

TABLE OF CONTENTS

Chapter 1. An Introduction to the Corporation	1
§ 1.1 What Is a Corporation?	1
A. Formal Creation	1
B. Legal Personality.....	2
C. Separation of Ownership and Control.....	3
D. Indefinite Duration.....	5
E. Transferability	6
F. Limited Liability.....	6
G. Some Fundamental Distinctions	6
§ 1.2 Sources of Corporate Law	8
A. State Corporate Law	8
B. Federal Law	10
1. Sarbanes-Oxley and Dodd-Frank	12
Chapter 2. Forming the Corporation	15
§ 2.1 Introduction	15
§ 2.2 Forming the Corporation	15
§ 2.3 Drafting the Organic Documents	16
A. Articles of Incorporation	16
B. Bylaws	18
1. Adoption and Amendment	18
2. Legality.....	20
§ 2.4 Preincorporation Transactions by Promoters.....	22
A. Corporation as Party	22
B. Promoter’s Liability After the Corporation Is Formed	23
C. Promoter’s Liability in the Event the Corporation Never Comes into Existence	25
D. Policy	25
§ 2.5 Defective Incorporation.....	26
A. De Facto Corporation	26
B. Corporation by Estoppel.....	27
C. Statutory Efforts to Abolish the Common Law Doctrines	28
D. Policy	29
§ 2.6 Promoter’s Fiduciary Duties.....	30
§ 2.7 Corporate Powers and Purposes.....	32
Chapter 3. Financing the Corporation	37
§ 3.1 Introduction	37
A. Corporate Capital Structure	37
B. Equity Securities	38
1. Common Stock	38
2. Preferred Stock	39
C. Debt Securities.....	40
1. Bond Value and Interest Rates.....	41
2. The Indenture	41
D. Convertible Securities	42
E. Asset Backed Securities	43

§ 3.2	Issuance of Securities: The Business Context	44
§ 3.3	Issuance of Securities: Corporate Law Aspects.....	45
	A. The Respective Roles of the Board and Shareholders	46
	B. Subscription Agreements	47
	C. Preemptive Rights	47
§ 3.4	Issuance of Shares: Federal Law.....	48
	A. The Registration Process	49
	B. Exemptions from Registration.....	49
	C. Civil Liabilities for Securities Fraud and Other Violations	52
	D. Becoming a Reporting Company: Registration Under the Securities Exchange Act	53
	E. Financial Disclosures	56
	1. The Audit Committee	57
	2. The Auditor	60
	3. Limits on Non-Audit Services.....	62
	4. The Internal Audit Function.....	63
	5. Internal Controls over Financial Reporting.....	64

Chapter 4. Limited Liability and Piercing the Corporate Veil.....69

§ 4.1	Introduction	69
§ 4.2	Thinking About Limited Liability	71
§ 4.3	Veil Piercing and Related Doctrines	73
	A. Standards	74
	B. Critical Factors in Any Veil Piercing Case	77
	1. Nature of the Claim.....	77
	2. The Nature of the Defendant.....	79
	3. The Laundry List.....	80
	4. Is Undercapitalization, Standing Alone, Enough?.....	83
	5. The Take-Home Lesson: Operationalizing Veil Piercing.....	86
	C. What Law Applies?.....	87
	D. Related Doctrines	88
	1. Reverse Veil Piercing.....	88
	2. Enterprise Liability	91

Chapter 5. Managing the Corporation95

§ 5.1	The Allocation of Corporate Decision-Making Power	95
§ 5.2	The Problem of Managerialism	97
§ 5.3	Consequences of the Separation of Ownership and Control.....	98
§ 5.4	The Board of Directors	101
	A. Why a Board?.....	101
	B. Board of Directors Housekeeping Rules	101
	1. The Requirement That Boards Act Collectively by Meeting	101
	2. Board Size	102
	3. Electronic Participation in Board Meetings....	102
	4. Notice of Board Meetings	103

	5. Quorum and Voting	104
	6. Board Term Limits	104
§ 5.5	Board Composition	105
	A. Board Qualifications.....	105
	B. Independence	105
	1. The Majority Independent Board	106
	2. Who Is Independent?.....	107
§ 5.6	Removal and Vacancies.....	110
§ 5.7	Board Committees	111
	A. State Law	111
	B. Stock Exchange Standards	112
	1. The Nominating and Corporate Governance Committee	112
	2. The Compensation Committee.....	113
	3. The Audit Committee	114
§ 5.8	Officers	117
	A. Delegation of Corporate Powers to Officers.....	117
	B. Officers as Agents.....	117
	1. The Agency Relationship Defined.....	118
	2. Authority of Agents	118
	3. Authority of Corporate Officers	120

