

COURSE SYLLABUS
Business Entity Fundamentals
Fall 2018
Professor Lipshaw
4 Credits

Instructor Information:

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For more information about me, see <http://www.professorlipshaw.com>

Course Information:

Meetings: M W 4:00-5:50 pm

Location: Room 385

Credit Hours: 4*

Overview

Important Notice: When you get to the Exam Format section below, you'll see that this course involves a series of online multiple choice quizzes as 1/3 of your total grade.

The subject of the first quiz is this Syllabus! Take advantage of an early opportunity to get some easy points.

Course Objectives and Learning Outcomes

This section of the course is a rigorous introduction to business entity law, geared particularly toward students who intend to pursue the Business Law and Financial Services Concentration and/or a career in transactional law. While it will serve as a basis for the business law aspects of the bar exam, please be advised that I do not teach all aspects of the doctrine covered on the bar exam, and do teach aspects of business law contexts and practice that are not the subject of bar exam questions. You are well-advised to supplement your bar preparation with one of the bar review courses.

* I am required by the school administration to advise you that a "credit hour" is an amount of work that reasonably approximates not less than one hour of classroom or direct faculty instruction and two hours of out-of-class student work per week for fifteen weeks, or the equivalent amount of work over a different amount of time.

Moreover, there are at least two approaches to teaching this material. One is to proceed serially through the doctrine and the business forms – agency to partnership to corporations and so on. The other approach is “topical,” and it is the method I use. We undertake an overview in the first two units, with the idea of putting the law in a business planning context and learning a common terminology. We then proceed topically through a comparative assessment of management, finance, limited liability, fiduciary duty, and end game issues.

Be forewarned. The course serves as an introduction to “numeracy” and financial concepts (including basic accounting) and includes some math. If you don’t want to have to do some simple arithmetic and maybe some algebra and have it count as a small part of your overall grade, don’t take this section. Rest assured, however, that there is no trigonometry or differential calculus.

When you have completed the course, you should have a working knowledge of the basic business entity forms, partnership, corporation, and LLC, the reasons one would organize a business in one of those forms or another, and the differences among the forms in terms of financial, management, ownership, and liability objectives of the participants. You should also have a basic understanding of business financial accounting.

Required Materials:

I use Blackboard (accessible through Campus Cruiser) as my primary means of communicating with you outside of class. You are responsible for checking it regularly. I supply a LOT of information, including all of the Power Point diagrams and schematics you will see in class.

There are no casebooks presently existing that organize the material for all of the basic business forms in the topical approach described above. As to unincorporated business entities (sole proprietorship, partnership, and LLCs), my co-authors and I designed a casebook to permit teaching in just that manner, and it is one of the required materials. It has been in the market long enough that you should be able to acquire a used version.

We will supplement the casebook material on agency, partnerships, and LLCs in two ways. The first is a highly readable text on corporate law, written by one of the leading scholar/teachers in the field, Stephen Bainbridge. The second will be by way of cases that I post under Course Materials on Blackboard.

You will not need to purchase a separate statutory supplement. My casebook includes all of the relevant partnership and LLC statutes. The two seminal corporate statutes not included in the casebook are the ABA’s Model Business Corporation Act and the Delaware General Corporation Law. Both are available under Course Materials on Blackboard.

Ribstein, Lipshaw, Fershee, & Miller, Unincorporated Business Entities, 5th ed. (LexisNexis) (“UBE”)

Bainbridge, Corporate Law, 3d ed. (Foundation Press) (“Bainbridge”)

Model Business Corporation Act (on Blackboard)

Delaware General Corporation Law (on Blackboard)

Cases on Blackboard (indicated in italics) (Note: I personally edited these cases. When I edit cases, I don't show the deletions, and I take a fair amount of liberty in making them more readable.)

Attendance and Class Participation

It is important that you attend class. I am well known for tailoring my exams to what we covered in class. My casual observation is that there is a correlation between class attendance and engagement and grades. Moreover, my exams usually entail unraveling an *extremely* complex business structure. The best teaching you are going to get on that will be in class.

I used to have an on-call list so that a “panel” of people would be prepared. I’ve stopped doing that. I’ve come to the conclusion that nobody cares more about bringing the horse to water (so to speak) than I do, but nobody cares less about whether you in fact drink it. In other words, it’s your life. You will get out of this what you put into it.

The Law School’s student attendance policy is set forth in Section II.B of the Rules and Regulations, which can be found at the following URL: <http://www.suffolk.edu/law/student-life/rulesandregs.php#rule2B>.

Recording

I ask the IT department to record and make ALL classes available via an MP3 posted under “Course Media” on Blackboard. I think there’s still a significant value in coming to class, but I want to remove some of the note-taking (particularly the “transcription” kind) pressure.

