM/LOW** priority rating is so you can see how important each rule is compared to the other rules at a glance, and **prioritize your studying**

---

¹ Constitutional Law, Contracts, Criminal Law & Procedure, Evidence, Real Property, and Torts.
to focus on the most important and frequently tested rules first and foremost before moving onto the less important ones.

For example, whenever a Civil Procedure question appeared we found that approximately forty (40%) percent of the time a component of the question dealt with the “Subject Matter Jurisdiction: Diversity of Citizenship” rule. Since this rule is tested frequently, it makes sense to spend more time memorizing it than, say, the rule of “Depositions”, which appeared only once in the last 25+ years.

Although a rule with the rating of LOW or MEDIUM has shown up either zero or only a few times in the past, that rule may still show up on future bar examinations. Therefore, such rules should NOT be ignored, and if you have enough time it should be memorized.

The HIGH, MEDIUM, or LOW designation is not a prediction of what rules will appear on any given exam.

Instead, it is meant to help you prioritize your studying to focus on the most important and frequently tested rules. Ultimately, this method promotes efficiency in studying for the bar exam.

Best of luck on the exam!

– The SmartBarPrep Team
UBE Smart Flashcards - Screenshots

20 Cards Studied!
14 uniques + 6 repeats

23 % Mastery

Unique Cards Rated This Session

Before After

Continue
What law governs contracts for the Sale of Goods?

Article 2 of the Uniform Commercial Code.

*Under the UCC, a contract may be made in any manner sufficient to show agreement (i.e. conduct showing parties recognize existence of a contract).

*For mixed contracts, the predominant purpose determines which law governs.

Priority: HIGH

How well did you know this?

1 NOT AT ALL  2  3  4  5 PERFECTLY
When is a general partnership created?

When:
1. Two or more persons;
2. As co-owners;
3. Carry on a business for profit.

*No written agreement or intent is needed.

Priority: HIGH
HOW TO PRINT THE FLASHCARDS

Printing Instructions

1. Download the "PDF" file of the flashcards to your computer.

2. Open the PDF file (Adobe Acrobat Reader can be downloaded for free at https://get.adobe.com/reader/).

3. Print the PDF file. In Adobe Acrobat Reader, print as “Actual size” for the best results.

4. After printing the PDF, cut on the solid lines and fold on the dotted line.

5. That’s it!

Best of luck on the exam!

– The SmartBarPrep Team
When does an Agency Relationship exist?

If there is:
1) Assent;
2) Benefit; **AND**
3) Control.

Priority: **HIGH**

What are the three types of Agency Relationships?

1) A *universal* agent (broad authority – ALL acts)
2) A *general* agent (a series of transactions)
3) A *special* agent (limited authority – specific act/transaction OR specified period of time)

Priority: **Low**

When does an Agency Relationship terminate? (when the agent no longer has authority to act)

a) When the principal/agent manifests to the other that the relationship is terminated;
b) A specified term of the agent’s authority expired;
c) Upon the death of the principal or agent; **OR**
d) Upon the incapacity of the principal or agent.

Priority: **Medium**

When does Express Actual Authority exist?

When the principal has *explicitly told the agent* that he is entitled to act.

Priority: **HIGH**
<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
<th>Priority: HIGH</th>
</tr>
</thead>
<tbody>
<tr>
<td>When does Implied Actual Authority exist?</td>
<td>When either:</td>
<td></td>
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<tr>
<td></td>
<td>a) The agent believes he is entitled to act to carry out his express authorized duties;</td>
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<td></td>
<td>b) The agent has acted similarly in prior dealings; OR</td>
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<td></td>
<td>c) It is customary for agents in that position to act in that way.</td>
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<tr>
<td></td>
<td>Priority: HIGH</td>
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<tr>
<td>When does Apparent Authority exist?</td>
<td>When:</td>
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<tr>
<td></td>
<td>1) A third-party reasonably believes that the person has authority to act on behalf of the principal;</td>
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<td>AND</td>
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<td>2) That belief is traceable to the principal’s manifestations.</td>
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<td>Priority: HIGH</td>
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<tr>
<td>How does a principal hold out an agent as having authority?</td>
<td>When he:</td>
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<tr>
<td></td>
<td>a) Gives the agent a position/title indicating such authority;</td>
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<td></td>
<td>b) Has previously held the agent out as having authority and has <em>not</em> published a revocation; OR</td>
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<td></td>
<td>c) Has cloaked the agent with the appearance of authority.</td>
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<tr>
<td></td>
<td>Priority: HIGH</td>
<td></td>
</tr>
<tr>
<td>Apparent Authority is <em>not</em> applicable during what circumstances?</td>
<td>a) If the third-party has actual knowledge that the agent did NOT have authority;</td>
<td></td>
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<tr>
<td></td>
<td>b) The contract/transaction was <em>not</em> within the ordinary usages of business; OR</td>
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<tr>
<td></td>
<td>c) If there is an undisclosed principal (May be applicable if principal is partially disclosed or unidentified.)</td>
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</tr>
<tr>
<td></td>
<td>Priority: HIGH</td>
<td></td>
</tr>
</tbody>
</table>
February 2019, Essay 2
SECURED TRANSACTIONS QUESTION

