

- I. Agency
 - a. Creating an Agency Relationship
 - 1. Requirements:
 - i. Mutual consent between agent and principal
 - ii. Agent must be subject to control by principal
 - iii. Some agreement that agent acts on behalf of principal
 - 2. No contract or compensation required (*Gorton v. Doty*)
 - 3. Agreement may create agency even if parties did not call it an agency relationship or intend an agency relationship to be created (*Cargill*)
 - b. Contractual Liability
 - 1. Principal is bound to contracts made by agent when:
 - i. Agent has actual authority:
 - 1. Express:
 - a. Agreement grants authority to agent
 - b. Principal has explicitly granted authority to agent
 - 2. Implied:
 - a. Evidence shows that principal intended to grant authority to agent (*Hogan*)
 - b. Agent would require such authority to perform duties
 - ii. Agent has apparent authority:
 - 1. Principal holds agent out as having authority to third parties (*Lind v. Schenley*)
 - 2. *370 Leasing v. Ampex*: apparent authority to do things usual and proper to type of business agent is employed to conduct
 - iii. Contract is within inherent agency power
 - 1. Acts usual or necessary in such a transaction, even if forbidden by undisclosed principal (*Watteau v. Fenwick*)
 - 2. Industry custom for an agent to have such authority and third-party belief in authority was reasonable, even if principal is disclosed (*Kidd v. Thomas Edison*)
 - iv. Principal ratifies the actions
 - 1. Principal expressly ratifies
 - 2. Principal accepts results with intent to ratify and has full knowledge of all material facts (*Botticello v. Stefanovics*)
 - v. Principal is estopped from disclaiming contract
 - 1. Reasonable and detrimental reliance by third party (*Hoddeson v. Koos Bros.*)
 - 2. Agent is bound to contracts made on behalf of principal when:
 - i. Principal is undisclosed or only partially disclosed
 - a. Agent has duty to disclose agency relationship to third party to avoid personal liability (*Atlantic Salmon*)
 - c. Tort Liability
 - 1. Principal is liable for:
 - i. Torts committed by employee in the scope of employment
 - a. Scope of employment may include reasonably foreseeable acts of employee (*Bushey v. United States*)

- b. Liability when employee's acts did not constitute total abandonment of employment (*Clover v. Snowbird*)
 - c. Liability for acts in response to conduct interfering with employee's duties (*Manning v. Grimsley*)
 - ii. Torts committed by independent contractor engaged in inherently dangerous work (*Majestic Realty v. Toti*)
 - 2. Employee vs. Independent Contractor
 - i. Key factor is control
 - ii. For employee relationship principal needs control over operation, not just control over results (*Hoover v. Sun Oil*)
 - d. Agents as Fiduciaries
 - 1. During agency:
 - i. Agents owe duties of loyalty and care to principals
 - ii. Personal benefit from agency relationship without approval of principal breaches fiduciary duty (*Reading v. Regem*)
 - iii. Drawing business away from principal without disclosing breaches fiduciary duty (*General Automotive v. Singer*)
 - 2. After termination of agency relationship:
 - i. Agents retain some duties owed to principals, including the duty not to use confidential trade secrets (*Town & Country*)

II. Partnerships

- a. Introduction
 - i. Governed by state law
 - ii. Default rules (see Uniform Partnership Act):
 - 1. Equal control of partnership
 - 2. Equal sharing of profits and losses
 - 3. Equal share of assets on dissolution
 - iii. Joint and several liability for partners
 - iv. Existence determined by totality of the circumstances (*Southex*)
 - 1. Factors: (*Fenwick v. Unemployment Compensation Comm.*)
 - a. Intent of parties
 - b. Manifestations to third parties
 - c. Right to share in profits
 - d. Obligation to share in losses
 - e. Ownership and control of partnership property
 - f. Control over management of business
 - g. Rights of parties on dissolution
 - 2. Intent to form partnership not required or determinative
 - 3. Intent to form association to carry on a business for profit as co-owners is required (*Martin v. Peyton*)
 - v. Partnership by estoppel – Uniform Partnership Act § 16
- b. Fiduciary Duties
 - i. Highest obligation of loyalty
 - ii. Duty of disclosure

