CHAPTER 1. AGENCY

-When can the actions of the agent bind the principal?

Three Types of problems:
1. Problem between the agent and the principal
2. Third party trying to hold principal to an agreement based on the conduct of the agent or an express agreement
3. Third party trying to hold principal liable for agent’s torts

DEFINITION OF AGENT

Agency is the fiduciary relationship that results from the manifestation that the agents shall act on behalf of and subject to the control of the principal
-“Manifestation of consent” requirement is objective
  -Does not matter what the principal truly intended
  -Depends on what the agent believed the principal intended
  -Agency can arise absent true mutual consent!!!

PROVING AGENCY

-B.O.P. is on the person asserting the principal-agent relationship

-Not dependent on the intent of the parties involved
  -Agency relationship can arise even if parties do not intend it to
  -Agency relationship may not arise if certain conditions are not met
    -Even if agent and principal intend to be in the relationship

-Formation of agency depends on certain factual elements
  -Must be an agreement b/w parties that agent will undertake some act on behalf of the principal with the understanding that principal remains in control of the undertaking

-Every agent is a fiduciary
  -Agent owes a higher std of care to the principal
  -Must avoid:
- Conflicts of interest
- Self-dealing
- Disloyal acts
- Etc…

(Similar to duty trustee owes trustor and beneficiaries)

- Gravuitous Agents
  ➔ Agents who perform their services without gain
  - Gravuitous agents cannot be compelled to perform the duty they have undertaken
  - Principal may still be liable for their torts

**CREATION OF AGENCY RELATIONSHIP**

1. By Agreement

2. By Ratification
  ➔ When the principal accepts the benefits or affirms the conduct of someone
     purporting to act for the principal, though no actual agency agreement exists

3. Agency by Estoppel
  ➔ Principal acts in a way that third party reasonably believes that someone is the
     principal’s agent

**Agency Arising from Use of a Vehicle:**

*GORTON v. DOTY* (1937)

-D lent car to coach to help him transport team, accident while driving D’s car, P sued D alleging
  agency

- *Held:* Coach was agent of D
  - Relationship of agent and principal b/w D and coach b/c D volunteered her car with the
    express condition that coach drive it
  - PRECEDENT: ownership of car alone regardless of owners presence in car at
    time of accident establishes prima facie case against D regarding agency
    relationship
    - Nobody said anything about loaning here

- *DISSENT:* Coach was a gratuitous bailee and not an agent of D
  - Car was loaned!

**Creditor Exercising control over Debtor:**

*GAY JENSON FARMS v. CARGILL* (1981)

-P sues to recover payments owed
- Cargill entered K with a grain elevator company
  - Company appointed D its grain agent and commodity credit corp
  - Company acts as grain purchaser for D
- Used drafts imprinted with company name and D’s name
- Provided D with statements
  - D would audit if $ difficulties arose

_Held:_ D is principal of company due to influence over company

- Consent is not necessary to initiating agency relationship
  - When creditor assumes de facto control of debtor, becomes a principal
    - De facto control arises because D continuously interfered in internal affairs of company
    - Needed permission to do certain things from D
    - Names on company drafts/forms
  - D consented when directed company to implement its recommendations

- Relationship was not “Buyer-Supplier”
  - It must be shown that supplier has an independent business
    - Company did not because entire operation was financed by D

**LIABILITY OF PRINCIPAL TO THIRD PARTIES IN CONTRACT**

- After establishing agency relationship, third party must demonstrate scope of agency’s authority to act for principal in one of several ways:
  1. **ACTUAL AUTHORITY:**
     - Must be _expressly_ conferred on agent, or reasonably _implied_ by custom, usage, or the conduct of principal to agent

    - Authority may be either _expressed_ or _implied_
      - **EXPRESS AUTHORITY:**
        - Is actual authority contained w/in agency agreement

      - **IMPLIED AUTHORITY:**
        - Comes from the words or conduct b/w principal and agent
          - Incidental to express authority
          - Implied from conduct
          - Implied from custom and usage
          - Implied b/c of emergency

**Implied from Past Conduct:**

*MILL STREET CHURCH v. HOGAN* (1990)

- Church hired Hogan to paint church again, Hogan typically hired bro to help with tricky parts and did so this time, bro fell and sued for workers comp.
- **Issue:** Did Hogan have authority to hire bro as assistant?
- **Held:** Yes b/c agent reasonably believed he had authority to hire bro
  - B/c in past church allowed Hogan to do so
    - Also, unreasonable to think one guy could paint entire church, hiring inevitable
  - Bro reasonably believed Hogan had authority to hire him
    - Church even paid bro for short time while he worked
2. APPARENT AUTHORITY:

→ Results when principal *manifests* to third party that agent is authorized and third party reasonably relies on manifestation
  - Must be some holding out by principal that causes third party to reasonably believe that third party has authority
  - Third party must reasonably rely on principal’s manifestations

**Apparent Authority of Supervisor:**

*LIND v. SCHENLEY* (1960)

-P told getting promotion from D’s VP, P told to report to sales manager to find out about new responsibilities and salary, at new job was told would receive a commission, when didn’t receive commission was told sales manager didn’t have authority to give it to him, P sued for this money

- **Issue:** Can D be bound to commission arrangement even if sales manager had no actual authority to make offer?
- **Held:** Yes, sufficient evidence to show that D caused P to believe sales manager had authority to offer commission

**Apparent Authority to Accept a K:**

*37 LEASING Co. v. AMPEX*

-D salesman discussed sale of memory units with P, D sends P document outlining a sale with signature lines both blank, P signed K and sent back, D sent delivery dates, then D claimed doc wasn’t a K and reneged by not accepting the K

