Legal Environment

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CLASS 2

Agency; Legal Considerations in Selecting the Business Format; Jurisdiction; Alternative Dispute Resolution
Agency

What is Agency?

• [A] relationship between parties in which one of the parties asks the other to act on his or her behalf.

Creation of Agency

• Principle authorizes another to act on the principal’s behalf subject to the principal's control
• Fiduciary Duty:
  – An obligation to act in another's best interest when one person acts on behalf of another person in a particular matter.
Formation of the Agency Relationship

- Agreement need not be in writing; consideration is not required
- A person must have contractual capacity to be a principal
- It is immaterial whether the agent personally has the legal capacity to make the contract
- Agency relationship can be created for any legal purpose
- Agency relationship can arrive by (1) agreement of the parties, (2) by ratification, (3), by estoppel, and (4) by operation of the law

Agency by Agreement

- Express or Implied Agreement
- Express – can be written or oral
- Implied by Conduct – is one person acting under the direction of another?

Agency by Ratification

- A person who is not an agent may make a contract on behalf of another
- If the principal approves or affirms the contract by word or by action, an agency relationship is created by ratification.
- Question of intent – can be expressed by words or conduct
Agency by Estoppel

- When a principal causes a third person to believe that another person is the principal's agent, and the third person acts to his or her detriment in reasonable reliance on that belief, the principal is "estopped to deny" the agency relationship.
- Appearance of agency that does not exist. The third party must prove that he or she reasonably believed an agency relationship existed.

Agency by Operation of Law

- Family relationships
  - Basic necessities
  - Social policy of promoting the general welfare of the spouse
- Emergency situations
  - Failure to act outside scope of authority would cause the principal substantial loss.

Employees/Independent Contractors

- All employees who deal with third parties are agents.
- Independent contractors who deal with third parties may or may not be agents.
Independent Contractor

- A person who works independently to accomplish a specific goal or set of goals on behalf of a principal. The independent contractor cannot be controlled in the day-to-day execution of the task by the person who hires him or her.

IRS/Governmental Determination

- Focuses on the degree of control over the worker
- IRS scrutiny
- Possibly require the company to pay social security, withholding, and unemployment taxes

Determining Employee Status

Government uses three tests for independent contractor or employee determination
1. Control over job
2. Financial factors
3. Relationship itself
Control Over Job
1. When and where to do the work;
2. What tools or equipment to use;
3. What workers to hire or to assist with the work;
4. Where to purchase supplies and services;
5. What work must be performed by a specified individual; and
6. What order or sequence to follow.

Financial Factors
1. The extent to which the worker has unreimbursed business expenses;
2. The extent of the worker's investment;
3. The extent to which the worker makes services available to the relevant market;
4. How the business pays the worker; and
5. The extent to which the worker can realize a profit or loss.

Relationship Itself
1. Written contracts describing the relationship the parties intended to create;
2. Whether the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation pay, or sick pay;
3. The permanency of the relationship; and
4. The extent to which services performed by the worker are a key aspect of the regular business of the company.
Agent’s Duties to the Principal

- Performance
- Notification
- Loyalty
- Obedience
- Accounting

Performance

- Agent must use reasonable diligence and skill in performing the work = ordinary care
- Gratuitous agent
  - Without payment
  - No contract
  - Only subject to tort liability
  - Once act has begun, there is a duty to continue to perform

Notification

- Agent is required to notify the principal of all matters that come to her or his attention concerning the subject matter of the agency
- Notice to the agent is notice to the principal
Loyalty

- Agent has the duty to act solely for the benefit of his or her principal
- Agent cannot represent two principals in the same transaction unless both know and consent
- Knowledge acquired through the relationship is confidential

Obedience

- An agent has a duty to follow all lawful and clearly stated instructions given by the principal
- Emergency situation – agent may deviate
- Unclear instructions – agent should act in good faith and in a reasonable manner

Accounting

- Agent has a duty to keep and make available to the principal an account of all property and funds received and paid out on behalf of the principal
- Maintain separate accounts
Principal’s Duties to the Agent

- Compensation
- Reimbursement and indemnification
- Cooperation
- Safe working conditions