1. Partner in a joint venture must disclose new opportunity with close nexus between partnership business to partners (*Meinhard v. Salmon*)
- iii. After leaving partnership
 1. Duties owed to partnership by ex-partner
 - a. May plot secretly to leave and may take clients, but may not use deception to obtain unfair advantage over partnership when taking clients (*Meehan v. Shaughnessy*)
 2. Duties owed to ex-partner by partnership
 - a. No fiduciary duty owed to ex-partner – decisions protected by business judgement rule (*Bane v. Ferguson*)
- iv. After dissolution
 1. Fiduciary duty owed to ex-partners until after partnership business is wound up and settled (*Monin v. Monin*)
- v. Partnership agreement may not eliminate duty of loyalty but may contain specific restrictions (Uniform Partnership Act § 103(b)(3))
- c. Governance
 - i. Default rules:
 1. All partners have equal rights in management and conduct of partnership business
 2. Differences arising in ordinary matters connected with partnership business decided by majority of partners
 3. May not join partnership without consent of all partners
 - ii. Partner is agent of partnership and acts of partner, if performed on behalf of partnership and within scope of business, are binding upon all co-partners
 - iii. Partners are not liable for results of transaction if majority of partners disapprove before it is entered into (*Nabisco v. Stroud*)
 - iv. If third party is made aware of limitation, acts of minority partner do not bind partnership or other parties (Uniform Partnership Act § 9(1))
 - v. When no other agreement speaks to issue, business differences in partnership must be resolved by majority decision (*Summers v. Dooley*)
 - vi. Objection to co-equal partner's actions and non-acquiescence may exempt objecting partner from reimbursing co-equal partner's expenses (*Summers v. Dooley*)
 - vii. Partnership agreement may contract out of default rule and give control of partnership policy to management committee (*Day v. Sidley & Austin*)
- d. Dissolution
 - i. Right to dissolve
 1. Express will of partner in partnership at will can dissolve at any time
 - a. Partnership is at will when no definite term or undertaking is specified (*Page v. Page*)
 - b. Dissolution of partnership at will must be exercised in good faith (*Page v. Page*)
 2. State action can dissolve a partnership
 3. Court may order dissolution of a partnership
 - a. Uniform Partnership Act § 32

- b. Where disagreement is of nature and extent such that all confidence and cooperation between parties is destroyed (*Owen v. Cohen*)
 - c. Where a partner's misbehaviour materially hinders proper conduct of partnership business (*Owen v. Cohen*)
 - d. Disappointing economic returns
 - e. Changes in circumstances so that partnership is no longer satisfying
 - f. Mere bad blood is not sufficient
 - g. Partner who has not fully performed obligations required by partnership agreement may not obtain order dissolving partnership (*Collins v. Lewis*)
 - 4. By default, death of a partner dissolves the partnership
 - 5. Partnership agreement may contain expulsion clause
 - a. Expulsion clause must be exercised in good faith (*Lawlis v. Kightlinger & Gray*)
 - b. Good faith presumed if conduct does not wrongfully withhold money or property from expelled partner (*Lawlis v. Kightlinger & Gray*)
- ii. Consequences
 - 1. Partnership may be sold as a business or may be broken up and assets sold
 - 2. If partners cannot agree on disposition, receiver appointed
 - 3. Uniform Partnership Act § 40 gives default priority for asset distribution
 - 4. Partner who has wrongfully dissolved may not buy partnership assets (*Owen v. Cohen*)
 - 5. Partners who excludes other partner may buy partnership assets, so long as exclusion was not done to obtain assets in bad faith (*Prentiss v. Sheffel*)
 - 6. Goodwill not included in partnership assets on dissolution (*Pav-Saver*)
 - 7. Patent licenses not returned when one partner has right to continue running business and licenses essential to run business (*Pav-Saver*)
- iii. Shared losses
 - 1. Default rule is that partners share equally in losses
 - 2. In service partnership where one partner contributes capital and other partner contributes skills, neither partner is liable for contributions of other partner (*Kovacik v. Reed*)
 - 3. Default rule under Uniform Partnership Act § 18(a) holds partners liable for all contributions of other partners, contrary to *Kovacik v. Reed*
- iv. Buy-out agreements
 - 1. Partners are held to terms of agreement regarding buy-out of partnership so long as dissolution isn't wrongful (*G&S Investments v. Belman*)
 - 2. By default, partners who have not wrongfully dissolved have right to continue running business on paying value of wrongdoer's interest to wrongdoer (Uniform Partnership Act § 38(2)(b))
- e. Limited Partnerships
 - i. Limited partnerships have:
 - 1. Many limited partners who do not control and have limited liability
 - 2. At least one general partner who controls the business and has unlimited liability