- **Issue:** Did D thru conduct of agent demonstrate acceptance of K?
- **Held:** Yes, though on its face not a K, D’s sending of delivery dates is reasonably interpreted as acceptance

  - **Apparent Authority:**
    - D testified that salesman did not have authority to enter into K’s, but this fact was never communicated to P
    - P reasonably believed salesman had authority

3. INHERENT AGENCY POWER:

→ Not well defined, but is analogous to doctrine of respondeat superior in torts
→ Doctrine recognizes that is inevitable that in performing of duties agent may harm a third party with a tort or deal with one in unauthorized manner
  - Principal liable b/c could reasonably foresee that agent would take the action he did

**Acts of Agent in Ordinary Course of Business:**

*WATTEAU v. FENWICK*

-Humble owned bar, transferred ownership to D but continued to be manager, Humble only had authority to buy certain things, but Humble bought cigars etc. too, P sued D to recover payment
**Issue:** Is undisclosed principal liable for acts of agent taken in the ordinary course of business even if principal didn’t authorize agent to act or held agent out as agent?

**Held:** Yes, principals are liable when conduct business thru a manager
- Even if manager exceeds his authority
  - Principal only liable if agent does something outside of authority that is usually confided to an agent of that character
  - Even if contrary to principal’s instructions (*Agency Restatement* § 195)

**Authority Inferred from Customary Powers of Similar Agents:**

*KIDD v. THOMAS EDISON* (1917)
- D record company hired Fuller to audition singers to perform tone test recitals of singers, P singer auditioned, P later sued for breach of K arguing that K was unconditional engagement for a singing tour, D said only were tone tests for record recordings, Fuller only authorized to determine fees each artist would expect they should be booked, and to engage record dealers to pay for these recitals
- **Issue:** Should D be held to K based on apparent authority of Fuller?

**Held:** Yes, Fuller had apparent authority because similar agents with such authorization to book could also engage singers unconditionally
  - Limitations of these kinds on Fuller were unheard of in these circumstances

**Inherent Authority and Jury Instructions:**

*NOGALES SERVICE CENTER v. ATLANTIC RICHFIELD CO.* (1980)
- D entered into agreement w/ P to finance construction of truck stop facility, D lent P money to complete and also provided fuel for sale, however fuel price was not competitive with locals, D said would give discount on fuel and lend money to build motel and restaurant, D later loaned but refused fuel discount, P defaulted on loans and D brought foreclosure action, D agent claimed fuel discount arrangement was outside the scope of his authority, Ct refused to give jury instructions P requested relating to Inherent Authority of an agent
- **Issue:** Should Ct have allowed the jury instructions?

**Held:** Yes, inherent authority may arise where agent does something similar to what he is authorized to do but in violation of orders as was here

4. **Ratification:**

  - A person may affirm or ratify a prior act supposedly done his behalf by another that was not authorized at the time it was performed
    - Ratification causes the agent’s act to be treated as if the principal had authorized it at the outset
Ratification Requires Intent and Full Knowledge:
*BOTTICELLO v. STEFANOVICZ* (1979)
-D’s were spouses owning farm as tenants in common, P made offer of $75k to buy farm, wife told P not for less than $85k, later P made deal with husband on $85k for lease w/ option to purchase, K was signed by husband and P, P was unaware of wife’s interest in land, P attempted to later purchase and D’s refused, it’s not like wife didn’t know after the K that someone was occupying the land on a lease

*Issues:* (1) Was husband acting as agent for wife? (2) Did wife ratify K by her subsequent conduct?
*Held:* (1) No (2) No
- Agency is not proven by marital status alone
- Agency is not proven by joint ownership alone
  - Must be shown that:
    a. Principal consented to agent acting for him
    b. Agent accepted the undertaking
    c. Parties understood that principal is in control of undertaking
-Wife did not ratify K by subsequent conduct
  - While wife knew of leasing, did not know K had option to buy
  - Wife had no reason to believe K contained the option

5. AUTHORITY BY ESTOPPEL:

> When a principal neg’il or int’il causes third party to believe that agent has authority to do something that’s actually beyond his authority
  - Third party *Detrimentally Relies* on principal’s conduct
  - Estoppel is different than Apparent Authority
  - Apparent Authority makes principal a *contracting party*
    - Rights and liabilities on both sides of the issue
    - Estoppel only compensates third parties for losses arising from reliance
      - Estoppel creates no enforcement rights in principal against third party

*Store Owner’s Neg’il Surveillance May Lead to Estoppel:*
*HODDESON v. KOOS BROS.* (1957)
-P sued D b/c bought something from allegedly D employee who was imposter
*Issue:* Can D be held liable for acts of imposter even if imposter was not D’s Agent?
*Held:* Yes, imposter had alleged apparent authority
  - D has duty to safety in the store
  - ***Agency by Estoppel should apply in cases which involve “tortuous dereliction of duty to an invited customer”***
6. AGENT’S LIABILITY ON THE CONTRACT:
   → An agent’s liability on a K depends on the status of the principal
   a) DISCLOSED PRINCIPAL
      -Not Personally Liable!
   b) UNDISCLOSED/PARTIALLY DISCLOSED PRINCIPAL
      -Personally Liable

Agent Personally Liable when Principal not Disclosed:

ATLANTIC SALMON A/S v. CURRAN (1992)
-P sued D to recover for salmon they supplied to D representing a fake company standing in for another company
Issue: Is an agent who makes a K on behalf of a partially disclosed principal personally liable on the K?
Held: Yes, P knew was dealing with corp. but did not know identity, therefore D liable