If you take notes, concentrate on engaging with what’s important - you can always go back and pick up details later.

When I first did this, a former student posed the natural question – “will it mean people don’t come to class?” That, of course, like all decisions in your life is yours to make. I asked if she would come to class, to which her response was “I wouldn’t want to miss the show.” My observation has been that the recording did not significantly affect in-class attendance, but did help make students’ lives easier.

NOTICE: YOU MAY ONLY LISTEN TO THE RECORDINGS VIA THE LINK PROVIDED ON CAMPUS CRUISER, AND MAY NOT DOWNLOAD OR RECORD THEM. THE RECORDINGS ARE MY PROPERTY, AND YOU ARE PERMITTED TO USE THEM FOR THIS CLASS ONLY. ANY REBROADCAST, REPUBLICATION, OR RETRANSMISSION WITHOUT THE EXPRESS WRITTEN CONSENT OF ME IS STRICTLY PROHIBITED.

Out of Class

I am almost always available by phone or e-mail or in my office. When I'm here my door is almost always open, and I invite you to come see me. Don't be shy if you need to talk about this class or anything else. I post a lot of material, and will sometimes sound a little exasperated if you ask me a question about something that has been posted already (like "what will the exam format be?")

Speaking of which:

Exam Format

1. Two-thirds of your grade will be based on an all-essay three-hour final exam. One-third of your grade will be based on a series of multiple-choice quizzes to be administered online through Blackboard over the course of the semester. There will be nine quizzes, including one at the end of each unit. **The first quiz will cover this syllabus!!!!**

The number of questions on each quiz are as follows:

Syllabus Quiz – 10

Unit 1 – 10

Unit 2 – 20

Unit 3 – 20

Unit 4 – 20

Unit 5 – 15

Unit 6 – 20

Unit 7 – 15

Unit 8 – 10

2. My exams and quizzes are "Open Book" under Suffolk's definition. That means there are no restrictions on what you may bring into the exam room or what you may look at when you do the quizzes. **The only restriction on the quizzes is that you are bound under the Honor Code to do them yourself.**
3. The flip side of the Open Book policy is that my exams are thorough. You cannot expect to do well if you are spending a lot of time referring to the materials you are free to bring with you!
4. I account for the difficulty of the exams in setting the curve. I follow the usual pattern for upper-level elective classes at Suffolk in allocating grades.
5. Although this is the first time we have offered this course, I will post exam questions I used in my previous LLC/Partnership and Corporations courses.

Speaking of which:

Accommodations

If you anticipate issues related to the format or requirements of this course due to the impact of a disability, it is important that you contact the Law School's Dean of Student Office for further information and assistance, including information on disability-related accommodations. We can then plan how best to coordinate any accommodations.

Mental health, stress and substance abuse

As a student, you may experience a range of issues that can cause barriers to learning, such as strained relationships, increased anxiety, health issues, alcohol/drug problems, feeling down, difficulty concentrating, lack of motivation, or feeling ill. These concerns or other stressful events may lead to diminished academic performance or may reduce your ability to participate in daily activities. Suffolk University services are available to assist you in addressing these and other concerns you may be experiencing. You can learn more about the broad range of medical services and confidential mental health services available on campus at the following websites:

Counseling Center -- <http://www.suffolk.edu/offices/989.html>,

Office of Health and Wellness Services -- <http://www.suffolk.edu/offices/932.html>

Law Students may also wish to access the services of Lawyers Concerned for Lawyers –

www.lclma.org

In addition, the Law School Dean of Students Office is available to discuss resources and possible approaches to address the academic/enrollment impact of the above issues. (The Law Dean of Students Office is on the 4th floor, within the Dean's Suite – LawDeanOfStudents@suffolk.edu).

Class Assignments:

I organize the reading assignments by unit. The units do *not* correspond to class sessions.

I. BASIC FORMS

Unit 1: Business Imperatives of Entity Selection

Reading: UBE, §§1.01 – 1.06

- I. Motivating concerns
 - A. Liability to third parties
 - B. Management of an enterprise
 - C. Finance and taxes
 - D. Ownership and transfer of interests

- II. Theoretical concepts
 - A. Transaction costs
 - B. Agency costs
 - C. Default rules and the Coase Theorem
 - D. Debt, equity, risk, and return

Unit 2: Overview of the Basic Forms

Reading: UBE, Chapter 2; §§3.01, 3.02, 3.03 (pp. 25-29; 36-49), 3.05 (pp. 57-67)
Bainbridge, §§1.1, 1.2, 2.1, 2.2, 2.3, 2.5A, 2.7
McDermott, Inc. v. Lewis
Theodora Holding Corp. v. Henderson