A company is in the business of manufacturing and selling stereo equipment. Several months ago, the company borrowed money from a bank, to be repaid by the company in monthly installments. The loan agreement, which was signed by the company’s owner, provided that, to secure the company’s obligation to repay the loan, the company granted the bank a security interest in “all personal property” owned by the company. Also that day, under an oral agreement with the company’s owner (who had full authority to speak on behalf of the company), the bank took possession of one of the most valuable items of the company’s property—an original Edison gramophone that the company had acquired because it was the earliest precursor of the company’s digital music players—as part of the collateral for the loan. The bank properly filed a financing statement in the appropriate filing office, listing the company as debtor and, in the space for the indication of collateral, listing only “all personal property.”

Since borrowing the money, the company has run into various financial troubles. It has missed some loan payments to the bank and recently lost a lawsuit, resulting in a large judgment against the company. Last month, the judgment creditor obtained a judicial lien on the gramophone.

Last week, the bank notified the company that it was in default under the loan agreement. Without giving advance notice to the company, the bank sold the gramophone to an antiques collector in a commercially reasonable manner. The judgment creditor has learned about the sale of the gramophone and asserts that he had a superior claim to it.

The sale of the gramophone did not generate enough money to satisfy the company’s obligation to the bank. The bank would like to seize some of the company’s other property in which the bank has an enforceable security interest.

1. Does the company have any claim against the bank with respect to the sale of the gramophone? Explain.

2. As between the bank and the judgment creditor, who had a superior claim to the gramophone? Explain.

3. Does the bank have an enforceable security interest in any personal property of the company other than the gramophone? Explain.
SMART ANALYSIS

Legal Problems

Point One (20%)  
May a secured party dispose of collateral after the debtor’s default without first notifying the debtor? The company has a claim against the bank with respect to the sale of the gramophone because the bank did not send the company a notification of disposition before the sale.

Point Two (40%)  
Whose rights are superior as between the rights of a secured party having possession of an item of collateral and a person who has a judicial lien on the same item? The bank’s security interest in the gramophone is superior to the judgment creditor’s lien because the bank’s security interest was perfected before the lien was created. The bank does not have an enforceable security interest in the company’s other assets because the description of the collateral in the loan agreement is insufficient to create an enforceable security interest in those assets.

Point Three (40%)  
Does a security agreement describing collateral as “all personal property” create an enforceable security interest in a debtor’s property? The bank does not have an enforceable security interest in the company’s other assets because the description of the collateral in the loan agreement is insufficient to create an enforceable security interest in those assets.

Summary

The company has a claim against the bank with respect to the sale of the gramophone because the bank did not provide the company with advance notification of the bank’s intent to dispose of the gramophone. The bank’s security interest in the gramophone is superior to the judicial lien of the judgment creditor because the bank’s security interest was perfected before the lien was created. The bank does not have an enforceable security interest in other property of the company because the language in the security agreement is insufficient and thus the bank’s security interest is not enforceable or attached.
Multistate Essay Exams (MEE’s from 1997-2020)
For the UBE/MEE
July & Fall 2020
July 2017
MEE Questions

Torts

Constitutional Law

Secured Transactions

Decedents’ Estates/Trusts & Future Interests

Evidence/Criminal Law & Procedure

Civil Procedure/Conflict of Laws
Businesses in the United States make billions of dollars in payments each day by electronic funds transfers (also known as “wire transfers”). Banks allow their business customers to initiate payment orders for wire transfers by electronic means. To ensure that these electronic payment orders actually originate from their customers, and not from thieves, banks use a variety of security devices including passwords and data encryption. Despite these efforts, thieves sometimes circumvent banks’ security methods and cause banks to make unauthorized transfers from business customers’ bank accounts to the thieves’ accounts.

To combat this type of fraud, State A recently passed a law requiring all banks that offer funds transfer services to State A businesses to use biometric identification (e.g., fingerprints or retinal scans) to verify payment orders above $10,000. Although experts dispute whether biometric identification is significantly better than other security techniques, the State A legislature decided to require it after heavy lobbying from a State A–based manufacturer of biometric identification equipment.

A large bank, incorporated and headquartered in State B, provides banking services to businesses in every U.S. state, including State A. Implementation of biometric identification for this bank’s business customers in State A would require the bank to reprogram its entire U.S. electronic banking system at a cost of $50 million. The bank’s own security experts do not believe that biometric identification is a particularly reliable security system. Thus, instead of complying with State A’s new law, the bank informed its business customers in State A that it would no longer allow them to make electronically initiated funds transfers. Many of the bank’s business customers responded by shifting their business to other banks. The bank estimates that, as a result, it has lost profits in State A of $2 million.

There is no federal statute that governs the terms on which a bank may offer funds transfer services to its business customers or the security measures that banks must implement in connection with such services. The matter is governed entirely by state law.