LIABILITY OF PRINCIPAL TO THIRD PARTIES IN TORT

SERVANT VERSUS INDIVIDUAL CONTRACTOR

a. Master-Servant:
   → This form of agency involves a servant who under the control of master renders a service
      -i.e. Employer-Employee relationship
      -Control is the essential feature here
      -Employer retains control of manner in which employees perform services

      -“Respondeat Superior Doctrine”
      → Employer liable for all torts committed by employee acting w/in scope of employment
      -Injured party can sue employer and employee
      -Employer is vicariously liable
      -Strict liability on employer

b. Independent-Contractors:
   → Form arises when principal retains person to do certain job or achieve specific objective
      -Principal retains no right of control over independent contractors
      -Independent contractor figures out how to perform alone

      -Respondeat Superior Doctrine does not apply
      -Employers liable in limited situations
      -Only when employer’s own neg’t is involved
      -Neg’t in selecting ind. Cont.
      -In performance of highly dangerous acts
**Issue is a Question of Fact:**

*HUMBLE OIL REFINING v. MARTIN* (1949)
- Third party’s car rolled down hill from P’s service station, injured D, D appeals arguing not liable for injuries b/c station was operated by ind. Cont.
- **Issue:** Do facts indicated master-servant relationship so D can be held liable?
- **Held:** Yes, this is a question of fact whether ind. Cont or M-S
  - D owned station and controlled a lot
  - Hours
  - Provided own products for sale and set prices
  - Had financial control
  - Paid 75% of utility bills
  - etc…
  - Station employee had only control over hiring, discharge and paying salaries

**Facts Demonstrate Ind Cont. Relationship:**

*HOOVER v. SUN OIL CO.* (1965)
- P injured when car caught fire while being filled with gas at D station operated by Barone
  - Accident due to neg’l of employee
- **Issue:** Was Barone agent of D such that D can be held liable for neg’l
- **Held:** No, D had no control over details of station’s operation
  - Barone assumed risk made no reports to D
  - Set hours, pay scale, working conditions of employees
  - Typical company-service station relationship
  - D’s reps made suggestions, not orders
    - Came weekly to take orders for products and inspect bathrooms

**FRANCHISING AGREEMENTS AND AGENCY**
- If franchise agreement gives franchise too much control over day-to-day agency relationship might arise

**The Test is Control:**

*MURPHY v. HOLIDAY INNS* (1975)
- P sued D for injuries sustained in slip and fall at the motel, licensing agreement only allowed motel to use the name Holiday Inn
  - Tr Ct found no relationship b/w motel and D
- **Issue:** Did licensing agreement or franchise K create agency relationship?
- **Held:** No, agency b/w franchisee only arises if agreement allows regulation of franchisee so that franchiser has power with control of operation of franchisee
  - No control of rates, no shares demanded, no profits demanded
  - Can control architecture so as to sthdize all chains
  - But has no control over maintenance
Tort Liability and Apparent Agency:

-Franchiser may be liable under apparent agency theory:

*BILLOPS v. MAGNESS CONSTRUCTION CO.* (1978)

-P rented ballroom at Hilton Inn, P paid rental fee in advance and got receipt, on day of event inn’s banquet director wrongfully requested additional rental payment which P refused, director and employees harassed guests eventually calling police for arrest, P sues for lots of torts

-Issue: Grant D’s motion for summary judgment cause not liable for P’s claims?

-Held: No, D franchiser maintained significant daily control over Inn

-Apparent agency maybe here

-Reasonable reliance on indicia of authority originated by principal Hilton
  -P’s relied on Hilton name when booking
  -No reasonable basis in operation or physical environment so as ordinary person could discern that he is dealing w/ anyone other than Hilton

**SCOPE OF EMPLOYMENT**

-For Respondeat Superior to apply, employee must have committed tortuous act w/in course and scope of employment

-Restatement sets forth factors to be considered:
  -Authorization of act by employer
  -Time, place, purpose of act
  -Whether act was commonly performed by employees
  -Extent of employer’s/employee’s interest involved

**Acts that are Reasonably Foreseeable:**

*BUSHEY v. U.S.* (1968)

-D’s seaman returned to vessel drunk and turned water intake valves damaging dock

-Issue: Did court err is holding D liable for acts of drunken seaman

-Held: No, conduct w/in scope of employment under reasonable foreseeability test

-Not so unforeseeable so as not to hold D liable

-Generally well-known that seaman drink in excess while ashore
  -Foreseeable damage occurs from them moving inb/w dock and city

**Battery Committed by Employee:**

*MANNING v. GRIMSLEY* (1981)

-P spectator injured by D pitcher’s intentional wild pitch toward hecklers 90 deg. from plate, D wins directed verdict

-Issue: Directed verdict to D on battery count right?