- ii. Limited partners become fully liable if they take part in the control of the business (*Holzman v. De Escamilla*)

III. Corporations

- a. Formation
 - i. Requires registration with state and payment of fees
 - ii. Corporations have articles of incorporation and bylaws
 - iii. There are other ongoing formalities
 - iv. Corporations are taxed separately and in addition to its owners
 - v. Rules differ between states – may incorporate in any state
 - vi. Acknowledgement of corporate entity and reliance on contract may give rise to ‘corporation by estoppel’ (*Southern Gulf Marine v. Camcraft*)
 - vii. Contracts signed prior to formation need to be adopted by the corporation
- b. Limited Liability
 - i. Shareholders are generally not liable (but may still lose the amount invested) unless their personal conduct establishes liability
 - ii. Promoters will be liable for contracts pre-dating formation of corporation, even after corporation adopts contract, unless third party lets them off
 - iii. Piercing the Corporate Veil
 - 1. Holding shareholders in a corporation liable
 - 2. Need unity of interest and ownership
 - a. Factors include (*Sea-Land Services v. Pepper Source*):
 - i. Failure to maintain corporate formalities
 - ii. Commingling corporate and personal assets
 - iii. Undercapitalization
 - iv. Corporation treated another corporation’s assets as its own (for reverse piercing)
 - b. Undercapitalization alone is not enough (*Walkovsky v. Carlton*)
 - c. Generally no assumption of risk for undercapitalization (*Kinney Shoe v. Polan*)
 - 3. Need fraud or sanctioning of injustice if corporation is acknowledged
 - a. More than mere inability of a creditor to collect or unjust enrichment is required (*Sea-Land Services v. Pepper Source*)
 - b. Inability to receive adequate tort recovery is not enough (*Walkovsky v. Carlton*)
 - 4. Some courts may look at totality of circumstances (*Kinney Shoe v. Polan*)
 - 5. Control of corporation by limited partners, when that corporation is the general partner of the limited partnership, does not lead to liability when corporate veil may not be pierced (*Frigidaire*)
 - 6. Reverse piercing
 - a. After the corporate veil has been pierced, going after the assets of other companies owned by the first company’s shareholders
 - b. Same test for piercing
 - iii. Piercing the Corporate Veil
- c. Derivative Lawsuits
 - i. Shareholders suing on behalf of corporation

1. States may impose requirements such as posting a bond on plaintiffs (*Cohen v. Beneficial Industrial Loan*)
2. Direct shareholder actions are proper where injury is separate or distinct from that of other shareholders, or where wrong involves contractual right existing independently from any right of corporation (*Grimes v. Donald*)
- ii. Demand Requirement
 1. Shareholders in a derivative must first ask board to bring suit unless demand requirement is excused
 - a. New York (*Marx v. Akers*):
 - i. Majority of board is interested in challenged transaction
 - ii. Board didn't fully inform itself
 - iii. Challenged transaction is so egregious that it couldn't have resulted from sound business judgement
 - b. Delaware (*Grimes v. Donald*):
 - i. Majority of board has material interest
 - ii. Majority of board is incapable of being independent
 - iii. Underlying transaction is not valid exercise of business judgement
 - iv. More likely to excuse demand requirement than New York
 - c. ALI (Universal Demand)
 - i. Demand requirement is never excused
 - ii. Adopted by some states
 2. Board's response to demand is entitled to presumption of good faith
- d. Special Litigation Committees
 - i. Formed to decide whether to pursue claims raised by shareholder
 - ii. Given greater deference than decision of board
 - iii. New York (*Auerback v. Bennett*):
 1. Independence of special committee
 2. Soundness of process used by committee
 3. Decision to reject claims is subject to business judgement rule
 - iv. Delaware (*Zapata v. Maldonado*):
 1. Independence of special committee
 2. Court's business judgement applied to shareholder claims
 3. More likely to allow suit than New York
- e. Purpose of the Corporation
 - i. Donations may be made by corporations (*A. P. Smith v. Barlow*)
 1. Delaware & New Jersey: allow limited donations that do not benefit directors and are not an unreasonably large part of profits and are colourably linked to purpose of corporation
 2. New York: allow donations that have some benefit to corporation
 3. California: no benefit to corporation has to be proven
 4. Pennsylvania: community is constituent of corporation, so donations to community are for corporate purpose
 - ii. Corporations may not benefit third parties to the detriment of shareholders (*Dodge v. Ford Motor Co.*)
 - iii. Corporate decisions entitled to business judgement rule unless there are allegations of fraud, illegality or conflict of interest (*Shlensky v. Wrigley*)

