

## **BUSINESS ASSOCIATIONS**

Fall 2008

Mondays - Wednesdays - Fridays

10:00 a.m. – 10:50 a.m.

Classroom 205

Three Credits

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Professor Gordon Smith

Office #422

Office Hours: Drop in or by appointment

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### **Course Description**

This course covers the law governing business associations, soup to nuts. We begin with the law of agency, which is foundational to all business associations. The remainder of the course is divided roughly evenly between closely held business associations and publicly held corporations. The study of closely held business associations is motivated primarily by potential conflicts among owners, whereas the study of publicly held corporations is motivated primarily by potential conflicts between shareholders and managers.

Closely held business associations are firms with a small number of owners, which often organize as partnerships or limited liability companies (LLCs), though many small businesses are corporations. While each form of business association is governed by its own statute, the challenges common in governing all closely held business associations ensure that our study of each of these entities emphasizes similar themes.

Our study of publicly held corporations will explore the ways in which state and national law empowers and constrains different classes of participants in the corporation, with special attention to the roles of shareholders and directors. Much of our time will be devoted to the complex web of fiduciary obligations created by courts to regulate these organizations. Because of limited time, we will not study the laws governing friendly mergers or hostile takeovers, nor will we cover the regulation of fraud under federal securities law. These topics will be covered in Corporate Finance, which is offered in the Winter Semester.

### **Learning Outcomes**

Students who successfully complete this course will be able to:

- Compare and contrast the distinctive features of each form of business association.
- Interpret and analyze business association statutes.
- Examine the effects of limited liability on investors and on society as a whole.
- Classify various factual scenarios according to the doctrines of fiduciary law.
- Create and evaluate the governing documents of a business organization.

## Required Materials

- D. GORDON SMITH & CYNTHIA A. WILLIAMS, BUSINESS ORGANIZATIONS: CASES, PROBLEMS & CASE STUDIES (2<sup>ND</sup> EDITION, ASPEN 2008) (“S&W”)
- WILLIAM A. KLEIN ET AL., BUSINESS ASSOCIATIONS: AGENCY, PARTNERSHIPS, LLCs AND CORPORATIONS, 2008 STATUTES AND RULES (FOUNDATION) (“STATUTORY SUPPLEMENT”)

A website for the course has been created on The West Education Network (TWEN): <http://lawschool.westlaw.com/twen/>.

## Meetings

The class will meet on Mondays, Wednesdays, and Fridays from 10:00 am – 10:50 am in Room 205. Class will not meet on September 19 and October 24. In lieu of class, students will be required to complete two team homework assignments.

## Current Events Questions

We will begin each class period with a “Current Events Question,” which will appear on the course TWEN website. Each question will be inspired by a story in *The Wall Street Journal*. I will keep track of your answers, and the five students with the most correct answers at the end of the semester will be invited to a “cheese night” with Professor Smith.

## Evaluation

The final grade in this course will have the following components: (1) one team “instigation” in class (5%); two team homework assignments (10%); (2) class attendance and participation (10%); (3) five multiple choice examinations (25%); and (4) a two-hour, open-book, essay examination, which is scheduled for Thursday, December 11, 2008 @ 1:30 pm (50%).

## Teams

Each student in the class will be randomly assigned to one of 26 teams comprising 3-4 students. Team members should sit in a cluster in the classroom to ensure that the members of the team are able to work together during the class period.

Instigation. Each team is responsible for serving as the “Instigator” for one class session. The role of the Instigator team is to facilitate learning among the students in the class by engaging the students in an original learning activity. The Instigator team should meet with Professor Smith prior to their assigned class period to discuss their planned activity. Each member of the Instigator team should play a role in developing and presenting or administering the in-class activity. The activity should (1) emphasize the central principles in that day’s assigned reading; (2) require every student in the class to engage actively in solving a problem; (3) involve some work by the students in the class as teams; (4) allow the Instigator team to debrief the class on lessons learned at the close of the activity; and (5) consume between 20 - 30 minutes of class time. The Instigator team will be evaluated as a *team* on a five-point scale. The evaluation will be informed by members of the class, who will have an opportunity to provide feedback in a poll hosted at the TWEN site.

Homework. Each team will complete two transactional homework assignments. Detailed instructions for each assignment will be distributed during the semester. Expected deadlines for the assignments are September 26 and October 29. Each team will grade three homework assignments from other teams.

## **Class Attendance and Participation**

The *Policies and Procedures* of the Law School provide, "Regular and punctual class attendance is required of all law students. It is a matter of importance to their professional preparation.... Students must assume that irregular attendance will result in a grade or credit sanction...."

Learning law is easier and more enriching when students and teachers are part of an engaged community. In this course, students who contribute meaningfully to that learning community will be acknowledged through the widely adopted "present and prepared" system. Here's how it will work ...

