

EXAMPLLES & EXPLANATIONS

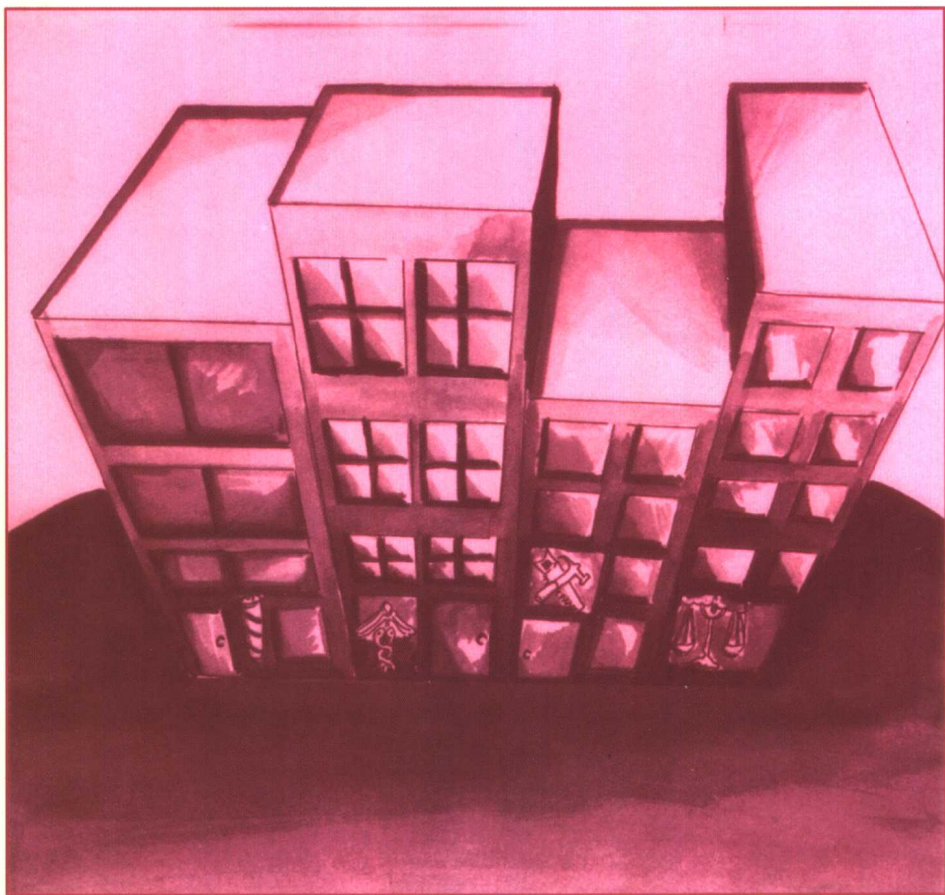
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Agency, Partnerships, and LLCs

第二版

案例与解析 影印系列

[美] 丹尼尔·S·克莱因伯格 / 著
(Daniel S. Kleinberger)