- f. Business Judgement Rule
 - i. Presumption that board's decisions not involving interest or self-dealing are made in good faith, are made on an informed basis, and are in the best interest of the corporation
 - ii. Corporate decisions are presumably entitled to business judgement rule unless bad faith, self-dealing, fraud, oppression, arbitrary action or breach of trust are alleged (*Kamin v. American Express*) – New York
 - iii. Board's decisions must be properly informed (*Van Gorkom*) – Delaware
 - iv. Board's failure to properly inform itself may be excused if no harm was done (*Cinerama v. Technicolor*)
- g. Duty of Care
 - i. Where board used experts, need to show (*Brehm v. Eisner*):
 - 1. Directors did not in fact rely on expert
 - 2. Reliance on expert was not in good faith
 - 3. Belief in expert's qualification was not reasonable
 - 4. Expert not selected with reasonable care or on behalf of corporation
 - 5. Subject matter so obvious that board's failure to consider was gross negligence
 - 6. Decision of board was so unconscionable that it was waste or fraud
 - ii. Duty to understand basics of corporation business and monitor corporation's affairs by attending meetings and reading financial statements (*Francis v. United Jersey Bank*)
 - iii. Directors of corporations that hold client monies have a duty to protect client monies (*Francis v. United Jersey Bank*)
 - iv. Prevent waste
 - 1. Exchanges so one-sided that no reasonable business person could conclude that terms of deal were adequate
 - v. Prevent illegal acts by employees
 - 1. Duty to act when illegality is detected (*Francis v. United Jersey Bank*)
 - 2. Liability when director could have taken steps to prevent harm but failed to do so (*Francis v. United Jersey Bank*)
 - 3. No duty to ferret out misconduct without reason for suspicion (*Caremark*)
 - 4. Must have formal system for monitoring and reporting (*Caremark*)
 - 5. To prove failure to prevent illegality, must show (*Caremark*):
 - a. Board knew or should have known of illegality
 - b. Board took no good faith steps to prevent or mitigate
 - c. Failure to act proximately caused loss
- h. Duty of Loyalty
 - i. Must not engage in self-dealing or further personal interests over those of the corporation
 - ii. Director Transactions
 - 1. Transactions between corporation and director
 - 2. Where there is a conflict of interest, must show 'entire fairness'
 - 3. Where conflict involves director's relatives, director must show (*Bayer v. Beran*):
 - a. Good faith