Starting with the second class session on Wednesday, August 27, Professor Smith will arrive at the classroom a few minutes early with copies of the class roll, dated for that day. Students who are willing and able to participate in class discussion may initial the roll. Professor Smith will then count such students as "present and prepared" for that day.

Professor Smith will keep a tally of who is present and prepared for all class sessions. Students who are *not* present and prepared for four or fewer classes from August 27 will receive ten points. Students who are *not* present and prepared for five to nine classes from August 27 will receive five points. Students who are *not* present and prepared for more than nine classes from August 27 on will receive no attendance and participation points.

Students may decide whether to pursue points for class attendance and participation or whether to be available to be called on for any given class. Some students do not feel prepared for a particular class, but may wish to hear the class discussion. Students who initial the roll and are not prepared will receive no participation points for the semester.

What does it mean to be prepared? Prepared students must have read all of the assigned material, including any material not covered from previous class sessions and all new material assigned for that day. Students must have made a good faith effort to think about the issues and to answer, at least preliminarily, questions asked in the casebook.

The final grades in the class, including the present and prepared adjustment, will conform to the law school's mandatory median. Students who choose not to pursue class attendance and participation points may receive lower grades than they would receive based solely on their performance on the final examination.

## **Quality Circle**

Quality circles are a form of participatory management used in some businesses to elicit ideas from employees about workplace safety, product quality, manufacturing efficiency, or other issues. Quality circles have been employed in higher education, including in law schools, to assist students in taking responsibility for their learning.

Members of the quality circle have agreed to meet with Professor Smith each week. Relying on their own classroom experiences and on comments from other members of the class, the quality circle will develop recommendations for improving the course.

Members of the quality circle for this semester are: [names].

## Reading Assignments

Below is a list of reading assignments. Though each assignment could be covered in one class session, some assignments may require more than one session.

### I. The Law of Agency (Chapter 1)

*Assignment #1: Creation of the Agency Relationship, S&W pp. 1-9*

*U.S. v. Cyberheat, Inc.*

*Assignment #2: Agent's Fiduciary Duties to Principal, S&W pp. 10-15*

*Food Lion, Inc. v. Capital Cities/ABC, Inc.*

Problem 1-1

*Assignment #3: Apparent Authority & Estoppel, S&W pp. 21-32*

*Bethany Pharmacal Co. v. QVC, Inc.*

Problem 1-2

### II. General Partnerships (Chapter 2)

*Assignment #4: Formation, S&W pp. 53-65*

*Holmes v. Lerner*

Instigators: Group A

*Assignment #5: Fiduciary Duties, S&W pp. 79-85, 86-95*

*Meinhard v. Salmon*

*Gibbs v. Breed, Abbott & Morgan*

Instigators: Group B

*Assignment #6: Liability of Partners to Third Parties, S&W pp. 111-116*

*In re Keck, Mahin & Cate*

Instigators: Group C

*Assignment #7: Limited Liability Partnerships, S&W pp. 117-131*

*Dow v. Jones*

FRODE JENSEN & PILLSBURY WINTHROP, LLP: A CASE STUDY

Instigators: Group D

**MULTIPLE CHOICE EXAMINATION: AGENCY & PARTNERSHIP (5 POINTS)**

### **III. Limited Liability Companies (Chapter 3)**

*Assignment #8: Birth and Development of LLCs, Formation, S&W pp. 143-152*

*Stone v. Jetmar Properties, LLC*

Group E

*Assignment #9: Limited Liability, S&W pp. 167-178*

*D.R. Horton Inc.-New Jersey v. Dynastar Development, L.L.C.*

Instigators: Group F

*Assignment #10: Fiduciary Duties, S&W pp. 178-195*

*Purcell v. Southern Hills Investments, LLC*

*Tzolis v. Wolff*

Instigators: Group G

### **IV. Organization & Structure of a Corporation (Chapter 4)**

*Assignment #11: Incorporation, S&W pp. 221-236*

*Grant v. Mitchell*

Instigators: Group H

*Assignment #12: Directors & Shareholders, S&W pp. 247-267*

*Adlerstein v. Wertheimer*

Instigators: Group I

### **V. Financial Rights of Shareholders (Chapter 5)**

*Assignment #13: Dividends and Distributions, S&W pp. 269-274*

*Klang v. Smith's Food & Drug Centers, Inc*

Instigators: Group J.