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EXAMPLES & EXPLANATIONS

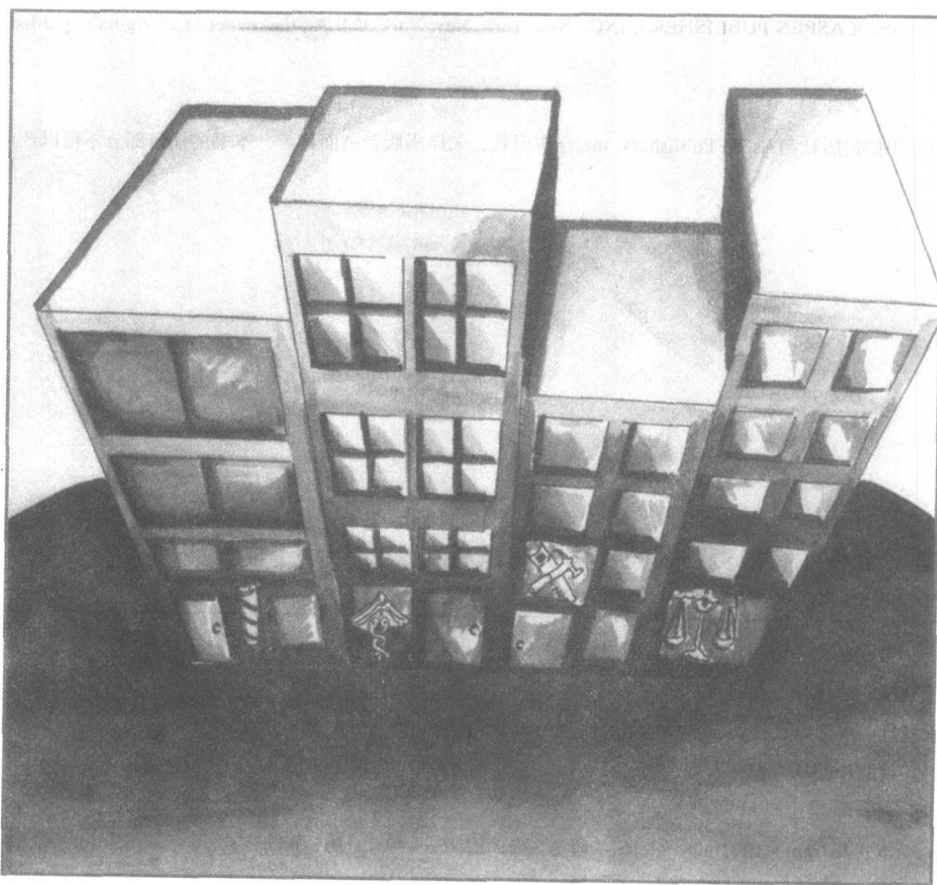
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代理 合伙 有限责任公司: 案例与解析

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总 序

吴志攀

加入世界贸易组织表明我国经济发展进入了一个新的发展时代——一个国际化商业时代。商业与法律的人才流动将全球化，评介人才标准将国际化，教育必须与世界发展同步。商业社会早已被马克思描绘成为一架复杂与精巧的机器，维持这架机器运行的是法律。法律不仅仅是关于道德与公理的原则，也不单单是说理论道的公平教义，还是具有可操作性的精细的具体专业技术。像医学专业一样，这些专业知识与经验是从无数的案例实践积累而成的。这些经验与知识体现在法学院的教材里。中信出版社出版的这套美国法学院教材为读者展现了这一点。

教育部早在2001年1月2日下发的《关于加强高等学校本科教学工作提高教学质量的若干意见》中指出：“为适应经济全球化和科技革命的挑战，本科教育要创造条件使用英语等外语进行公共课和专业课教学。对高新技术领域的生物技术、信息技术等专业，以及为适应我国加入WTO后需要的金融、法律等专业，更要先行一步，力争三年内，外语教学课程达到所开课程的5%-10%。暂不具备直接用外语讲授条件的学校、专业，可以对部分课程先实行外语教材、中文授课，分步到位。”

引进优质教育资源，快速传播新课程，学习和借鉴发达国家的成功教学经验，大胆改革现有的教科书模式成为当务之急。

按照我国法学教育发展的要求，中信出版社与外国出版公司合作，瞄准国际法律的高水平，从高端入手，大规模引进畅销外国法学院的外版法律教材，以使法学院学生尽快了解各国的法律制度，尤其是欧美等经济发达国家的法律体系及法律制度，熟悉国际公约与惯例，培养处理国际事务的能力。

此次中信出版社引进的是美国ASPEN出版公司出版的供美国法学院使用的主流法学教材及其配套教学参考书，作者均为富有经验的知名教授，其中不乏国际学术权威或著名诉讼专家，历经数十年课堂教学的锤炼，颇受法学院学生的欢迎，并得到律师实务界的认可。它们包括诉讼法、合同法、公司法、侵权法、宪法、财产法、证券法等诸多法律部门，以系列图书的形式全面介绍了美国法律的基本概况。