- b. Inherent fairness to corporation
 - 4. Voidable unless fair and reasonable to corporation (*Lewis v. SL&E Corp.*)
 - iii. Corporate Opportunities
 - 1. Directors may not usurp corporation's business opportunities
 - 2. Business opportunity doctrine (*Broz v. Cellular Information Systems*):
 - a. Opportunity presented to corporate director or officer
 - b. Corporation is financially able to take advantage of opportunity
 - c. Opportunity is in the line of corporation's business
 - d. Opportunity is of practical advantage to corporation
 - e. Self-interest of director in taking advantage of opportunity conflicts with interest of corporation
 - iv. Shareholder Transactions
 - 1. Transactions between corporation and majority shareholder
 - 2. Majority shareholder has duty to minority shareholders
 - 3. Actions of majority shareholders are subject to business judgement rule unless there is self-dealing (*Sinclair Oil v. Levien*)
 - 4. Majority shareholder may not induce corporation not to take action for breach of contract against majority shareholder (*Sinclair Oil v. Levien*)
 - 5. Majority shareholder may not use its control of board of directors to benefit at expense of minority shareholders (*Zahn v. Transamerica*)
 - i. Ratification by shareholders
 - i. Shareholders ratify actions taken by board of directors
 - ii. Approval by fully-informed majority of disinterested shareholders extinguishes voidability of director transactions, but normal shareholder majority due to interested votes means fairness needed (*Fliegler v. Lawrence*)
 - iii. Approval by fully-informed majority of shareholders extinguishes duty of care claims (*Wheelabrator*)
 - iv. Approval by fully-informed majority of disinterested shareholders entitles action to business judgement rule in duty of care claims (*Wheelabrator*)
 - v. Directors must show entire fairness when transaction is ratified by normal majority and transaction is between corporation and controlling shareholder (*Wheelabrator*)
 - vi. Plaintiff must show unfairness when transaction is ratified by majority of minority shareholders and transaction is between corporation and controlling shareholder (*Wheelabrator*)
- IV. LLCs
- a. Introduction
 - i. Hybrid of partnership and corporation
 - ii. Limited liability – may opt out of this by contract
 - iii. Corporate taxes do not apply
 - iv. Notice given by 'LLC' designation
 - 1. When trying to hold parties liable because of their status as members or managers of an LLC, the 'LLC' designation bars individual liability
 - 2. When trying to hold parties liable under agency theories, normal agency rules apply (*Westec v. Lanham*)

- b. Formation
 - i. Provided by state law
 - ii. Registered like a corporation
 - c. Control
 - i. Managed by either:
 - 1. All members – more like a partnership
 - 2. Management committee – more like a corporation
 - d. Piercing the LLC Veil
 - i. LLC veil may be pierced
 - ii. Same test as for piercing a corporate veil (*Kaycee v. Flahive*)
- V. Securities Regulation
- a. State Securities Law
 - i. ‘Blue skies’ laws
 - 1. Protection from wildly speculative schemes – may be more restrictive than federal law
 - b. Federal Securities Law
 - i. Regulates “securities”
 - 1. Definition of “securities” includes: stock, notes, bonds; evidence of indebtedness, investment contracts, any instrument commonly known as a security (non-traditional instruments)
 - 2. Investment contracts are securities when (*Howey* test):
 - a. “Investment of money”
 - b. Common enterprise
 - c. Profits to come solely from the efforts of others
 - 3. Five common features for non-traditional instruments (Forman):
 - a. Right to receive dividends contingent on profits
 - b. Negotiability
 - c. Ability to be pledged or hypothecated
 - d. Voting rights in proportion to amount owned
 - e. Ability to appreciate in value
 - ii. 1933 Securities Act
 - 1. Regulates primary market – initial issuance of securities
 - 2. Prescribes registration process
 - a. Mandatory disclosures
 - b. Exemption from mandatory disclosure under some circumstances
 - i. Private offering (*Doran v. Petroleum Management*):
 - 1. Number of offerees and relationship between themselves and issuer (most important)
 - 2. Number of units offered
 - 3. Size of offering
 - 4. Value of offering
 - iii. 1934 Security Exchange Act
 - 1. Regulates secondary market – trading in securities beyond initial issuance
 - 2. Must disclose ten days after a person or group of people acting in concert acquires 5% of shares

3. Rule § 10b-5
 - a. Forbids:
 - i. Directly or indirectly
 - ii. Using a means or instrumentality of interstate commerce, or the mail, or a stock exchange
 1. Employing a device, scheme or artifice to defraud
 2. Making an untrue statement of material fact or omission of material fact
 3. Or engaging in an act, practice or course of business that operates or would operate as fraud or deceit on anyone
 - iii. In connection with the sale or purchase of any security
 - b. Test for materiality is whether a reasonable person would attach importance (*Basic v. Levinson*)
 - c. Reliance on material misrepresentations can be presumed – the ‘fraud on the market’ theory (*Basic v. Levinson*)
 - d. There must be manipulation or deception (*Santa Fe Industries*)
 - e. Forbids insider trading under traditional and misappropriation theories
 - i. Insider trading is trading on the basis of non-public and material information
 - ii. Materiality depends on whether a reasonable person would attach importance to it (*SEC v. Texas Gulf Sulphur*)
 - iii. Prior to 1934 Security Exchange Act, (*Goodwin v. Agassiz*)
 - iv. Traditional
 1. Trading in breach of direct or indirect duty owed to issuer or its shareholders
 - v. Misappropriation
 1. Trading in breach of direct, indirect or derivative duty owed to source of information (*US v. O’Hagan*)
 2. No liability under misappropriation after disclosure
 3. Must allow reasonable time to pass after disclosure
 4. *Chiarella* took place before change in Rule to allow liability for misappropriation
 5. Duty only inherited from source of information when source disclosed for improper purpose (such as personal gain) and tippee knew or should have known of impropriety of disclosure (*Dirks v. SEC*)
 6. Information acquired from relatives is confidential unless there was no express or implied agreement to maintain confidence or the course of dealing shows no expectation of confidentiality (Rule § 10b5-2(b)(3))