Chapter 6. The Duty of Care and the Business

	Judgment Rule	125
§ 6.1	Introduction	125
	A. <i>Shlensky</i> and Abstention.....	126
	B. <i>Technicolor</i> and Substantive Review	128
	C. Where Is Delaware Now?.....	132
§ 6.2	Why a Business Judgment Rule?	133
§ 6.3	The Law of Business Judgment	140
	A. The Nature of the Rule.....	140
	B. Preconditions	141
	1. An Exercise of Judgment	141
	2. Disinterested and Independent Decision Makers.....	141
	3. Absence of Fraud or Illegality.....	142
	4. Absence of Waste	144
	5. Rationality.....	145
	6. An Informed Decision (a.k.a. Process Due Care)	147
	C. The Contextual Business Judgment Rule.....	153
	D. Application to Officers.....	156
§ 6.4	The Duty of Care	157
	A. Is the Duty of Care a Negligence Standard?	157
	B. Causation	158
	C. Reliance on Officers	161
	D. Oversight Cases	162
	E. Shareholder Ratification	163
	F. The MBCA.....	164
§ 6.5	Statutory Responses to <i>Van Gorkom</i> and the “D & O Liability Crisis”	166
	A. Liability Limitation Statutes.....	167

	B. Indemnification Statutes	168
	Chapter 7. The Duty of Loyalty	175
§ 7.1	Distinguishing Care and Loyalty	175
§ 7.2	Conflicted Interest Transactions	176
	A. Common Law Evolution	177
	B. Interested Director Statutes	180
	1. Approval of Conflicted Interest Transactions by a Disinterested Board Majority	180
	2. Approval of Conflicted Interest Transactions by Shareholders	182
	3. Fairness Absent Valid Approval or Ratification	183
	4. MBCA Subchapter F	185
	C. Executive Compensation	186
§ 7.3	Corporate Opportunities	187
	A. Delaware's Standard	188
	B. The ALI Approach	192
	C. Remedy	194
	D. Defenses	195
	1. Capacity	195
	2. Financial or Technical Inability	195
	3. Refusal to Deal	197
§ 7.4	Good Faith	198
§ 7.5	Oversight and Loyalty	200
§ 7.6	Fiduciary Duties of Controlling Shareholders	205
	A. Introduction	205
	B. Identifying Controlling Shareholders	205
	C. Parent-Subsidiary Transactions	209
	1. The Canonical <i>Sinclair Oil</i> Opinion	209
	2. <i>Zahn v. Transamerica</i> and Conflicts Between Classes of Stock	212
	D. Sales of Control	214
	1. The General Rule	214
	2. Sale to a Looter	215
	3. Sale of Office	215
	4. Usurping a Corporate Opportunity	217
	5. Refusals to Sell	219
	E. Freeze-Outs	221
	1. The Business Purpose Test	223
	2. Freeze-Outs and Fairness	224
	3. Freeze-Outs, Fiduciary Duties, and Appraisal	226
	4. Effect of Shareholder Ratification	229
	Chapter 8. Shareholder Litigation	235
§ 8.1	Introduction	235
§ 8.2	Direct Versus Derivative Litigation	235
§ 8.3	Attorney's Fees: Herein of Strike Suits and Their Converse	239
§ 8.4	Procedural Aspects	241
	A. FRCP 23.1	241

B.	Choice of Law and Forum	242
C.	Verification.....	245
D.	Contemporaneous Ownership.....	247
1.	The Basic Requirement	247
2.	Bondholder Standing to Sue Derivatively	249
3.	Director Qua Director Standing	251
E.	Collusive Jurisdiction and Realignment of Parties	252
F.	Fair and Adequate Representation	252
G.	Judicial Approval of Settlements	254
H.	Recovery	255
I.	Jury Trial	256
§ 8.5	Demand and Board Control of Derivative Litigation.....	256
A.	The Demand Requirement.....	256
1.	New York’s Demand Futility Standard.....	257
2.	Delaware’s Demand Futility Standard	259
B.	Board Control of Derivative Litigation	263
1.	Demand Required Cases	263
2.	Demand Excused Cases.....	265
3.	Judicial Concern with Structural Bias.....	270
C.	The ALI and MBCA Universal Demand Alternatives	270
1.	MBCA § 7.44	271
2.	ALI PRINCIPLES Part VII.....	272
3.	Evaluating Universal Demand	273
	Chapter 9. The Limits of Fiduciary Obligation.....	275
§ 9.1	Introduction	275
§ 9.2	Corporate Social Responsibility and the Law.....	275
A.	Case Law	275
B.	Nonshareholder Constituency Statutes	278
C.	Benefit Corporations	281
§ 9.3	Extra-Contractual Duties to Bondholders	282
§ 9.4	Extra-Contractual Duties to Preferred Shareholders....	284
§ 9.5	The “Special” Problem of Corporate Philanthropy.....	287
	Chapter 10. Shareholder Voting	289
§ 10.1	Introduction	289
§ 10.2	State Law	290
A.	Overview	290
B.	Notice, Quorum, and Votes Required.....	290
C.	Election of Directors	292
1.	Plurality Versus Majority Vote.....	292
2.	Cumulative Voting.....	294
3.	Classified Boards	296
D.	Group Voting.....	298
E.	Shareholder Inspection Rights	300
§ 10.3	Federal Regulation of Proxies	306
A.	Origins.....	306
B.	The Regulatory Framework	308
1.	What Is a Solicitation of Proxies?.....	308
2.	The Proxy Rules.....	309