-Held: No, professional pitcher acting while in the scope of employment

**Statutory Claims**

-Racial Discrimination:

*ARGUELLO v. CONOCO* (2000)

-Group of minorities filed suit against D for separate racial event
-Issues: (1) No agency relationship b/w stores and D? (2) Was racist storekeeper acting outside scope of employment during occurrence?
-Held: (1) No, no agency relationship present, no daily control of stores
(2) Use scope of employment test listed previously

LIABILITY FOR TORTS OF IND. CONTs.
- Employers of ind. Conts. Not liable on respondent superior theory
- Liable if neg’l in choosing ind. Cont.
- Or if work involves highly dangerous acts (e.g. blasting)
- WORK CONSTITUTES A NUISANCE PER SE

Contractor Engaged in Activity that is a Nuisance:
MAJESTIC REALTY v. TOTI CONTRACTING (1959)
- City contracted with D to tear down building, piece of building fell on P’s building, P sues city
- Issue: Can city be liable for neg’l acts of ind. Cont. if work done was nuisance per se?
- Held: Yes! Cts have equated nuisance per se w/ activities that are “inherently dangerous”
- Inherently Dangerous:
  - Act can only be carried out by exercise of special skill and care
  - Act involves grave risk of danger to persons or property if neg’l done
    - Split Cts on whether demolition activity constitutes this
    - In NY razing in busy areas does constitute this

FIDUCIARY OBLIGATIONS OF AGENTS

DUTIES DURING AGENCY
→ Agent is fiduciary and owes principal obligation of faithful service
  - This obligation requires the agent to notify principal of all matters affecting agency

DUTY OF LOYALTY/CONFLICTS OF INTEREST
→ Agent is charged w/ fiduciary duty of loyalty which includes duty not to compete w/ principal
  - Anything agent obtains as a result of employment belongs to principal
    - Bars retention of secret profits, advantages, benefits absent principal’s consent

REMEDIES AVAILABLE TO PRINCIPAL
a) Damages
  - Agent may be liable in tort for breach of fid. Duty
b) Action for Secret Profits
   - Agent liable to principal for secret profits/property acquired based on breach of fid
     duty

c) Rescission
   - Any transaction that violates agent’s fid duty is voidable by principal

d) Other
   - Other remedies available include accounting, or imposition of constructive trust
     on property the agent obtained in violation of his fid duty

**Secret Profits:**
*READING v. REGEM* (1948)
-Soldier used uniform and his service as escort to make money helping illegal activity passing by
checkpoints
   - Military took his profits for the crown
- **Issue:** Is P entitled to getting his money back made outside the scope of his employment
- **Held:** No, if servant enriches self by virtue of his service w/o his master’s sanction the law says
  he cannot keep the profit

**Duty to Disclose Information:**
*GENERAL AUTOMOTIVE MFG v. SINGER* (1963)
-D was employee of P as general manager, D started taking on more orders than P could
complete and passed out orders to other shops for profit
- **Issue:** Did D breach fid duty to P by failing to inform P of non-fillable orders?
- **Held:** Yes, D was behaving as broker for his own profit where by K he had duty to work only
  for p
   - Acted in own self-interest
   - Acted adversely to P’s interests
-D had duty to disclose existence of additional orders to P so P could do with them as they
wanted
   - P could’ve sub-jobbed them!
   - Profit belongs to P

**DUTIES DURING AND AFTER TERMINATION OF AGENCY: HEREIN OF “GRABBING AND LEAVING”**
- Post-termination competition with a formal principal is permitted
- But former agent is barred from disclosure of trade secrets or other confidential
  info obtained during his employment

**Soliciting Former Employer’s Clients:**
*TOWN & COUNTRY HOUSE v. NEWBERRY* (1958)
-Ds worked for P for three years, after Ds left, set up directly competing business and solicited
P’s customers
- **Issue:** Can P enjoin Ds from soliciting its customers?
-**Held**: Yes! Ds must have had P’s current customer call list b/c they were the only ones solicited
  -Must have taken it!
  -Stole trade secret!
  -Would’ve been okay if solicited new customers form a pool of potential customers available to both P and Ds

### CHAPTER 2. PARTNERSHIPS

⇒ An assoc of two or more persons to carry on a business as co-owners for profit
  -Partnership cannot be formed for nonprofit purposes

-Each partners is the agent for other partners
  -Acts w/in scope of partnership binds other partners

**Joint Venture**
⇒ Assoc of two or more members agreeing to share profits; usually more limited than pship i.e. formed for a single transaction
  -Rights are usually same as pships
  -Cts usually apply same rules in disputes

### CHARACTERISTICS OF THE PSHP

1. **Both Characteristics**
   -Pship is treated as both a sep entity from its partners (for some purposes) and as though there is no sep entity but merely an aggregate of separate, individual partners

2. **Aggregate Theory**
   -For example, partners are jointly and severally liable for obligations of the partnership
     -Pship itself doesn’t pay taxes
     -Fed income tax: income and losses of pship are attributed to the individual partner
     -Although it does file an informational return

3. **Entity Characteristics**
   -Fr other purposes, pship is treated as separate entity apart from its individ partners

   a. **Capacity To Sue Or Be Sued**
      -Jurisdictions vary as to whether a partnership can be sued and/or sue in its own name
      -Ex: in fed questions pship can sue in its own name in fed cts
(b) Ownership of Property
- Pship can own and convey title to real or personal property in its own name w/o all partners joining in the conveyance

(4) RUPA (Revised Uniform Pship Act)
- Unlike the UPA, RUPA *expressly states* that a pship is an entity, thus simplifying many pship rules such as those on property ownership and litigation

AGREEMENT TO FORM A PARTNERSHIP
- Pship is voluntary association
- Must be express or implied agreement in order to form a pship

(a) Formalities
- If pship is to continue over a year, Statute of Frauds req that agreement be written

(b) Duration
- If no term specified, then pship is terminable at the will of any partner

(c) Capacity to Become a Partner
- Persons must have the capacity to contract, some states hold that corps can’t be partners

(d) Consent of other Partners
- Prospective partner must have the consent of all other prospective partners

(e) Intent of the Parties
- Where there is question, intent of the parties involved is determined from the circumstances