VI. Control

- a. Proxy Fights
 - i. Directors may use corporate funds to solicit proxy votes, so long as such use is disclosed and is not excessive (*Levin v. MGM*)

- ii. Shareholders may reimburse the reasonable expenses of successful contestants in a proxy fight over corporate policy (*Rosenfeld v. Fairchild*)
- b. Proxy Litigation
 - i. Rule § 14(a)
 - ii. May not obtain authorisation for corporate action by using false or misleading proxy solicitations
 - iii. Private right of action for proxy violations (*J. I. Case v. Borak*)
 - iv. False or misleading information must be material
 - 1. Material information is information which is capable of significantly affecting the vote (*Electric Auto-Lite*)
 - 2. Reliance on material information may be presumed (*Electric Auto-Lite*)
 - v. Proxy solicitation must have been necessary for the transaction (*Electric Auto-Lite*)
 - vi. Shareholder may get attorney's fees when suing under § 14(a)
- c. Shareholder Proposals
 - i. Rule § 14(a)(8)
 - ii. Proposals may be significantly related to a business for non-economic reasons, in which case they may not be excluded (*Lovenheim*)
 - iii. Proposals involving significant strategic decisions in daily business matters may not be excluded (*NYCERS v. Dole Foods*)
 - iv. Proposals either designed to result in a benefit to the proponent not shared by the other shareholders in general or designed to further the proponent's personal interest may be excluded (*Austin v. Con-Ed*)
- d. Inspection Rights
 - i. Federal Law
 - 1. Rule § 14(a)(7)
 - 2. Corporation may choose whether to give list of shareholders or to send materials to shareholders and charge for doing so
 - ii. State Laws
 - 1. New York
 - a. Purpose for getting list must involve business of the corporation
 - b. Tender offers involve business of the corporation (*Crane v. Anaconda*)
 - c. Also applies to corporations with substantial ties to New York (*Sadler*)
 - 2. Delaware
 - a. To get list, must have proper purpose related to interest as a shareholder, not just social or political concerns (*ex rel. Pillsbury*)
 - 3. Inspection rights are liberally construed in favour of shareholders (*Sadler*)
- e. Shareholder Voting
 - i. Subject to state law, a corporation may prescribe whatever restrictions it thinks necessary when issuing shares (*Stroh v. Blackhawk*)
 - ii. Shares must generally have a proprietary interest – management or control – in the corporation
 - iii. Acting with primary purpose of interfering with shareholder voting constitutes a breach of fiduciary duty – must have a compelling justification for taking such actions (*SWIB v. Peerless Systems*)

- iv. Do not need to attend shareholder meeting to challenge propriety of a shareholder vote (*SWIB v. Peerless Systems*)
- f. Control in Closely-Held Corporations
 - i. Voting Trusts
 - 1. Model Business Corporations Act § 7.30
 - 2. Shareholders transfer votes to a trustee
 - 3. Trustee votes based on an agreement
 - 4. Voting trusts must be disclosed to corporation
 - 5. Voting trusts are irrevocable proxies
 - a. Model Business Corporations Act § 7.22
 - ii. Shareholder Agreements
 - 1. Shareholders may enter into binding agreements regarding the exercise of voting rights (*Ringling Bros. v. Ringling*)
 - 2. Shareholders may not enter into agreements interfering with directors' powers to exercise independent judgement in management, because doing so would hurt minority shareholders (*McQuade v. Stoneham*)
 - 3. Where directors are the sole shareholders of a corporation, shareholder agreements interfering with director's powers allowed (*Clark v. Dodge*)