*Assignment #14: Limited Liability, Piercing the Corporate Veil ..., S&W pp. 275-281*

*Soerries v. Dancause*

Instigators: Group K

**MULTIPLE CHOICE EXAMINATION: LIMITED LIABILITY (5 POINTS)**

## **VI. Control of the Closely Held Firm (Chapter 6)**

*Assignment #15: Transfer Restrictions, S&W pp. 306-315*

*Capital Instigators: Group Companies, Inc. v. Armour*

Instigators: Group L

*Assignment #16: Classified Shares, S&W pp. 330-341*

*Benchmark Capital Partners IV, L.P. v. Vague*

Instigators: Group M

*Assignment #17: Preemptive Rights, S&W pp. 359-367*

*Kimberlin v. Ciena Corporation*

Instigators: Group N

*Assignment #18: RED HAT, INC.: A CASE STUDY, S&W pp. 376-383*

Instigators: Group O

## **VI. Oppression of Minority Shareholders (Chapter 7)**

*Assignment #19: Introduction; The Plight of the Minority Shareholder, S&W pp. 385-402*

*Elmaleh v. Barlow*

*Leslie v. Boston Software Collaborative, Inc.*

Instigators: Group P

*Assignment #20: Remedies for Minority Oppression, S&W pp. 410-422*

*Naito v. Naito*

Instigators: Group Q

**MULTIPLE CHOICE EXAMINATION: CLOSELY HELD CORPORATIONS (5 POINTS)**

## **VIII. Control of the Publicly Held Firm (Chapter 8)**

*Assignment #21: Kmart Corporation: A Case Study, S&W pp. 423-430*

Instigators: Group R

*Assignment #22: Shareholder Voting, S&W pp. 430-437*

*Unisuper Ltd. Et al. v. News Corporation*

Instigators: Group S

*Assignment #23: Shareholder Proposals: Introduction to Rule 14a-8, S&W pp. 447-450, 460-471*

*Apache Corporation v. NYCERS*

Instigators: Group T

*Assignment #24: Shareholder Proposals: Bylaw Resolutions, S&W pp. 479-488*

*CA, Inc. v. AFSCME (Handout on course TWEN site)*

*AFSCME v. AIG*

Instigators: Group U

*Assignment #25: ENRON CORPORATION AND SARBANES-OXLEY: A CASE STUDY, S&W pp. 488-500*

Instigators: Group V

## **MULTIPLE CHOICE EXAMINATION: FEDERAL REGULATION OF CORPORATIONS (5 POINTS)**

## **IX. Duty of Care (Chapter 9)**

*Assignment #26: Directors' Duty of Care, S&W pp. 501-506*

*Gagliardi v. TriFoods International, Inc.*

Instigators: Group W

*Assignment #28: The Oversight Context, S&W pp. 506-521*

*Smith v. Van Gorkom*

Instigators: Group X

*Assignment #28: The Oversight Context, S&W pp. 522-531*

*In re Caremark International Inc. Derivative Litigation*

Instigators: Group Y

*Assignment #28: The Role of Good Faith, S&W pp. 535-566*

*In re Walt Disney Company Derivative Litigation*

Instigators: Group Z

## **X. Duty of Loyalty (Chapter 10)**

*Assignment #29:* Conflict-of-Interest Transactions Generally, S&W pp. 593-612

*Hollinger v. Black*

*Assignment #30:* Corporate Opportunities, S&W pp. 639-649

*Broz v. Cellular Information Systems, Inc.*

### **MULTIPLE CHOICE EXAMINATION: CORPORATE FIDUCIARY DUTIES (5 POINTS)**

## **XI. Litigation to Enforce Directors' Duties (Chapter 11)**

*Assignment #31:* Introduction; The Demand Requirement, S&W pp. 651-665

*Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*

*Assignment #32:* Direct Versus Derivative, S&W pp. 665-671

*Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*

*Assignment #33:* Special Litigation Committees, S&W pp. 671-695

*In re. Oracle Corp. Derivative Litigation*

*Assignment #34:* Statutory Exculpation From Liability, S&W pp. 695-712

*Malpiede v. Townson*

*Emerald Partners v. Berlin*

## **Preventing Sexual Harassment**

Title IX of the Education Amendments of 1972 prohibits sex discrimination against any participant in an educational program or activity receiving federal funds. The act is intended to eliminate sex discrimination in education. Title IX covers discrimination in programs, admissions, activities, and student-to-student sexual harassment. BYU's policy against sexual harassment extends not only to employees of the university but to students as well. If you encounter unlawful sexual harassment or gender based discrimination, please talk to your professor, contact Associate Dean Katherine Pullins (422-5576), contact the Equal Opportunity Office (422-5895), or contact the Honor Code Office (422-2847).

## **Students with Disabilities**

Brigham Young University is committed to providing a working and learning atmosphere that reasonably accommodates qualified persons with disabilities. If you have any disability which may impair your ability to complete this course successfully, please contact Associate Dean Katherine Pullins (422-5576) or the University Accessibility Center (422-2767). Reasonable academic accommodations are reviewed for all students who have qualified documented disabilities. Services are coordinated with the student and instructor by the Accessibility Center. If you need assistance or if you feel you have been unlawfully discriminated against on the basis of disability, you may seek resolution through established grievance policy and procedures. You should contact the Equal Opportunity Office (422-5895, D-282 ASB).