*Partners Compared with Employees:*
*FENWICK v. UNEMPLOYMENT COMPENSATION COMMISSION (1945)*
- Cheshire and Fenwick entered into pship agreement stating Fenwick contrib. all capital investments, possessed exec control over the management of the business and bore the risk of all business losses
- *Issue:* Do the agreement and conduct of the parties evince a pship?
- *Held:* No, Pship is an association of 2+ peops to carry on as co-owners of business for pofit
  - In determining existence of pship court looks to:
    - Intent of parties
    - Profit sharing
    - Language of agreement
    - Rights of parties on dissolution
Partners Compared with Lenders:
-Sharing of profits not conclusive evidence of pships:
*MARTIN v. PEYTON* (1927)
-P sued Ds as alleged partners of a firm that owed P money, when the Ds entered into an elaborate loan agreement w/ the firm
-Issue: Has a pship been formed?
-Held: No, pship is created by express or implied K b/w two peops w/ intent to form pship
-Ds could not bind or initiate any actions for the firm
-Not just profit sharing evidences a pship
-All features of the agreement must be consistent
-This agreement was a loan agreement not pship K

Lack of Intent to Form a Pship:
*SOUTHEX EXHIBITIONS v. RI BUILDERS* (2002)
-D replaced P as promoter of its home show after terminating a K w/ other firm
-Issue: Pship exist?
-Held: No, sharing profits is prima facie evidence of pship, which can be rebutted by evidence sufficiently demonstrating that parties didn’t intent to create pship
*TOTALITY-OF-CIRCUMSTANCES TEST*
-Do circumstances evidence a pship?
-The labels parties assign their intended relationship may be probative of intent to form pship but are not necessarily dispositive

PARTNERSHIP BY ESTOPPEL

 LIABILITY of alleged partner
-One who holds self out to be partner or who expressly or impliedly consents to representations that he is such a partner is liable to any third person who extends credit in good-fath reliance on such representations [UPA §16]

EX:
-A reps to C that she has wealthy partner, B, in order to obtain credit; B knows of the reps and does nothing to inform C that he is not partner; C makes loan
-For purposes of loan, B will be held to be partner with A, bu has no other rights to participation in A’s business

Liability of an Affiliated Company:
*YOUNG v. JONES* (1992)
-P and other invested money in reliance upon a fraudulent audit statement prepared by Price Waterhouse-Bahamas
-Issue: Do a U.S. firm and its foreign affiliate operate as partners by esoppel when the foreign affiliate uses the firm name and trademark, an U.S. firm makes no distinction in its advertising b/w itself and its foreign affiliates?
FIDUCIARY OBLIGATIONS OF PARTNERS

1. Duties of Partners to Each Other
   - Duties of one partner to all others are based on fid relationship
   - Specifically, partner owes certain duties of care and loyalty

2. Duties w/ Regard to Outside Opportunities:
   MEINHARD v. SALMON (1928)
   - D terminated a lease belonging to his joint venture w/ P to enter into a new lease on behalf of his solely owned business
   - Issue: Does the new lease come w/in D’s fid obligation to his joint venture partner as a joint venture oppor?
   - Held: Yes! Like partners, joint adventurers owe one another the duty of loyalty

3. Duties Regarding Dissolution:
   BANE v. FERGUSON (1989)
   - P’s pension payments were terminated when his former firm’s management council decided to merge w/ another law firm ultimately resulting in dissolution
   - Issue: Does a retired partner have any common law or statutory claim against Ds for the loss of his pension?
   - Held: No, fid duties owed by one partner to another terminate when the pship is dissolved

4. Withdrawing Partners Removing Clients from Firm:
   MEEHAN v. SHAUGHNESSY (1989)
   - Os separated from Ds firm to form a new firm w/ cases removed from old firm
   - Issue: Did partners who left breach their fid duty to pship in taking clients from the firm?
   - Held: Yes! Partner must render on demand true and full info of all things affecting the pship to any partner
     - Fid duty does not prevent partner from secretly preparing to start own law firm
     - Can’t secretly prep clients prior to leaving to leave with partners as to gain an unfair-advantage over the firm

5. Expulsion of a Partner:
   LAWLIS v. KIGHTLINGER & GRAY (1990)
   - P was expelled from law pship of D sespite complying w/ all conditions for his continued relationship
   - Issue: (1) Did notification that Finance Committee intended to rec his severance in the future and removal of files from his office two days later constitute expulsion in contravention of the terms of his pship agreement? (2) Was P expelled in bad faith?
-Held: No; No; When a partner is involuntarily expelled from a business his expulsion must be in good faith for a dissolution to occur w/o violating the pship agreement

PARTNERSHIP PROPERTY

-What Constitutes Pship Prop?
  ➔ All property originally bought into the pship or subsequently acquired by purchase or otherwise for the pship is pship prop [UPA §8(1)]
  -Involves whether prop is pship prop or is indiv prop of a partner

-Proof of Intent
  -Where this is no clear intention expressed as to whether prop is pship prop, then Cts consider all of the facts related to acquisition and ownership of the asset in question
  -Some of the factors considered are:
    -How title to prop is held
    -Whether pship funds were used to buy the prop
    -Whether pship funds used to improve the prop
    -How central the prop is to the pship’s purposes
    -How frequent and extensive the pship’s use is of the prop
    -Whether the prop is accounted for on pship financial records

RIGHTS AND INTERESTS

-Individual partner’s interest in the pship
  -Prop rights of indiv partner in the pship prop are
    (1) His rights in specific pship property
    (2) His rights to participate in the management of the pship
        [UPA §24]