这次大规模引进的美国法律教材包括：

伊曼纽尔法律精要 (Emanuel Law Outlines) 美国哈佛、耶鲁等著名大学法学院广泛采用的主流课程教学用书，是快捷了解美国法律的最佳读本。作者均为美国名牌大学权威教授。其特点是：内容精炼，语言深入浅出，独具特色。在前言中作者以其丰富的教学经验制定了切实可行的学习步骤和方法。概要部分提纲挈领，浓缩精华。每章精心设计了简答题供自我检测。对与该法有关的众多考题综合分析，归纳考试要点和难点。

案例与解析 (Examples and Explanations) 由美国最权威、最富有经验的教授所著，这套丛书历

经不断的修改、增订，吸收了最新的资料，经受了美国成熟市场的考验，读者日众。这次推出的是最新版本，在前几版的基础上精益求精，补充了最新的联邦规则，案例也是选用当今人们所密切关注的问题，有很强的时代感。该丛书强调法律在具体案件中的运用，避免了我国教育只灌输法律的理念与规定，而忽视实际解决问题的能力培养。该丛书以简洁生动的语言阐述了美国的基本法律制度，可准确快捷地了解美国法律的精髓。精心选取的案例，详尽到位的解析，使读者读后对同一问题均有清晰的思路，透彻的理解，能举一反三，灵活运用。该丛书匠心独具之处在于文字与图表、图例穿插，有助于理解与记忆。

案例教程系列 (Casebook Series) 覆盖了美国法学校院的主流课程，是学习美国法律的代表性图书，美国著名的哈佛、耶鲁等大学的法学院普遍采用这套教材，在法学专家和学生中拥有极高的声誉。本丛书中所选的均为重要案例，其中很多案例有重要历史意义。书中摘录案例的重点部分，包括事实、法官的推理、作出判决的依据。不仅使读者快速掌握案例要点，而且省去繁琐的检索和查阅原案例的时间。书中还收录有成文法和相关资料，对国内不具备查阅美国原始资料条件的读者来说，本套书更是不可或缺的学习参考书。这套丛书充分体现了美国法学教育以案例教学为主的特点，以法院判例作为教学内容，采用苏格拉底式的问答方法，在课堂上学生充分参与讨论。这就要求学生不仅要了解专题法律知识，而且要理解法律判决书。本套丛书结合案例设计的大量思考题，对提高学生理解概念、提高分析和解决问题的能力，非常有益。本书及时补充出版最新的案例和法规汇编，保持四年修订一次的惯例，增补最新案例和最新学术研究成果，保证教材与时代发展同步。本丛书还有配套的教师手册，方便教师备课。

案例摘要 (Casenote Legal Briefs) 美国最近三十年最畅销的法律教材的配套辅导读物。其中的每本书都是相关教材中的案例摘要和精辟讲解。该丛书内容简明扼要，条理清晰，结构科学，便于学生课前预习、课堂讨论、课后复习和准备考试。

除此之外，中信出版社还将推出教程系列、法律文书写作系列等美国法学教材的影印本。

美国法律以判例法为其主要的法律渊源，法律规范机动灵活，随着时代的变迁而对不合时宜的法律规则进行及时改进，以反映最新的时代特征；美国的法律教育同样贯穿了美国法律灵活的特性，采用大量的案例教学，启发学生的逻辑思维，提高其应用法律原则的能力。

从历史上看，我国的法律体系更多地受大陆法系的影响，法律渊源主要是成文法。在法学教育上，与国外法学教科书注重现实问题研究，注重培养学生分析和解决问题的能力相比，我国基本上采用理论教学为主，而用案例教学来解析法理则显得薄弱，在培养学生的创新精神和实践能力方面也做得不够。将美国的主流法学教材和权威的法律专业用书影印出版，就是试图让法律工作者通过原汁原味的外版书的学习，开阔眼界，取长补短，提升自己的专业水平，培养学生操作法律实际动手能力，特别是使我们的学生培养起对法律的精细化、具体化和操作化能力。

需要指出的是，影印出版美国的法学教材，并不是要不加取舍地全盘接收，我们只是希望呈现给读者一部完整的著作，让读者去评判。“取其精华去其糟粕”是我们民族对待外来文化的原则，我们相信读者的分辨能力。

是为序。

AGENCY, PARTNERSHIPS, AND LLCs

Examples and Explanations



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to Carrie, the partner of my life,

and

*to Rachael and Sam, each in her or his own way
the finest Examples I have ever helped create.*

Preface to Second Edition

In the seven years since the publication of the first edition, the law of unincorporated business associations has undergone a revolution. The limited liability company (“LLC”) has become the entity of choice for a myriad of enterprises, and the Revised Uniform Partnership Act (“RUPA”) has revitalized the law of general partnerships. In some states, the annual number of newly-formed LLCs has exceeded the number of newly-formed corporations, and RUPA—with its tilt toward entity continuity and its provisions on limited liability partnerships (“LLPs”)—has made the “shielded” general partnership as useable and interesting as an LLC.