- I. The Nature of the Firm
 - A. From Sole Proprietorship to Corporation
 - B. Intentionality
 - C. Standard Form Flexibility
 - D. Personhood and Taxation
- II. Partnerships
 - A. Governing Law
 - B. Objective Characterization
 - C. Indicia
 - 1. Profit-sharing
 - 2. Everything else
 - 3. Distinguishing other relationships
 - D. Inadvertent Partnerships – *Minute Maid v. United Foods*
- III. Corporations
 - A. The Nature of the Corporation
 - 1. Conceptual Metaphors
 - 2. Sources of Law
 - B. Some Corporate Law Basics
 - 1. Corporation as Client
 - 2. Terminology
 - a. Profit versus non-profit
 - b. Public versus closely-held
 - c. Incorporators
 - d. Articles or Certificate of Incorporation
 - e. Board of Directors
 - f. Bylaws
 - g. Officers
 - h. Shareholders
 - i. Other stakeholders
 - 3. Internal Affairs Doctrine – *McDermott v. Lewis*
 - 4. Why Delaware is So Important
 - 5. Corporate Purpose – *Theodora*
- IV. LLCs

- A. Kintner, Check-the-Box, and Development of the Form
- B. ULLCA, RULLCA, Delaware and Other Governing Statutes
- C. Formation Issues

II. THE LIFE OF THE ENTERPRISE

Unit 3: Ownership and Management

Reading:

UBE, §§4.01, 4.02 (pp. 94-95), 4.03, 4.04, 4.05A (pp. 104-119), 4.05B (pp. 125-127; 131-138), 4.05C (pp. 159-164)

Bainbridge, Chapter 5, Chapter 10 (§§10.1, 10.2A, 10.2B, 10.2C)

Auer v. Dressel

Campbell v. Loew's, Inc

CA, Inc. v. AFSCME

- I. Agency in Voluntary Transactions
 - A. Agency, Business Firms, and an Introduction to the Problem of Authority
 - B. Agency Formation
 - C. Agent's Authority
 - 1. Actual
 - a. Express
 - b. Implied
 - 2. Apparent
 - a. Sources
 - b. Reasonableness
 - c. Manifestation
 - 3. Agency in Action - *Essco*
 - 4. Inherent Agency Power & Undisclosed Principal – *Kidd, Watteau*
 - 5. Ratification
- II. Agency and Management in Partnership
 - A. Default Rules under UPA and RUPA
 - B. Variations – *Bailey v. Fish & Neave*
- III. Agency and Management in LLCs
 - A. Member-managed and Manager-managed
 - B. Articles and Operating Agreements
 - C. Agency Power of Managers
- IV. Corporate Management
 - A. Separation of Powers between Boards and Shareholders
 - B. Board of Directors
 - C. Officers
 - D. Shareholders
 - 1. Basic Rights
 - 2. Meetings
 - 3. Voting Rights

4. Conflicts Between Shareholders and Boards
 - a. Shareholder Initiated Action (*Auer*; *Campbell*)
 - b. Bylaw Amendments (*CA, Inc.*)

Unit 4: Finance and Capital Structures

*Reading: UBE, §§5.01, 5.02 (pp. 201-205, Note 4 on p. 210); 5.04, 5.05
 Bainbridge, §§3.1, 13.1, 13.2, 13.3, 13.4
 Klang v. Smith's Food & Drug Centers, Inc.
 Litle v. Waters
 Kamin v. American Express*

- I. Business Numeracy
 - A. The Legal Context of Business Accounting
 - B. The Basics of Financial Accounting
 1. Introduction
 2. The Fundamental Equation and the Pool Metaphor
 3. Assumptions Upon Which Financial Accounting is Based
 4. The Magic of Double Entry Bookkeeping
 5. The Balance Sheet
 - a. Types of Accounts
 - b. Balance Sheet Transactions
 6. Income Statement
 - a. Types of Accounts
 - b. Transaction Bookkeeping
 - c. Income Statement Transactions
 7. Accrual versus Cash Accounting (and Cash Flow Statements)
 8. Accounting Value versus Market Value
 9. Auditing, GAAP, and GAAS
 - C. Reprise on Context
- II. Partnership and LLC structures
 - A. Default rules for capital contribution and profit allocation
 1. Partnership
 2. LLC
 - B. Capital accounts in partnership and LLC law (Darr)
 - C. Loss sharing anomalies (Kessler)
- III. Corporate financial structures
 - A. Forms of securities
 1. Common stock
 2. Preferred stock
 3. Debt
 4. Hybrids
 5. Options and other derivatives
 - B. Shareholder distributions and legal capital rules – *Klang*
 - C. Dividend policy – *Litle*; *Kamin*