The bank’s lawyers have drafted a complaint against State A and against State A’s Superintendent of Banking in her official capacity. The complaint alleges all the facts stated above and asserts that the State A statute requiring biometric identification as applied to the bank violates the U.S. Constitution. The complaint seeks $2 million in damages from State A as compensation for the bank’s lost profits. The complaint also seeks an injunction against the Superintendent of Banking to prevent her from taking any action to enforce the allegedly unconstitutional State A statute.

1. Can the bank maintain a suit in federal court against State A for damages? Explain.

2. Can the bank maintain a suit in federal court against the state Superintendent of Banking to enjoin her from enforcing the State A statute? Explain.

3. Is the State A statute unconstitutional? Explain.
July 2017
MEE Analyses

Torts

Constitutional Law

Secured Transactions

Decedents’ Estates/Trusts & Future Interests

Evidence/Criminal Law & Procedure

Civil Procedure/Conflict of Laws
ANALYSIS

Legal Problems:

(1) Can a private company maintain a suit against a state in federal court seeking damages based upon a claim that the state injured its business by enforcing an unconstitutional law?

(2) Can a private company maintain a suit against a state official in federal court to enjoin that official from enforcing an allegedly unconstitutional law?

(3) Does a state law that requires a multistate business to adopt expensive security measures as a condition of providing certain services in the state impose an unconstitutional burden on interstate commerce?

DISCUSSION

Summary

The bank cannot maintain a suit against State A for damages in federal court. The Eleventh Amendment precludes the federal court from exercising jurisdiction over a suit by a private party seeking to recover damages from a state.

The court can hear the bank’s claim against the Superintendent of Banking because the bank has sued the superintendent in her official capacity and is seeking injunctive relief only.

Although the statute does not discriminate against interstate commerce, it does impose a significant burden on interstate commerce. A court could conclude that the law unconstitutionally burdens interstate commerce if the court finds that the burden imposed is clearly excessive in relation to the purported benefits. A balancing of benefits and burdens would require the court to evaluate the extent of the actual burden the statute imposes on the bank and whether the statute has substantial fraud-protection benefits.

Point One (30%)

Because states are immune under the Eleventh Amendment from suits for damages in federal court, a federal court would dismiss the bank’s damages claim against State A if State A made a claim of sovereign immunity.

The Eleventh Amendment provides that “the Judicial power of the United States” does not extend to “any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . . .” U.S. Const. amend. XI. As “one of the United States,” State A is immune from suit unless it agrees to be sued. While this immunity of States from suits has been described as an “anachronistic survival of monarchical privilege,” it is nonetheless firmly established. *Kennecott Copper Corp. v. State Tax Comm.*, 327 U.S. 573, 580 (1946)
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July 2018

MPT-2 Point Sheet:

Rugby Owners &

Players Association
Rugby Owners & Players Association

DRAFTERS’ POINT SHEET

In this performance test, the examinee is an associate in a private law firm. The Rugby League of America (the League) and the Professional Rugby Players Association (the Players) want the firm to assist them in the creation of an unincorporated membership association, the Rugby Owners & Players Association (ROPA). ROPA will be a joint venture of the League and the Players. It will own certain tangible and intangible properties, which it will exploit commercially. The resulting net revenues will be evenly divided between the League and the Players. Although the League and the Players each have their own counsel, they need a neutral counsel to assist them in the creation of ROPA.

The creation of ROPA poses many legal issues, including issues in the areas of liability, tax, intellectual property, real property, and antitrust. However, the examinee is asked to assist only in the drafting of provisions of ROPA’s Articles of Association that deal with the association’s governance.

The examinee is asked to draft those provisions and to offer a brief explanation of each of his or her recommendations. The task involves application of the law, as set forth in treatise provisions and a single case in the Library, to the facts, as revealed in the File, for the drafting of the provisions and the explanation of each.

The File contains (1) the memorandum from the supervising partner, which includes specific instructions for the format of the examinee’s drafts, with an example; (2) an extended interview with the representatives of the League and the Players; and (3) an initial draft of selected provisions of the ROPA Articles of Association, with blanks to be filled in for both substantive language and explanation for those provisions the examinee is to draft. The Library contains (1) selected excerpts from Walker’s Treatise on Corporations and Other Business Entities, which deals with Franklin corporate law and is also applicable to unincorporated membership associations under Franklin law; and (2) Schraeder v. Recording Arts Guild, a case decided by the Franklin Court of Appeal dealing with quorum and voting requirements.

The following discussion covers all the points the drafters intended to raise in the problem.

I. FORMAT AND OVERVIEW

The examinee must, first, master the facts as revealed by the items in the File, specifically identifying the clients’ needs and desires; second, master the law as set forth by Walker’s Treatise and the case; third, match the clients’ needs and desires to the law and the open provisions of the draft Articles of Association; fourth, draft those provisions indicated in the provided initial draft of the Articles of Association; and fifth, explain the basis for each recommended draft provision in terms of the law and the clients’ needs and desires.