

## **BUSINESS ASSOCIATIONS**

Fall 2009

Tuesdays & Thursdays

3:00 p.m. – 4:15 p.m.

Classroom 306

Three Credits

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Professor Gordon Smith

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### **Course Description**

This course surveys the laws governing business associations. 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 the regulation of fraud under federal securities law.

### **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”)
- A website for the course has been created on The West Education Network (TWEN): <http://lawschool.westlaw.com/twen/>. Among other things, the website will include statutes and other supplementary materials.

## Evaluation

The final grade in this course will be based on a 100 point scale with the following components: (1) three team homework assignments plus feedback (15 points); (2) class attendance and participation (10 points); (3) five multiple choice examinations (25 points); and (4) a take-home examination (50 points).

## Teams

Each student in the class will be randomly assigned to a team consisting of four or five students. Team members should sit together in a cluster in the classroom to ensure that the members of the team are able to work together during the class period.

In addition to engaging in class discussions, each team will complete three transactional homework assignments. Detailed instructions for each assignment will be distributed during the semester. Expected deadlines for the assignments are Wednesday, September 30; Wednesday, October 21; and Wednesday, November 18.

Teams that complete an assignment in good faith will receive two points. In addition, each team will have the opportunity to earn up to three additional points on each assignment by providing feedback to other teams.

## Class Attendance and Participation: “Present and Prepared System”

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 week of classes on Monday, August 31, 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 count such students as “present and prepared” for that day and will use the roll in deciding which students to call on for class participation. *If you arrive late, please do not interrupt the class by attempting to sign the roll. The purpose of the present-and-prepared system is to improve the quality of our class time, and that includes arriving to the class in a timely manner.*

Professor Smith will keep a tally for all class sessions, and points will be awarded as follows:

- Missed four or fewer classes = 10 points
- Missed five to eight classes = 5 points
- Missed more than eight classes = 0 points

Absences caused by appointments for on-campus interviewing will not count as missed classes, if students clear those absences with Professor Smith *in advance*. In addition to absences excused for on-campus interviewing, students have the first week of class, placement break, and an additional four classes to conduct a job search while still getting full credit for attendance and participation. Students can take eight additional days off (almost one-third of the class) and still get half credit.

One of the virtues of the present-and-prepared system is that students may elect whether to be available to be called on in 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 points, will conform to the law school's mandatory median. As a result, students who choose not to pursue class attendance and participation points will 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.