(1) Rights in Specific Pship Property
  -Each partner is a tenant-in-partnership w/ her co-partners as to each asset of the partnership [UPA §25(1)]
  -The incidents of this tenancy are as follows:
    a. Each partner has equal right to possession for pship purposes
    b. The right to possession is not assignable, except when done by all partners individually or by the pship as an entity
    c. The right is not subject to attachment or execution except on a claim against the pship (The Entity Theory)
    d. The right is not community prop hence it is not subject to family allowances, dower, etc.
    e. On the death of a partner the right vests in the surviving partners (or in the executor or administrator of the last surviving partner)
      -Hence the prop is not part of the estate of a dead partner but vests in the surviving partner who is under a duty to account to the
deceased partner’s estate for the value of the decedent’s interest in the pship

(2) Partner’s Interest in the Pship
-Partner’s interest in the pship is her share of the profits, surplus, which is 
  *Personal Property* [UPA §26]

  (a) Consequences of Classification as Personal Property
  -Partner’s interest is personal prop even if the firm owns real prop
  -Thus partner’s rights to any individ prop held by the pship are equitable (pship holds title) and this equitable interest in “converted” into a personal prop interest
  -Can be important in inheritance situations where real prop may be give to one heir and personal prop to another

  (b) Assignments
  -Partner may assign her interest in the pship (unless provision in K saying no) and unless the K provides otherwise such an assignment will not dissolve the pship [UPA §27(1)]
  -The assignee has no right to participate in the management of the partnership
  -i.e. he is not a partner, only has rights to assign partner’s share of profits and capital
  -But Assignee is liable for all partnership obligations

  -*Creditor’s Rights*
  -A creditor of an individual partner may not attached partnership assets
  -He must get a judgment against the partner and then proceed against the individ partner’s interest (by an assignment of future distributions, a sale of interest for the proceeds etc.)

**Effects of Conveying a Partnership Interest:**

*PUTNAM v. SHOAF* (1981)

-P sold interest in pship to D in exchange for D’s assumption of personal liability on a bank note

-*Issue:* When partner conveys her pship interest to another, can she later claim an interest in a recovery resulting from a choice in action unknown to the parties at the time she conveyed her interest?

-*Held:* No! Partner’s property rights include rights in specific pship property, interests in the pship and the right to participate in the pship’s management
  -Accordingly, the pship, not the partner owns the property and assets
  -It is evident that the P intended to convey her entire interest in the pship to the D
RAISING ADDITIONAL CAPITAL

- Often pships need to raise additional capital funds to finance their activities and attempt to find the lowest cost method to do so
  - Sometimes this issue is addressed w/in the pship K itself
    - “Pro Rata Dilution” (one type of K provision)
      - Permits a call to each partner for a certain sum and provides for the reduction in pship shares of any partner who does not contribute
  - Hypo Provision: Partners invest in firm at reduced price
  - “”: Partners make loans that will bear interest at higher rate
  - “”: Partners may sell new pship assets to peops outside of pship
    - Like issuing new stock

MANAGING THE CORPORATION

- Equal Rights
  - All partners have equal rights in management
    - Even if sharing of profits is unequal

One Partner Cannot Escape Responsibility by Notifying Creditor:

*NATIONAL BISCUIT CO. v. STRÓUD* (1959)
- Freeman purchased bread from P although his partner D had informed Freeman and the P that he would no longer be responsible for additional bread purchases
- Issue: If there are no restrictions in the partnership agreement as to the partners’ authority, can an equal partner escape responsibility for pship obligations by notifying a creditor that he will not be responsible for pship debts incurred w/ that creditor?
- Held: No! Every partner is an agent of the pship for the purpose of its business and every partner’s acts for apparently carrying on in the usual way the partnership’s business binds the partnership unless the acting partner has in fact no authority to act for the partnership and the person w/ who he is dealing knows that he has no such authority
  - Had D dissolved the pship and given P notice prior to order, D would not have been personally liable for the pship debt to P

Differences must be Resolved by the Majority:

*SUMMERS v. DOOLEY* (1971)
- P incurred expenses when he hired a pship employee despite D’s objection
- Issue: In a two person pship, can one partner, over the objection of the other partner, take action that will bind the pship?
- Held: No! Absent a contrary agreement each partner possesses equal rights to manage the pship’s affairs and no partner is responsible for expenses incurred w/o majority approval
Partners May Fashion an Agreement as to Who Makes the Decisions:

*DAY v. SIDLEY & AUSTIN* (1975)

- P sued D for breach of K, fraud, and breach of fid duty after he resigned due to the D’s decision to merge w/ another law pship

-Issue: Was P’s resignation precipitated by any illegality?

-Held: No! Managing partners have no fid duty to disclose changes in the pship’s internal structure if the changes do not generate a profit or loss for the pship

**DISSOLUTION**

- Dissolution of a pship does not immediately terminate the pship
- The pship continues until all its affairs are wound up [UPA §30]