Compensation

- Duty to pay the agent for services rendered
- Agreement to compensate is implied
- Pay in a timely manner
- If no amount agreed upon – customary compensation for services

Reimbursement and Indemnification

- When an agent disperses funds to fulfill request of principal or to pay for necessary expenses in the reasonable course of agency duties, the principal has a duty to reimburse
- Principal has the duty to indemnify an agent for liabilities incurred because of authorized and lawful acts and transactions
Cooperation

• Principal has the duty to cooperate with the agent and to assist the agent in performing his or her duties

Safe Working Conditions

• Principal has the obligation to provide safe working premises, equipment, and conditions for all agents and employees.
• Duty to inspect
• Duty to warn about unsafe conditions

Rights and Remedies

• Monetary damages
• Termination of the agency relationship
• Injunction
• Required accountings
Agent’s R&R Against the Principal

- Tort and contractual remedies
- Demand for accounting
  - An agent can withhold further performance and demand that the principal give an accounting
- No right to specific performance

Principal’s R&R Against the Agent

- Constructive trust
  - Anything that an agent obtains by virtue of employment or agency relationship belongs to the principal
- Avoidance
  - If an agent breaches, the principal has a right to void any contract entered into with the agent
- Indemnification
  - When principal is sued by a third party for an agent’s negligent conduct, the principal can sue the agent for an equal amount of damages

Scope of Agent’s Authority

- Actual – Express or Implied
- Apparent
Express Authority

• Authority declared in clear, direct, and definite terms
• Equal dignity rule – if the contract being executed is or must be in writing, the agent’s authority must also be in writing

Power of Attorney

• Confers express authority
• Special or general authority
• Terminates on incapacity or death

Implied Authority

• An agent has the implied authority to do what is reasonably necessary to carry out express authority and accomplish agency objectives
• Can also be:
  – Implied by custom
  – Inferred from the position the agent occupies
Apparent Authority and Estoppel

- When the principal, by either word or action, causes a third party reasonably to believe that the agent has authority to act, even though the agent has no express or implied authority.

Ratification

- Occurs when the principal affirms, or accepts responsibility for, an agent’s unauthorized acts.
- Can be expressed or implied.

Liability for Contracts

- Depends on how the principal is classified and whether agent’s were authorized or unauthorized
- Principal may be
  - Disclosed – known by the 3rd party at time contract is made with agent
  - Partially disclosed – principal’s identity is not known but the 3rd party knows the agent may be acting for a principal
  - Undisclosed – principal whose identity is unknown and 3rd party does not know agent is acting as an agent
Authorized Acts

- If agent acts within scope of authority, principal is normally bound.
- If principal is disclosed, agent has no contractual liability.
- If principal is partially disclosed, agent is also treated as a party.
- If principal is undisclosed
  - Undisclosed principal is bound to perform
  - If agent is forced to pay, the agent is entitled to be compensated
  - Once the principal’s identity is revealed, the third party can hold the agent or the principal liable.

Unauthorized Acts

- If an agent has no authority but nevertheless contracts with a third party, the principal cannot be held liable on the contract.
- If the principal is disclosed or partially disclosed, the agent is liable as long as the third party relied on the agency status.
- If the third party knows at the time the contract is made that the agent does not have authority, then the agent is not liable.

Principal’s Tortious Conduct

- A principal conducting an activity through an agent may be liable for harm resulting from the principal’s own negligence or recklessness.
Principal’s Authorization of Agent’s Tortious Conduct

• A principal who authorizes an agent to commit a tort may be liable to persons or property injured…

Liability for Agent’s Misrepresentation

• A principal is exposed to tort liability whenever a third person sustains a loss due to the agent’s misrepresentation

Apparent Implied Authority

• When a principal has placed an agent in a position of apparent authority—making it possible for the agent to defraud a third party—the principal may also be liable for the agent’s fraudulent acts.
Liability for Agent’s Negligence

- Respondeat superior – the principal/employer is liable for any harm caused to a third party by an agent-employee within the scope of employment
- Principal/employer has vicarious liability

Determining Scope of Employment

1. Whether the employee’s act was authorized by the employer.
2. The time, place, and purposed of the act.
3. Whether the act was one commonly performed by employees on behalf of their employers.
4. The extent to which the employer’s interest was advanced by the act.