## 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.*

Agent's Fiduciary Duties to Principal, S&W pp. 10-15

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

#### Assignment #2

Actual Authority, S&W pp. 15-21

*Castillo v. Case Farms of Ohio, Inc.*

Apparent Authority & Estoppel, S&W pp. 21-32

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

### II. General Partnerships (Chapter 2)

#### Assignment #3

Formation, S&W pp. 53-65

*Holmes v. Lerner*

Fiduciary Duties, S&W pp. 79-85

*Meinhard v. Salmon*

#### Assignment #4

Liability of Partners to Third Parties, S&W pp. 111-116

*In re Keck, Mahin & Cate*

Limited Liability Partnerships, S&W pp. 117-131

*Dow v. Jones*

FRODE JENSEN & PILLSBURY WINTHROP, LLP: A CASE STUDY

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

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

#### *Assignment #5*

Birth and Development of LLCs, Formation, S&W pp. 143-152

*Stone v. Jetmar Properties, LLC*

Limited Liability, S&W pp. 167-178

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

#### *Assignment #6*

Fiduciary Duties, S&W pp. 178-195

*Purcell v. Southern Hills Investments, LLC*

*Tzolis v. Wolff*

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

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

#### *Assignment #7*

Incorporation, S&W pp. 221-236

*Grant v. Mitchell*

#### *Assignment #8*

Directors & Shareholders, S&W pp. 247-267

*Adlerstein v. Wertheimer*

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

#### *Assignment #9*

Dividends and Distributions, S&W pp. 269-274

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

Limited Liability, Piercing the Corporate Veil ..., S&W pp. 275-281

*Soerries v. Dancause*

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

### *Assignment #10*

Transfer Restrictions, S&W pp. 306-315

*Capital Group Companies, Inc. v. Armour*

Classified Shares, S&W pp. 330-341

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

### *Assignment #11*

Preemptive Rights, S&W pp. 359-367

*Kimberlin v. Ciena Corporation*

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

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

### *Assignment #12*

Introduction; The Plight of the Minority Shareholder, S&W pp. 385-402

*Elmaleh v. Barlow*

*Leslie v. Boston Software Collaborative, Inc.*

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

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

### *Assignment #13*

Kmart Corporation: A Case Study, S&W pp. 423-430

Shareholder Voting, S&W pp. 430-437

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

### *Assignment #14*

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

*Apache Corporation v. NYCERS*

### *Assignment #15*

Shareholder Proposals: Bylaw Resolutions, S&W pp. 479-488

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

*AFSCME v. AIG*

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

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

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

### *Assignment #16*

Directors' Duty of Care, S&W pp. 501-506

*Gagliardi v. TriFoods International, Inc.*

The Decision Making Context, S&W pp. 506-521

*Smith v. Van Gorkom*

### *Assignment #17*

The Oversight Context, S&W pp. 522-531

*In re Caremark International Inc. Derivative Litigation*

The Role of Good Faith, S&W pp. 535-566

*In re Walt Disney Company Derivative Litigation*

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

### *Assignment #18*

Conflict-of-Interest Transactions Generally, S&W pp. 593-612

*Hollinger v. Black*

Corporate Opportunities, S&W pp. 639-649

*Broz v. Cellular Information Systems, Inc.*

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

### *Assignment #19*

Introduction; The Demand Requirement, S&W pp. 651-665

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

Direct Versus Derivative, S&W pp. 665-671

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

### *Assignment #20*

Special Litigation Committees, S&W pp. 671-695

*In re. Oracle Corp. Derivative Litigation*

### *Assignment #21*

Statutory Exculpation From Liability, S&W pp. 695-712

*Malpiede v. Townson*

*Emerald Partners v. Berlin*

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

## **XII. Friendly Mergers and Acquisitions (Chapter 12)**

### *Assignment #22*

Fiduciary Duties in Friendly Transactions, S&W pp. 749-759

*Weinberger v. UOP, Inc.*

Independent Board Committees, S&W pp. 759-769

*Kahn v. Lynch Communication Systems, Inc.*

### *Assignment #23*

Majority-of-the-Minority Provisions, S&W pp. 771-784

*In re PNB Holding Co. Shareholders Litigation*

Tender Offers, S&W pp. 784-801

*In re Pure Resources, Inc. Shareholders Litigation*

### *Assignment #24*

The Appraisal Remedy, S&W pp. 801-812

*Pueblo Bancorporation v. Lindoe, Inc.*

## **XIII. Defending Against Hostile Takeovers (Chapter 13)**

### *Assignment #25*

A Brief History of Hostile Takeovers, S&W pp. 815-819

Delaware's "Intermediate Scrutiny" of Hostile Takeovers, S&W pp. 819-828

*Unocal Corp. v. Mesa Petroleum Co.*

Refining "Intermediate Scrutiny," S&W pp. 838-840

### *Assignment #26*

Change-of-Control Transactions, S&W pp. 859-896

*Revlon, Inc. v. & Forbes Holdings, Inc.*

*Paramount Communications, Inc. v. Time, Inc.*

*Paramount Communications, Inc. v. QVC Network Inc.*

## **Preventing Sexual Harassment**

Title IX of the Education Amendments of 1972 prohibits sex discrimination against any participant in an educational program or activity that receives federal funds. The act is intended to eliminate sex discrimination in education and pertains to admissions, academic and athletic programs, and university-sponsored activities. Title IX also prohibits sexual harassment of students by university employees, other students, and visitors to campus. If you encounter sexual harassment or gender-based discrimination, please talk to your professor; contact Assistant Dean Wendy Archibald at 801-422-5576; contact the Equal Employment Office at 801-422-5895 or 1-888-238-1062 (24-hours), or <http://www.ethicspoint.com>; or contact the Honor Code Office at 801-422-2847.

## **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 Assistant Dean Wendy Archibald at 801-422-5576 or the University Accessibility Center at 801-422-2767. 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 at 801-422-5895 or 1-888-238-1062 (24-hours) or D-282 ASB.