-Causes:
- Unless otherwise provided for in the pship K, the following may result in dissolution:

  a. Expiration of the Pship Term
     (1) Fixed Term:
     - Even where the pship is to last for a fixed term, partners can still terminate at will (but it will be a breach of the K by terminating partner, which may result in damages charged to the terminating partner)
     (2) Extension of Term
     - Partners can extend pship by creating a pship at will on the same terms

  b. Choice of a Partner
     - Any partners can terminate pship at will
     - B/c a pship is personal relationship no one can be forced to maintain
     - Where the pship is for term or even where it is pship at will, if dissolution is motivated by bad faith it may be breach of K

  c. Assignment
     - Assignee or creditor can get dissolution decree on expiration of pship term or at any time in a pship at will [UPA §§30-32]
     - Assignment of a partner’s interest is not an automatic dissolution
     - Nor is levy of a creditors charging order against a partner’s interest

  d. Death of a Partner
     - Surviving partners are entitled to possession of pship assets and charged w/ winding up pship affairs w/o delay [UPA §37]
     - Surviving partners also charged w/ fid duty in liquidating pship and must account to estate of deceased partner for value of decedent’s interest

  e. Withdrawal or Admission of a Partner
     - Most pship K’s provide that losing or admitting partner will not result in dissolution
- New partners may become parties to preexisting K by signing it at time of admission to pship [UPA §13(7)]
- When old partner leaves usually are provisions for continuing pship and buying out leaving partner

f. Illegality
   - Dissolution results from any event making it unlawful for the pship to continue in business

g. Death of Bankruptcy
   - W/o provision in the pship K to contrary, pship is dissolved on death or bankruptcy of any partner

h. Dissolution by Court Decree
   - A Ct in its discretion may dissolve pship in circumstances including:
     - Insanity of a partner
     - Incapacity
     - Improper conduct
     - Inevitable loss
     - Wherever it is equitable

The Right to Dissolve

-Significant Disagreements b/w Parties:
OWEN v. COHEN (1941)
- Court dissolved P and D’s pship upon finding that the parties couldn’t practicably continue in business together
  - Parties disagreed about matters essential to carrying on the business

Breach of Agreement:
COLLINS v. LEWIS (1955)
- P and D entered into pship to operate cafeteria w/ P providing financial backing and D managing
  - Held: Partner may not obtain a judicial dissolution of pship if his own interference causes pship to be unprofitable

Partnership at Will:
PAGE v. PAGE (1961)
- P seeks to dissolve hi unprofitable pship w/ D
  - Held: Pship may be dissolved by express will of any partner if pship K specifies no definite term or particular undertaking
CONSEQUENCES OF DISSOLUTION

a. Distribution of Assets

(1) Pship Debts
   - The debts of the pship must first be paid

(2) Capital Accts
   - Amts are applied to pay the partners their capital accts
     \[ (\text{Capital contributions} + \text{accumulated earnings and less accumulated losses}) \]

(3) Current Earnings
   - If there is anything left over, partners receive their agreed share of current pship earnings

(4) Distributions in Kind
   - Where there are no pship debts, or where debts can be handled from cash acct, pship assets may not be sold but may be distributed in kind to the partners

(5) Pship Losses
   - Where liabilities exceed assets, partners must contribute

b. Rights of the Partners

(1) No Violation of pship K
   - If the dissol does not violate pship K, then pship assets are distributed as set forth above, no partner has any cause of action against any other

(2) Dissol Violates pship K
   - If dissol does viol the K (e.g. fixed term of the agreement) then innocent partners have rights in addition to those listed above
     - Rights to Damages
       - Innocent partners have right to damages against offending partner [UPA §38(2)]
         - e.g., lost profits due to dissol etc.
     - Right to Continue Business
       - Innocent partners also have right to continue pship business by purchasing offending partner’s interest in the pship [UPA §38(2)(b)]
         - Pship may also dissol, paying partner his share less damages
c. Effects of Dissol

- Partners are Liable Until Debts Discharged
  - Liability of partners for existing pship debts remains until they are discharged

- New Pship Remains Liable for Old Debts
  - When has been dissol due to death, w/drawl, or admission of new partner, and pship business is continued, new pship remains liable for all debts of previous pship [UPA §41]

- Retiring Partner’s Liability for Debts Incurred by Partners Continuing the Business
  - Dissol ends the power of a partner to bind pship except to extent necessary to wind up its affairs [UPA §33]
    - If third parties do not know of dissol, K’s entered into with a partner bind the pship
    - Notice of w/drawl or dissol may be published in newspaper of general circulation

A Partner May Bid for the Pship’s Assets at Dissol:
PRENTISS v. SHEFFEL (1973)
- Upon dissol of a pship the former partners purchased the pship assets at a judicial sale
- Upon Dissol of a pship the former partner may bid on the pship assets at a judicial sale

Fid Duty at Dissol:
MONIN v. MONIN (1989)
- After P assumed ownership of all pship assets, the D acquired a milk-hauling K that had previously belonged to the pship
- Issue: Did D breach his fid duty to the pship?
- Held: Yes! Partners owe the utmost duty of good faith and fairness to former partners after the pship is dissolved and until the pship affairs are wound up

Pship Agreement and the UPA at Dissol:
PAV-SAVER v. VASSO (1986)
- D alleged P wrongfully dissol the pship seeking to continue the pship business
- Issue: Do the terms of the pship agreement control at dissol if the result of following them would likely run afoul of the purpose of a UPA provision?
- Held: No!
  - Upon wrongful dissol of a pship in vio of the pship K, each partners who has not wrongfully dissol the pship is entitled to damages for breach of K and may continue the pship business for the term req under the pship K w/ the right to possess the pship property upon posting a bond
The Sharing of Losses:
KOVACIK v. REED (1957)
-P sought recovery from D for ½ the money capital he received in a losing business venture
-Issue: Is a party who has contributed only his services and not capital to a JV liable for a portion of the venture’s losses?
-Held: No! If one partner or joint adventurer contributes the money capital and the other contributes skill and labor necessary for the venture, neither party is entitled to contribution from the other
-Each party loses the value of his own capital or contribution