C.	Proxy Contests	313
1.	Disincentives to Proxy Campaigns	314
2.	Reimbursement of Expenses	314
3.	Shareholder Apathy and Related Problems	317
4.	Proxy Contests and Takeover Bids	318
D.	Proxy Litigation	319
1.	The Implied Private Right of Action	319
2.	Key Elements of the Proxy Cause of Action	322
3.	Materiality	322
4.	Reliance and Causation	324
5.	State of Mind	325
6.	Remedies	325
§ 10.4	Shareholder Proposals Under Rule 14a-8	326
A.	SEC Review	327
B.	Eligibility	328
C.	Procedural Issues	328
1.	Number of Submissions	328
2.	Prior Submissions	328
3.	Attendance	329
4.	Timing	329
5.	Length	329
D.	Substantive Grounds for Excluding a Proposal	329
1.	Proper Subjects for Shareholder Action	329
2.	False or Misleading Proposals	330
3.	Not Otherwise Significant	331
4.	Ordinary Business	332
	Chapter 11. Insider Trading and Securities Fraud	335
§ 11.1	Introduction	335
§ 11.2	Origins of the Insider Trading Prohibition	337
A.	State Common Law	337
1.	Face-to-Face Transactions	337
2.	Do Selling Directors Owe a Fiduciary Duty to Their Nonshareholder Purchasers?	338
3.	Stock Market Transactions	339
4.	State Common Law Today	341
5.	Derivative Liability for Insider Trading Under State Corporate Law	342
B.	Origins of the Federal Prohibition	343
C.	A Rule 10b-5 Primer	345
1.	Standing	346
2.	Application to Omission Cases	347
3.	Materiality	348
4.	Scienter	349
5.	The Limits of Rule 10b-5: The Need for Deception	350
6.	Secondary Liability and the Plain Meaning Issue	351
D.	<i>Cady, Roberts</i>	352
E.	<i>Texas Gulf Sulphur</i>	353
§ 11.3	The Disclose or Abstain Rule	356
A.	<i>Chiarella</i>	356
1.	The Facts	356

	2. Inside Versus Market Information.....	357
	3. The Holding.....	357
	B. <i>Dirks</i>	358
	1. Selective Disclosure and Regulation FD.....	360
	2. Tipping Chains.....	361
§ 11.4	The Misappropriation Theory and Rule 14e-3: Post- <i>Chiarella</i> Gap-Fillers.....	362
	A. Rule 14e-3.....	362
	B. Misappropriation.....	364
	1. Origins.....	364
	2. Called into Question.....	366
	3. <i>O'Hagan</i> : Facts.....	367
	4. <i>O'Hagan</i> : Issues.....	367
	5. <i>O'Hagan</i> : Holding.....	371
	6. Open Questions.....	373
§ 11.5	Elements of the Modern Prohibition.....	378
	A. Material Nonpublic Information.....	378
	B. The Requisite Fiduciary Relationship.....	379
	C. Who Is an Insider?.....	382
	1. Classic Insiders.....	383
	2. Constructive Insiders.....	384
	3. Tippees and Tippees.....	386
	4. Nontraditional Relationships.....	387
	5. What Does "Other Relationship of Trust and Confidence" Mean?.....	390
	D. Possession or Use?.....	391
	E. Is There Liability for Trading in Debt Securities?.....	392
	F. Remedies and Penalties.....	394
§ 11.6	Section 16(b).....	396
	A. Matching Transactions.....	397
	B. Officers, Directors, and 10% Shareholders.....	398
	C. Limited Scope.....	401
	D. Form Versus Substance.....	401
	E. Impact of Sarbanes-Oxley.....	403
Chapter 12. Mergers and Acquisitions.....		405
§ 12.1	Introduction.....	405
	A. Classifying Acquisition Techniques.....	405
	B. A Preliminary Overview of Acquisition Mechanics.....	406
	1. The Merger.....	406
	2. The Sale of All or Substantially All Assets.....	408
	3. The Tender Offer.....	408
	4. Negotiated or Open Market Purchases.....	409
	5. The Proxy Contest.....	409
§ 12.2	Statutory Acquisition Techniques.....	410
	A. The Merger.....	410
	B. The Sale of All or Substantially All Corporate Assets.....	413
	1. What Does "All or Substantially All" Mean?.....	413