In 2001, the National Conference of Commissioners on Uniform State Laws promulgated a new uniform limited partnership act—ULPA (2001). While the new act modernizes the law applicable to limited partnerships and also provides for limited liability limited partnerships (“LLLPs”), limited partnerships formed under predecessor statutes continue to serve thousands of ventures in which essentially passive investors rely on powerful, entrenched management.

Meanwhile, the common law of agency has been undergoing a recrudescence of its own. The American Law Institute is working through a Restatement (Third) of Agency, giving particular attention to agency issues *within* business entities and other modern organizations. By happenstance, agency law issues have also become relevant to the daily headlines. As this edition goes to press, those headlines contemplate accounting firms that have failed to detect massive corporate cheating and religious organizations allegedly rife with sexually abusive clergy. The auditors defend themselves, in part, by asserting that the corporations already “knew” of the cheating because, as a matter of agency law, a corporation knows what its top officers know.¹ The allegations of clergy abuse raise questions of a “master’s” vicarious liability for the intentional torts of a “servant”² and a principal’s direct liability for negligently hiring, training, supervising or retaining an agent.³

The matters covered by this book thus have great current importance, but such “relevance” accounts for only half the benefits of studying these

1. See section 2.4.

2. See section 3.2.6.

3. See section 4.4.1.

Preface

topics. Regardless of the use you plan to make of your legal training, studying agency law and the law of unincorporated business organizations will help you learn part of what is loosely called “thinking like a lawyer.”

Such thinking includes a process I have labeled “categories and consequences”—analyzing situations by defining categories of behavior and then attaching consequences to those categories. This is not the only way in which lawyers understand the world, but it is certainly a fundamental one.

Agency law is an excellent way to learn about categories and consequences. Indeed, the analytic training that comes with understanding agency law’s approach to issues rivals the analytic training available in confronting the Rule Against Perpetuities. Fortunately, mastering agency law is less traumatic.

The analytic benefits of studying partnership law come from several sources: applying the categories and consequences approach in more complex settings; seeing how themes from one area of law (i.e., agency) manifest themselves in a related but distinct area of law; developing familiarity with the concept and function of “default rules”; and learning to distinguish between issues within an organization (*inter se* issues) and issues between an organization and third parties.

To this mix of skills and concepts, studying the law of LLCs, LLPs, and LLLPs adds further experience in recognizing old themes in new settings (e.g., power to bind the organization; fiduciary duties within an organization) and further refinement of the distinction between *inter se* issues and third party issues (e.g., direct versus derivative claims, conflicts between an LLC’s articles of organization and operating agreement).

I hope you will find this book useful, whether you are taking a course that considers its topics in depth or in passing.

August 2002

Daniel S. Kleinberger

Introduction

The structure of legal rules. Law does much of its analysis by applying labels to facts.

Example: A multinational corporation lends millions of dollars to a local grain and seed company and tells that company how to run its business. The local company becomes insolvent, owing substantial debts to local farmers. The farmers try to recover from the multinational corporation. Whether they can do so depends on whether they can label the local company as the “agent” of the corporation.

Example: A national franchisor requires its local franchisees to follow a thick volume of operating regulations. A customer slips and falls while on the franchise’s premises and attempts to recover from the national franchisor. Whether the customer can do so depends on whether the customer can label the franchisee as the “servant” of the franchisor.

The link between categories and consequences controls the structure of legal rules. Every legal rule can be stated as an IF/THEN proposition, with the IF component stating the elements and the THEN component stating the consequences.