5. The extent to which the private interests of the employee were involved.
6. Whether the employer furnished the means or instrumentality by which an injury was inflicted.
7. Whether the employer had reason to know that the employee would perform the act in question and whether the employee had done it before.
8. Whether the act involved the commission of a serious crime.
Employee Travel Time

- Outside scope of employment
  - To and from work
  - To and from meals
- Required business travel – time on trip all is within scope of employment unless significant departure

Notice of Dangerous Condition

- The employer is charged with knowledge of any dangerous conditions discovered by an employee and pertinent to the employment situation.

Liability for Agent’s Intentional Torts

- The employer can be liable for international torts of the employee that are committed within the course and scope of employment
E-Agents

- If an e-agent does not provide an opportunity to prevent errors at the time of the transaction, the other party to the transaction can avoid the transaction.
- If an e-agent fails to provide an on-screen confirmation of a purchase or sale, the other party can avoid the effect of any errors.

Termination of an Agency

- Terminal by Act of Parties
- Termination by Operation of Law

Terminal by Act of Parties

- Lapse of Time
- Purpose Achieved
- Occurrence of a Specific Event
- Mutual Agreement
- At the Option of One Party
- Notice of Termination
Termination by Operation of Law

- Death or Insanity
- Impossibility
- Charged Circumstances
- Bankruptcy
- War

Legal Considerations in Selecting Business Format

Where to Set up the Business

- Situs - the legal and operating jurisdiction of a business.
- Home state, Delaware, or other place
Control

• How much control will the business owner(s) have over the business?
  – Depends on type of organization

Liability

• Certain business organizations provided for limited liability, while others do not
• **Limited Liability** - liability that is restricted by law or by contract and that prevents the owner of a business from being held personally liable for business debts. The owner can only lose his or her investment in that company.

Taxation

• Certain business forms are taxed once (i.e., directly through the owners) and other business forms are double taxed (i.e., a tax on the business AND a tax on the individual)
Capitalization

• Does the business need to have significant assets to operate?

Transferability of Ownership

• Should ownership or portions of ownership of the business be transferable to others?

Jurisdiction
Jurisdictional Requirements

• What is jurisdiction?
  – the power of a court to decide a matter in controversy (i.e., a case)

• What is needed to establish jurisdiction?
  – Authority of the court to hear the case (e.g., original or appellate jurisdiction)
  – Authority of the court over the subject matter (subject matter jurisdiction)
  – Jurisdiction over the parties (personal jurisdiction) or property (in rem jurisdiction) of the suit
  – Proper notice

Subject Matter Jurisdiction

Diversity Jurisdiction
§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000 exclusive of interest and costs, and is between:

1. Citizens of different States;
2. Citizens of a State and citizens or subjects of a foreign state;
3. Citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
4. A foreign state, defined in section 1603(a) of this title [28 USCS § 1603(a)], as plaintiff and citizens of a State or of different States.

Federal Question Jurisdiction
Cases arising under the Constitution, Acts of Congress or treaties, and involving their interpretation and application

Power over Person or Property

• Jurisdiction in personam – power which a court has over the defendant’s person and which is required before a court can enter a personal or in personam judgment.

• Jurisdiction in rem – power of a court over a thing so that its judgment is valid as against the rights of every person in the thing

Black’s Law Dictionary
Personal Jurisdiction

• How can personal jurisdiction be established?
  – General jurisdiction – systematic contacts
  – Specific jurisdiction – specific acts

Due Process Considerations

• When the defendant is out-of-state, a court can exercise personal jurisdiction over the defendant pursuant to the state’s long arm statute (and due process).
• The defendant must have minimum or sufficient contacts to be subject to jurisdiction in the state.
• What if the defendant is in the same state as the court?

Establishing Personal Jurisdiction over the Internet

• Generally, courts view a defendant’s web site to determine whether jurisdiction based on sufficient contacts has been established.
• Courts addressing web site passivity have found that creating a web site without more is not an act “purposefully directed at a forum state” sufficient to warrant the exercise of jurisdiction.
• Courts look to the level of interactivity and commercial nature of the exchange of information that occurs on the web site to determine if sufficient contacts exist to warrant the exercise of jurisdiction.
Cybersell v. Cybersell

Factual Background

• Cybersell AZ
  - It was incorporated in May 1994 to provide Internet and web advertising and marketing services, including consulting.
  - "On August 8, 1994, Cybersell AZ filed an application to register the name "Cybersell" as a service mark. The application was approved and the grant was published on October 30, 1995. Cybersell AZ operated a web site using the mark from August 1994 through February 1995. The site was then taken down for reconstruction.'

