Corporations Short Outline-Thompson
Focused on Olde Learnin’

**Voting**
- Special Meetings
  - Delaware: Only call by Bd of dir. Unless otherwise auth. by bylaws - §211
  - MBCA: Call by 10% Stakeholder- w/purpose - §7.02
- Quorum Requirement
  - Delaware: Majority = Quorum, or as low as 1/3 - §216
  - MBCA: Majority or as designated - §7.25
  - May be raised to create minority veto power
- Cumulative Voting
  - NS = [(ND x TS) / (TD +1)] +1 where NS = Number to elect, ND = Number of Directors to elect, TS = Total Shares in corporation, TD = Total number of directors.
- Removal
  - Delaware: Without Cause OK, unless –Classified Board, Cumulative Restriction (veto = enough to elect, no removal), Class exception - §141(k).
  - MBCA: Same, except no restriction on Classified § 8.08

**Fiduciary Duty**
- Duties
  - Duty of Care
    - Substantive: Good Decision
    - Procedural: Good Process (Smith v. VanGorkum)
    - Duty to Be Informed
  - Duty of Loyalty
    - Self Dealing
    - Corporate opportunity
    - Director Sale/Use of corporate assets
- Remedy Conflict Transactions
  - Delaware: §144 – *Not presumptively void* where
    - Cleansing Action (approval of disinterested or shareholders in GF)
    - Intrinsic Fairness
  - MBCA: §8.61- *is valid where*
    - Cleansed
    - Shown to be fair
Derivative Litigation

♦ Demand
  ♦ Delaware- May be Excused-
    ♦ Where interested use intrinsic fairness rather that BJR
  ♦ Two Factor Test Arronson v. Lewis
    ♦ Allege Reasonable Doubt of Disinterested Decision
    ♦ Doubt Decision would be Protected by BJR
      ♦ Interest (See Big Outline)
  ♦ Must show interest where no action by board for excuse (can’t only alleged BJR violation)– Rales v. Blasband – no action considered where:
    ♦ Majority of Directors Replaced Since
    ♦ Not Approved by Board
    ♦ Acted on by Different board
  ♦ Use of ILC (Zapata v. Maldonado) two part test applied where demand excused (2 part test)
    ♦ Good Faith Reasonable Investigation
    ♦ Apply court’s Independent Business Judgment
  ♦ MBCA- Universal Requirement- §7.42
    ♦ ILC §7.40
      ♦ Good Faith Reasonable Investigation

Close Corporations

♦ Designation
  ♦ Delaware- Must Delegate as to receive protection
  ♦ MBCA- no specific designation
♦ Controls
  ♦ Restricting Board Discretion (may be ok)
  ♦ Super-Majority Restrictions
  ♦ Voting Agreements
♦ Remedy
  ♦ May bring direct suit- Dissolution Action
    ♦ Avoid by buyout- MBCA §14.30
  ♦ Enhanced Fiduciary Duty
  ♦ Stock Repurchase Agreements
    ♦ Enforceable at Ex Ante Price
    ♦ Breach of Fiduciary Duty = trigger fair price requirement
    ♦ Restrictions on Alienation (generally ok where notice/noted)
Mergers

♦ De Facto Doctrine
  ♦ Rejected by Delaware – majority of jurisdictions
  ♦ MBCA- has voting requirement for most quasi-organic changes anyway

♦ Appraisal as Remedy
  ♦ Delaware §262- only available for mergers
    ♦ Not available where Market traded
  ♦ Fiduciary Duty- Weinberger
    ♦ Must allege FD violation – otherwise appraisal only remedy
  ♦ Subject to ‘entire fairness’ review
    ♦ Fair Dealing
    ♦ Fair Price
  ♦ Cleansing Transaction- Minority has burden to prove unfairness where used.

♦ 3rd Party Mergers
  ♦ Recissionary damages may be available where loyalty breach (Cinerama v. Technicolor)
  ♦ MBCA §13.02 – available for all merger like transactions- sole and exclusive remedy.
  ♦ Fiduciary Duty - May use ‘legitimate purpose test’

Hostile Takeovers

♦ Ways to take over corporation-
  ♦ Merger
  ♦ Tender offer (buy shares)
  ♦ Proxy Fights (vote shares)

♦ Defensive Tactics
  ♦ Lock-up/Termination Fees
  ♦ Poison Pills
  ♦ Stock Repurchase (Self-Tender Offer)
  ♦ Shark Repellant (no specific bidder)
    ♦ Super-Majority Amend
    ♦ Fair Price Amend
    ♦ Staggered Board Amend.

♦ Judicial Review of Tender Offer
  ♦ Dominate Motive Test – “reasonable investigation” and good faith belief that plausible business purpose.
  ♦ Unocal Standard – Del.
    ♦ Reasonable Perception of Threat
    ♦ Reasonable Response to Threat
      ♦ No ‘best deal’ requirement – prefer long to short term
      ♦ Poison Pills are reasonable even w/o raider
♦ Revlon Duties- Del. – auctioneer duty to get best price  
    ♦ Decision to sell (unilateral trigger)  
    ♦ Alternative Transaction Involving Break Sought – (abandon future existence)  
    ♦ May be trigger wherever sale of control  
♦ Judicial Review of Proxy Contests  
    ♦ Cannot Subvert Franchise (Chris-Craft)  
    ♦ Good Faith Irrelevant (Blasius)  
    ♦ Unocal Std. – Must Be Winnable Proxy Contest – (Unitrin)  

Fed Regulation of Securities  
♦ Rule 14(a)9 – Fraud and Proxy Statement  
    ♦ Implied Action – Required Elements:  
    ♦ Material Misrep/Omission  
    ♦ Causation- presumption  
        ♦ Not Required to prove – Mills  
        ♦ Not available where Majority enough- VA Banksh  
        ♦ Unless St. Remedy Abridged- Wilson  
    ♦ Scienter (no std.)  
♦ Rule 10(b)5 – General Fraud- *no requirement of public trading*  
    ♦ Standing Requirement  
        ♦ Must actually transacted (Birnbaum)  
        ♦ Must have misrepresentation (Santa Fe)  
    ♦ Common Law Fraud Elements  
        ♦ Misrepresentation/Omission (Basic)  
            ♦ Silence ok unless duty to speak  
            ♦ Must correct where become misleading  
        ♦ Material Fact – Reasonable DM would want (magnitude * Prob.)  
        ♦ Scienter – more than negligence (Ernst & Ernst)  
        ♦ Reliance – Presumption – Fraud on Market – shaky law  
        ♦ Causation – relation to reliance must show stock price affected  
        ♦ Measure of Damages – Out of Pocket  

Insider Trading  
♦ 10B-5 as regulator-  
    ♦ Traditional- based on FD to S/H of corporation  
        ♦ Disclose or abstain rule (TGS)  
        ♦ Limited to where duty imposed (Chiarella)  
    ♦ Temporary- lawyers etc. – based on agency  
    ♦ Tippee- Based on Insiders FD to S/H  
        ♦ Must show Breach of FD by Insider  
            ♦ Benefit to Tippor = Breach of Duty  
        ♦ Know or should have of breach by Insider
♦ Misappropriation- (3rd party security) Based on Duty to Source of Info – entrustment based on not trading.

♦ 14(e)3- Tender Offers- Post Chiarella- makes any fraud in connection with pending tender offer punishable - broadens liability – imposes own duty.