IF: the facts of situation meet specified elements (i.e., if the situation fits a particular category)

THEN: specified consequences result

For example:

IF:

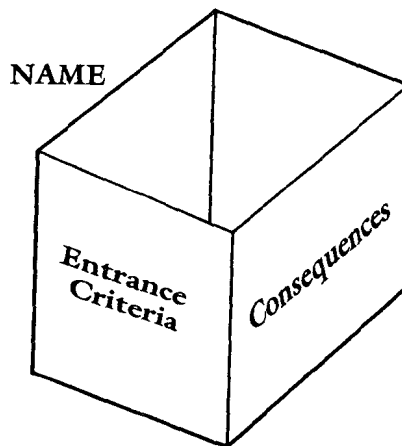
- a party fraudulently makes an assertion of past or present fact concerning a proposed transaction,
- another party justifiably relies on that assertion and is thereby induced to make a contract with the asserting party, and
- the assertion is:
 - inaccurate and
 - material

THEN: the misled party may rescind the contract

Introduction

Those who are more graphically inclined can think of each legal rule as a box. On top, the box has a name of a legal category, for example, “fraudulent inducement.” The front panel of the box contains the “entrance criteria”—the elements that must be satisfied to qualify a situation to fit into the box. The right side panel contains the legal consequences created by the rule. If a situation fits “in the box,” the consequences follow.¹ The figure below illustrates this approach.

In all events, you should keep in mind the link between labeling (categorization) and consequences. By doing so, you will synchronize your way of thinking with the way the law of agency approaches its subject matter.



Name of the box (i.e., the legal category)

- fraud in the inducement

Entrance criteria (i.e., elements of the rule)

- a party fraudulently makes an assertion of past or present fact concerning a proposed transaction
- another party justifiably relies on that assertion and is thereby induced to make a contract with the asserting party
- the assertion is inaccurate and material

Consequences

- defrauded party may rescind contract

1. Perhaps this metaphor helps explain why lawyers are often accused of trying to pigeonhole everything and everybody.

Introduction

Legal analysis for preventative lawyering. Some of the questions in this book ask you to think proactively—that is, to consider a client’s situation and goals, to identify potential legal problems, and to suggest a course of conduct that will prevent the problems from materializing. You may initially find these questions disconcerting, since law school analysis often operates from a post hoc, litigation perspective. That is, you consider a dispute that has already materialized, analyze each party’s prospects, and predict the outcome of the dispute.

You may find the following protocol helpful in thinking preventatively:

1. Review the facts (e.g., the client’s current situation and proposed conduct) and identify legal rules whose application might produce unpleasant consequences for the client.
2. For each such rule, identify the facts that are key to:
 - a. making the rule applicable, and
 - b. causing the rule to produce an unpleasant outcome for the client.
3. For each such fact, try to imagine a change that will make the problematic rule inapplicable or avoid the problematic outcome, but will not frustrate the client’s goals.

Special Notice

Note on the Restatements of Agency and the Meaning of “Person”

Unless otherwise indicated, all references to the Restatement are to the Restatement (Second) of Agency (1958), promulgated by the American Law Institute (“ALI”).² The ALI is currently working on a Restatement (Third) of Agency. References to that project contain the phrase “Restatement (Third)” and indicate a particular draft.

As of fall 2002, the ALI is approximately one-third (perhaps one-half) of its way through developing the Restatement (Third) of Agency. This edition makes numerous references to the Restatement (Third), but readers should keep in mind that the referenced provisions are merely tentative and remain subject to change until an ALI Annual Meeting gives final approval to the entire Restatement (Third).

Unless otherwise indicated, “person” means “legal person” and includes not only human beings but also organizations, such as partnerships, limited liability companies, and corporations.

2. The ALI is a private, nonprofit organization whose members are distinguished lawyers, judges, and law professors. The ALI has published a number of Restatements, each of which attempts to state and explain the law in a particular field. Each Restatement contains a large number of “black letter” propositions, accompanied by explanatory comments and illustrations. Adopted in 1958, the Restatement (Second) of Agency has been and continues to be very influential in courts throughout the United States.

AGENCY, PARTNERSHIPS, AND LLCs

Examples and Explanations

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