• Cybersell FL
  - "In the summer of 1995 ... [Cybersell FL was formed] to provide business consulting services for strategic management and marketing on the web.'

Cybersell v. Cybersell

Arizona Long Arm Statute

• "The Arizona Supreme Court has stated that under Rule 4.2(a), 'Arizona will exert personal jurisdiction over a nonresident litigant to the maximum extent allowed by the federal constitution.' ... Thus, Cybersell FL may be subject to personal jurisdiction in Arizona so long as doing so comports with due process.'

Cybersell v. Cybersell

Specific Jurisdiction

• "We use a three-part test to determine whether a district court may exercise specific jurisdiction over a nonresident defendant:
  1) The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections[].
  2) [the claim must be one which arises out of or results from the defendant's forum-related activities]; and
  3) exercise of jurisdiction must be reasonable."
Cybersell v. Cybersell

- "Interactive" web sites present somewhat different issues. Unlike passive sites such as the defendant's in Bensusan, users can exchange information with the host computer when the site is interactive. Courts that have addressed interactive sites have looked to the "level of interactivity and commercial nature of the exchange of information that occurs on the Web site" to determine if sufficient contacts exist to warrant the exercise of jurisdiction. See, e.g., Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F.Supp. 1119, 1124 (W.D.Pa.1997) (finding purposeful availment based on Dot Com's interactive web site and contracts with 3000 individuals and seven Internet access providers in Pennsylvania allowing them to download the electronic messages that form the basis of the suit); Maritz, Inc. v. Cybergold, Inc., 947 F.Supp. 1328, 1332-33 (E.D.Mo.), reconsideration denied, 947 F.Supp. 1338 (1996).

Cybersell v. Cybersell

- "Cybersell AZ points to several district court decisions which it contends have held that the mere advertisement or solicitation for sale of goods and services on the Internet gives rise to specific jurisdiction in the plaintiff's forum. However, so far as we are aware, no court has ever held that an Internet advertisement alone is sufficient to subject the advertiser to jurisdiction in the plaintiff's home state."
- "Here, Cybersell FL has conducted no commercial activity over the Internet in Arizona. All that it did was post an essentially passive home page on the web, using the name "CyberSell," which Cybersell AZ was in the process of registering as a federal service mark. While there is no question that anyone, anywhere could access that home page and thereby learn about the services offered, we cannot see how from that fact alone it can be inferred that Cybersell FL deliberately directed its merchandising efforts toward Arizona residents."

Holding

- "We conclude that the essentially passive nature of Cybersell FL's activity in posting a home page on the World Wide Web that allegedly used the service mark of Cybersell AZ does not qualify as purposeful activity invoking the benefits and protections of Arizona. As it engaged in no commercial activity and had no other contacts via the Internet or otherwise in Arizona, Cybersell FL lacks sufficient minimum contacts with Arizona for personal jurisdiction to be asserted over it there. Accordingly, its motion to dismiss for lack of personal jurisdiction was properly granted."
Zippo Manufacturing v. Zippo Dot Com

Factual Background

• Zippo Manufacturing (based in PA)
  – Lighters
• Zippo Dot Com (based in CA)
  – Usenet Postings
• Basis of Proceeding
  – Trademark infringement, trademark dilution, false designation of origin

Zippo Manufacturing v. Zippo Dot Com

• How broad is PA’s long arm statute?
  – Fullest extent permitted under the Constitution
• Types of personal jurisdiction
  – General jurisdiction – “systematic and continuous activities” in the forum state
  – Specific jurisdiction – “relationship between the D and the forum falls within the ‘minimum contacts’ framework …”

Zippo Manufacturing v. Zippo Dot Com

• Sliding scale
  – D clearly does business with the website
  – D has a passive website
  – Middle ground
    • Some information exchanged
    • Court looks to “the level of interactivity and commercial nature of the exchange of information that occurs on the website”
Zippo Manufacturing v. Zippo Dot Com

• Why does the court find personal jurisdiction in this case?
  – The court held that the sales of user subscriptions and the contract with Internet service providers were sufficient to conclude that defendant had purposely availed itself for purposes of personal jurisdiction in Pennsylvania.