VII. Mergers and Acquisitions

- a. De Facto Merger
 - i. When the consequences of an action are effectively the same as a merger, that action is treated as a merger under the de facto merger doctrine (*Glen Alden*)
 - ii. No de facto merger doctrine in Delaware (*Hariton v. Arco Electronics*)
- b. De Facto Non-Merger
 - i. When a corporate act is called a merger but may also be something else
 - ii. No de facto non-merger doctrine in Delaware (*Rauch v. RCA*)
- c. LLC Mergers
 - i. Members owe a duty of loyalty and good faith to other members, other members must be notified even if they are not required to effect a merger (*VGS v. Castiel*)
- d. Triangular Mergers
 - i. Forward
 - 1. Target merges into subsidiary of acquiring corporation
 - 2. Subsidiary's cash is used to purchase stock of target
 - 3. Former shareholders of target receive cash paid for target
 - 4. *Coggins v. New England Patriots*
 - ii. Reverse
 - 1. Subsidiary of acquiring corporation merges with target
 - 2. Target becomes wholly-owned subsidiary of acquirer
 - 3. Shareholders of target receive shares in acquirer (not in subsidiary)
- e. Cash-Out Mergers
 - i. Also known as freeze-out or buy-out mergers
 - ii. Minority shareholders receive cash for their shares
 - iii. Delaware:
 - 1. *Weinberger v. UOP*

2. Must have fair dealing
3. Must be fair price
- iv. Massachusetts
 1. *Coggins v. New England Patriots*
 2. Must have fair dealing
 3. Must be fair price
 4. Must have a legitimate business purpose (not just personal benefit)
- v. Remedies
 1. Rescission
 - a. If cash-out merger is unfair, rescission is most appropriate remedy
 - b. If rescission cannot be done cleanly, damages based on current value (*Coggins v. New England Patriots*)
 2. Appraisal Rights
 - a. Right to have value of shares independent appraised
 - b. Available to dissenting minority shareholders in cash-out merger
 3. Fraud, misrepresentation, self-dealing, waste or gross over-reaching by controlling shareholder in cash-out merger may lead to damages, rather than just appraisal rights (*Rabkin v. Philip A. Hunt Chemical*)
- f. Defensive Measures against Takeovers
 - i. Greenmail
 1. Paying a premium to buy back the shares of a would-be acquirer
 2. Not all states allow greenmail
 3. Directors have burden of showing that buy-back was done for benefit of corporation and not out of desire to perpetuate control (*Cheff v. Mathes*)
 - ii. Response must be proportionate to threat (*Unocal v. Mesa*)
 - iii. Share Buy-back
 1. Corporation buys back some of its own shares from shareholders
 2. Offer to buy back shares must be made to all shareholders – discriminatory self-tender (as in *Unocal*) no longer permissible
 - iv. Lock-up provisions
 1. Party is given the right to buy parts of the corporation for a set price upon acquiring a set percentage of shares to discourage others from bidding
 - v. No-shop provisions
 1. Corporation is forbidden from entering into more favourable agreements with another party
 - vi. Poison pills
 1. Shareholders given option to trade shares for equity or securities under favourable terms
 2. Takes effect when would-be raider acquires set percentage of shares
 3. Corporation may redeem before taking effect
 4. Discourages shareholders from selling to raider
 5. No hand
 - a. Upon change in control, pill is non-removable for a limited term
 - b. Not allowed in Delaware
 6. Dead hand
 - a. Only incumbent directors or their chosen successors may remove pill

- b. Dead hand for limited time, after which new directors may remove
 - c. Not allowed in Delaware
- vii. When it becomes apparent that a company will be sold, directors' duties switch from preservation of corporate entity to getting the highest price for shareholders – defensive measures are no longer permissible (*Revlon*)
- viii. Negotiations for sale do not trigger *Revlon* duties unless there will be an objective change of control, so defensive measures may still be proper (*Paramount v. Time*)
- ix. Taking a company private will trigger *Revlon* duties
- x. Transaction resulting in a shift of control, including sale of shares with a control premium attached, will trigger *Revlon* duties (*Paramount v. QVC*)