Unit 5: Vicarious and Limited Liability

Reading: UBE, §§6.01, 6.02A (not Thompson), 6.03 (not Kaycee)
Bainbridge, §§4.1, 4.2, 4.3A-B, 4.3D2
Walkovsky v. Carlton
Freeman v. Complex Computing Co.
Gardemal v. Westin Hotel Co.
OTR Associates v. IBC Services

- I. Default Rules on Partners' Vicarious Liability and Exhaustion - *Gildon*
- II. Piercing the Veil in Corporations and LLCs
 - A. Corporations
 - 1. Tort Cases - *Walkovsky*
 - 2. Contract Cases – *Freeman*
 - 3. Corporate Groups – *Gardemal/OTR*
 - B. LLCs

Unit 6: Fiduciary Obligations

Reading: UBE, §§8.01, 8.02B, 8.03B1, 8.04, 8.05A (pp. 402-403); 8.05B
Bainbridge, §§7.1, 6.1 (intro), 6.1A, 6.2, 6.3, 6.4D, 6.5, 7.4, 7.6A, 7.6B,
7.6C, 8.1, 8.2, 8.5A, 8.5B (intro)
Puma v. Marriott
Guth v. Loft, Inc.
Shlensky v. Wrigley
Francis v. United
Smith v. Van Gorkom
In re Caremark Int'l Inc. Derivative Litigation
Sinclair Oil v. Levien
Zahn v. Transamerica, Inc.
Wilkes v. Springside Nursing Homes, Inc.
Miller v. HCP

- I. Fiduciary Obligations Generally – *Meinhard*
- II. Partnership Fiduciary Obligations
- III. Corporate Fiduciary Obligations
 - A. The Basic Business Judgment Rule – *Shlensky*
 - B. The Duty of Loyalty
 - 1. Director Conflicts – *Puma*
 - 2. Corporate Opportunity – *Guth*
 - C. The Duty of Care
 - 1. Statutory Standards
 - 2. Individual Directors – *Francis*
 - 3. The Board

- a. Decision-Making Process – *Smith v. Van Gorkom*
 - b. Oversight - *Caremark*
 - c. Director Liability and its Amelioration
 - i. Exculpation under DGCL §102(b)(7)
 - ii. Indemnification
 - iii. Directors’ & Officers’ Insurance
 - D. Controlling Shareholders
 - 1. Public corporations – *Sinclair; Zahn*
 - 2. Closely held corporations – *Wilkes*
- IV. Fiduciary Duties in Hybrid Unincorporated Entities
 - A. Active and Passive Owners in Unincorporated Entities – *Auriga (skim only)*
 - B. Waivers under Delaware Law – *Fisk, Miller*
- V. Remedies
 - A. Partnership Accountings
 - B. Direct and Derivative Actions
 - 1. Corporate
 - 2. Non-corporate – *Anglo-American*

III. ENDGAMES

Unit 7: Breaking Up the Partnership or LLC

Reading: UBE, §§7.01, 7.02, 7.03A, 7.03C, 9.01, 9.02, 9.05A, 9.07B-C [Horowitz v. Farbman]

- I. Transfer of Partnership or LLC Interests
 - A. Partnership – *Sunshine Cellular; [Horowitz v. Farbman?]*
 - B. LLCs – *Achaian*
 - C. The Structural Complexity Issue
- II. Dissolution and Dissociation of Partnerships under UPA and RUPA
 - A. Overview and Flow Chart
 - 1. The Classic Law of Dissolution under UPA
 - 2. The Concept of Dissociation without Dissolution under RUPA
 - 3. How Dissolution and Dissociation Are Different from Winding Up and Liquidation
 - B. Accounting and Valuation Issues in Dissociation and Buyouts – *Spayd*
 - C. Contentious Issues during Buyout and Continuation
 - 1. Expulsion or Forced Buyout - *Cadwalader*
 - 2. Breaking Up is Hard to Do – *Meehan*
- III. LLC Dissolution

Unit 8: Corporate Takeover Defenses

Reading: Bainbridge, §§12.1 (intro), 12.1A, 12.5, 12.6, 12.8, 12.9 (intro), 12.9B, 12.9C

Unocal Corp. v. Mesa Petroleum Co.
Revlon, Inc. v. MacAndrews & Forbes

- I. Antitakeover Device Typology
 - A. Takeover Overview
 - B. Classified Boards
 - C. Poison Pills
 - D. Share Repurchases
 - E. Lockups
- II. Judicial Review of Antitakeover Devices
 - A. Proportionality – *Unocal Corp.*
 - B. Auctions – *Revlon*