	2. Choosing Between a Merger and an Asset Sale	415
	C. Triangular Transactions	417
	D. Ensuring Exclusivity	418
§ 12.3	The Appraisal Remedy	421
§ 12.4	De Facto Mergers	422
§ 12.5	The Target Board's Proper Role in Statutory Acquisitions	425
§ 12.6	Non-Statutory Acquisition Techniques	428
	A. Share Purchases Versus Tender Offers	428
	B. Tender Offers Versus Proxy Contests	429
§ 12.7	Federal Regulation of Tender Offers	431
	A. Beachhead Acquisitions	432
	1. The Obligation to Disclose	432
	2. The Content of a Schedule 13D Disclosure Statement	435
	3. Section 13(d) Litigation	437
	B. Tender Offer Disclosure and Procedural Rules	440
	1. Definition of Tender Offer	440
	2. Commencement of a Tender Offer	443
	3. Content of Required Disclosure	443
	4. Procedural Rules	444
	5. Target Obligations	445
§ 12.8	Takeover Defenses: The Arsenal	448
	A. Shark Repellents	448
	1. Classified Boards	448
	2. Supermajority Vote Requirements	449
	3. The Fair Price Variant	450
	B. Poison Pills	451
	1. Flip-Over Pills	451
	2. Flip-In Pills	454
	3. Redemption Provisions	454
	4. Modern Pills	455
	C. Other Defenses	455
	1. Defensive Acquisitions	455
	2. Dual Class Stock Plans	455
	3. Stock Repurchases	456
	4. Lockups	457
§ 12.9	The Propriety of Target Board Resistance to Unsolicited Offers	458
	A. <i>Cheff v. Mathes</i>	459
	B. <i>Unocal</i>	461
	C. <i>Revlon</i>	464
	D. The Paramount Cases	466
	E. <i>Unitrin</i>	476
	F. <i>Corwin</i> and <i>MFV</i>	477
§ 12.10	Consideration of Nonshareholder Constituency Interests	478
	A. Delaware Case Law	479
	B. Nonshareholder Constituency Statutes	481

§ 12.11 State Anti-Takeover Legislation	481
A. The First Generation and MITE	481
1. Preemption Standards.....	482
2. Did the Williams Act Preempt the IBTA?.....	483
B. The Second Generation and CTS.....	486
1. The Second-Generation Statutes	486
2. Powell's CTS Opinion	488
C. Interpreting CTS	490
1. A Meaningful Opportunity for Success	490
2. <i>Amanda</i> Acquisition	491
3. Commerce Clause Issues.....	493

Chapter 13. Dividends and Other Legal Capital

Arcana.....	495
§ 13.1 Introduction	495
§ 13.2 Money in: Herein of Watered Stock	496
A. Watered Stock in Delaware Law Today.....	498
B. Watered Stock Under the MBCA Today	499
§ 13.3 Money out: Dividend Statutes	499
A. Modern Dividend Statutes	499
1. Delaware	500
2. MBCA: Old and New	503
B. Dividends and Asset Revaluation.....	505
§ 13.4 Redemptions and Repurchases.....	506
A. Delaware Law	507
B. MBCA	508
C. Note on Related Legal Issues.....	508
§ 13.5 Stock Splits and Dividends	510
A. Stock Dividends	510
B. Stock Splits	511
C. Reverse Stock Splits and Freeze-Outs	512
§ 13.6 Dividends on Preferred Stock	512
A. Cumulative Dividends.....	513
B. Contingent Voting Rights	515
§ 13.7 Suits to Compel Declaration of a Dividend.....	515

Chapter 14. Close Corporations

§ 14.1 Exit Versus Voice	519
§ 14.2 Private Ordering in Close Corporations	521
A. Private Ordering of Voting Rights.....	521
1. Voting Trusts	521
2. Vote Pooling Agreements	522
B. Private Ordering Re Decision-Making Authority...	528
C. Private Ordering Re Exit Rights	532
1. Restrictions on Transferability	532
2. Buyout Agreements	534
§ 14.3 Fiduciary Duties in Close Corporations.....	538
A. The Massachusetts Line of Cases.....	538
1. The Fiduciary Duties of Majority Shareholders	538
2. The Fiduciary Duties of Minority Shareholders	541

TABLE OF CONTENTS

	B. California Law	543
	C. Delaware Law	544
	D. Lawyers and Freeze-Outs	546
	E. Private Ordering of Fiduciary Obligation	546
§ 14.4	Dissolution	548
	A. Dissolution on Grounds of Oppression and the Reasonable Expectations Standard.....	550
	B. Buyout in Lieu of Dissolution	552
	TABLE OF CASES	557
	INDEX	569