Missouri's Long Arm Statute

• Mo.Rev.Stat. § 506.500, provides, in relevant part as follows:
  1. Any person or firm, whether or not a citizen or resident of this state, or any corporation, who in person or through an agent does any of the acts enumerated in this section, thereby submits such person, firm, or corporation, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of such acts:
     (1) The transaction of any business within this state;
     (2) The making of any contract within this state;
     (3) The commission of a tortious act within this state;


• Case History
• W.DC of WA
  – Dismissed copyright action for lack of jurisdiction
• 9th Circuit
  – Reversed dismissal

- **Technology at issue**
  - Boots and boot design

- **Parties**
  - Washington Shoe – manufacturer of foot apparel
  - AZ Sporting Goods – operator of a retail store in Alma, Arkansas

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- **Background**
  - A-Z purchased items from WS
  - WS Salesman identified infringing boot copies available at AZ store
  - WS counsel sends C&D letter
  - A-Z removed boots from store and sold of remaining inventory
  - WS sued A-Z

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- **Applied three part jurisdiction test**
  - "purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;"
  - the claim must be one which arises out of or relates to the defendant’s forum-related activities; and
  - the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable."
In tort cases, we typically inquire whether a defendant ‘purposefully direct[s] his activities’ at the forum state, applying an ‘effects’ test that focuses on the forum in which the defendant’s actions were felt, whether or not the actions themselves occurred within the forum.”

The ‘purposeful direction’ or ‘effects’ test … ‘requires that the defendant . . . have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.”

Thus, courts may exercise personal jurisdiction over a defendant who engages in an intentional act that causes harm in the forum state, even if that act takes place outside of the forum state.”

- "A-Z purchased the boots at issue from China and the infringing boots were sold in the same Arkansas store as Washington Shoe's footwear. Subsequently, after receiving notice of the alleged copyright infringement through cease-and-desist letters, A-Z sold the infringing boots to a thrift store. We have little difficulty finding that by intentionally engaging in the actual, physical acts of purchasing and selling the allegedly infringing boots, A-Z has clearly committed an 'intentional act'…"

- "We have repeatedly stated that the 'express aiming' requirement is satisfied, and specific jurisdiction exists, 'when "the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state."'"

- A-Z's activities could rise to willful copyright infringement because of notice of rights before and after selling and tort is an intentional tort.

- "Because the harm caused by an infringement of the copyright laws must be felt at least at the place where the copyright is held, we think that the impact of a willful infringement is necessarily directed there as well."
Enterprise Rent-A-Car Co. v. Stowell

• "In the instant case, Defendant published and maintained a website with the domain name "VIRTUALCAR.COM" that was accessible to Missouri users of the Internet. The website included photographs of classic cars, but the user could not purchase such cars via the site or exchange information with Defendant via the site. No Missouri users contacted Defendant about buying cars and the site led to no business with a Missouri user. Exercising personal jurisdiction in this case is inconsistent with due process."

Discussion

• Would a user's Facebook page cause the user to be liable for personal jurisdiction anywhere in the country?

Alternative Dispute Resolution
Alternative Dispute Resolution

• Settling a legal dispute with one or more experts
• Flexibility includes:
  – How the dispute will be settled
  – Procedures used
  – Whether 3rd party will present or make a decision
  – Binding or non-binding decision
  – Privacy

Forms of ADR

• Negotiation
• Mediation
• Arbitration

Negotiation

• Informal meeting
• With or without attorneys
• Parties attempt to reach an agreement by themselves
Mediation

- Neutral third party mediator meetings with the parties
- The mediator may suggest or propose resolutions
- The parties decide the resolution

Arbitration

- The parties present their arguments and evidence before an arbitrator at a hearing
- The arbitrator renders a decision
- The decision may be binding or non-binding

Example Mediation

- In-class example mediation, with a discussion of the results at the end.
Program Completed

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