

Midterm Essay Questions Issue Outlines

Question 1.

- I. Partnership or something else?
  - a. What is the test as to whether they had formed a partnership
    - i. Intent irrelevant in some states
    - ii. Multi part test in other states
      1. Where test applied they agreed to share profits
      2. Did not expressly agree re losses
      3. Did not discuss control rights
    - iii. Statute of frauds issues with respect to duration?
- II. If there was a partnership, what impact on their scheme vis-à-vis taking equipment?
  - iv. In modern jurisdictions, no right to any asset (entity theory)
  - v. In others, argument may be that each has right to fraction of each piece of equipment
  - vi. In most instances, the agreement of the parties will govern BUT
    1. Agreement was to take only when business dissolved so no right to take presently
- III. What enforceable duty did Mervyn owe the others?
  - vii. Covenant of good faith
  - viii. Duty of loyalty
  - ix. Duty not to usurp opportunity
  - x. Duty not to compete
  - xi. BUT no per se breach of duty just because partner's own interests are advanced
- IV. Remedies
  - a. Injunctive relief may be available because can demonstrate breach of duty giving rise to irreparable or incalculable losses (due to inability to know how long would be out of business)
- V. Obligation on the lease
  - a. Joy personally obligated certainly
  - b. Is there any issue raised because lease in all three names?
    - i. Would need to know if the others knew it (presenting estoppel argument)
    - ii. If a partnership obligation, each is jointly and severally liable
  - c. Is there a right to contribution from the others under any theory?
    - i. Would need to know what they agreed to do about the deposit
    - ii. What they agreed to do about the rent

- d. Equitable indemnity available where the others benefitted
- e. May be action against Dan for interference

Question 2.

- I. Carl's rights arise from his role as
  - a. Shareholder generally
  - b. Minority shareholder
  - c. Director
- II. As against Abraham,
  - a. Breach of duty of care as director
  - b. Gross negligence with respect to conduct surrounding explosives
  - c. Conflict of interest
  - d. Breach of duty of loyalty with respect to putting own interests ahead of company
  - e. No Business Judgment defense available to Abraham since made no decision for corporation, only for himself
    - i. No colorable claim that he thought his actions were in the best interests of the corporation
- III. As Against Francine
  - a. Breach of duty of care (*Francis* case) abject dereliction of duty
  - b. Breach of duty to other directors to inform them of facts revealed by Abraham
  - c. Arguable conflict of interest due to engagement to Abraham
- IV. As Against Majority Shareholders
  - a. Breach of fiduciary duty to minority shareholders
    - i. "Freeze out" attempt
- V. As Against other Directors
  - a. Duty of care (monitoring plant)
    - i. Issue as to how available information from shop foreman was
    - ii. Was there any effort to monitor?
    - iii. Given the nature of the business, possible heightened responsibility
  - b. Did David Diller have an obligation to act in face of refusal of 3 directors to address emergency
- VI. Carl's own responsibility
  - a. Arguably on notice to investigate further given suspicion re Abraham
    - i. Certainly imprudent to promptly thereafter vote for bonuses
  - b. Could persons injured argue to pierce the veil
    - i. Elements available to establish
      - 1. Failure to keep minutes
      - 2. Self dealing
        - a. Abraham using company as piggy bank
        - b. Putting fiancé on board
      - 3. Unreasonable actions measured against risks (explosives)
      - 4. Probably insufficient

- c. Why no board action between after first explosion?
  - d. Did he breach duty of loyalty by worrying about his stock when corporation's interests required immediate judicial intervention to protect the interests of the minority shareholders and to remove Abraham, at a minimum, from the board.
  - e.
    - i. Facts don't indicate what any board member did other than fight about control.
- VII. Actions to terminate Carl
- a. Probably OK in concept, shareholders usually have the right to replace directors
  - b. Same for right to amend articles and create new class of stock, provided provisions of by-laws and any applicable statutes are honored.
    - i. Depends on jurisdiction as to formality which must be followed regarding adding classes of stock. Unlikely could do that quickly, but could do