Buy-Out Agreements:
G&S INVESTMENTS v. BELMAN (1984)
-P died while suit for dissol was pending, triggering the pship K’s buy-out provisions
-Issue: (1) Can P’s continue the pship after the death of a partner?; (2) Is pship buy-out K valid if the agreed-upon purchase price is less or more than the actual value of the interest at the time of the buy-out?
-Held: (1) Yes! (2) Yes!
-Under the UPA, a court may dissolve a pship when a partner become incapable of performing under the pship agreement, when a partner’s conduct tends to affect the business prejudicially, or when a partner willfully breaches the pship K terms

Law pship Dissol:
-Absent an Agreement:
JEWEL v. BOXER (1984)
-After dissol of a law firm pship, the former partners sought to recover their respective pship shares in legal fees generated after dissol on cases that originated w/ the former pship
-In the absence of a pship K the UPA req that attorney’s fees received on cases in progress upon dissol of a law pship are to be shared by the former partners according to the right to fees in the former pship, regardless of which former partner provides legal services in the case after the dissol

Enforcement of Agreement:
MEEHAN v. SHAUGHNESSY (1989) [REPEAT CASE]
-Ps separated from D law partnership to form new law firm w/ cases removed from old firm
-Every partner must account to the pship and hold as a trustee for the pship any profits he derives w/o the other partners’ consent, from any transaction connected w/ the pship’s formation, conduct or liquidation

LIMITED PARTNERSHIPS
⇒ A pship formed by two+ persons and having as its members one or more general partners and one or more limited partners
- General Partner
  - Assumes management responsibilities and full personal liability for debts of the pship

- Limited Partner
  - Makes a contribution of cash, other prop, or services rendered to the pship and obtains an interest in the pship in return but not active in management and has limited liability for pship debts [RULPA §303(b)]

- A Person can be Both at the Same Time
  - In such a case, partner has w/ respect to his contribution as a limited partner, all rights that he would have if were not also a general partner [ULPA §12]

- Purpose:
  - May carry on any business that a pship could carry on [UPLA §3]

- Liability:
  - General partner is personally liable
  - Limited partner is not personally liable, may only lose amt of his investment in the limited pship [ULPA §1]
    - EXCEPTION:
      - When a limited partner takes part in the management and control of the business, he becomes liable as a general partner

- Rights of Limited Partners:
  - Rights are substantially the same as those of a partner in an ordinary pship
    - Except has no rights w/ regards to management
      - No rights to access pship books, accounting, dissol, and winding up by decree of the court [ULPA §10]
  - Limited partner may lend money to or transact business w/ a limited pship [ULPA §13]
  - Limited partner’s interest is assignable unless K provides otherwise
    - Assignment vests in the assignee all rights to income or distrib of assets of the pship, but unless and until the certificate of limited pship is amended w/ the consent of all other partners, the assignee is NOT entitled to inspect pship books, obtain accounting etc. [RULPA §702]

- Formation of Limited Pship
  - Really no formalities necessary except:

[SEE LEGALINES PAGE 62]
Limited of General Partner?:  
HOLZMAN v. DE ESCAMILLA (1948)  
- P as bankruptcy trustee sued the limited partners of a bankrupt pship to est them as general partners liable for their credible debts  
- A limited partner is not liable as a general partner unless in addition to exercising his rights and powers as a limited partner, he takes part in the control of the business  
  - These Ds took part in control of the business so they are considered general partners

CHAPTER 3. THE NATURE OF THE CORPORATION

PROMOTERS  
- Act on behalf of the corporation not yet formed (in the course of forming)  
  - Contract for products or services  

-Promoter Liability  
  - If promoter contracts solely for and in the name of the corp he is not liable if the corp never forms  
  - If promoter contracts in own name, may be held liable  
    - Ct looks to intent of parties and other factors

-Corporate Liability  
  - If corp ratifies or accepts K after incorp, corp may be held liable on pre-incorp promoter Ks  
    - Ratification may be express or implied from adoptive conduct of the corp  

-Quasi-K Recovery  
  - If corp repudiates the K it is still liable for the value of anything that it makes use of

- Adoption by Implication  
  - Arises out of the corp’s knowing use or receipt of the benefits under the K

-Consequences of Defective Incorporation  
  - First issue to examine is if corp has actually been properly formed

- “De Jure” Corp  
  - Crop that has complied strictly w/ all mandatory provisions for incorp  
    - Can’t be attacked by any party, even the state
“De Facto” Corp
- Common law indicates that even if corp has not complied w/ all mandatory reqs to be De Jure, it may comply sufficiently to be given corp status vis-à-vis third parties (although not against the state)

-Corp by Estoppel
- When corp is not given De Jure or De Facto status, its existence as a corp may be attacked by any third party
  - However, sometimes situations where Cts will hold that the attacking party is estopped to treat the entity as other than corp

Conduct of Parties:
SOUTHERN-GULF v. CAMCRAFT (1982)
-P signed a K as a corp to purchase supply vessl from D but it didn’t incorporate until later
-D may not interpose as a defense to breach of K that a P corp lacked the capacity to contract b/c it was not incorp at the time it exec the k, unless the failure to incorp actually harmed the D

CORPORATE ENTITY AND LIMITED LIABILITY

THE CORPORATE FORM

-Characteristics of the Corp
  a. Separate Legal Entity
     - Corp is separate legal entity apart from the individs that may own it or manage it
     - Has separate legal rights and duties as a separate legal entity
  b. Limited Liability
     - The owners (shareholders) have limited liability
     - Debts/liabilities incurred by the corp belong to the corp and not shareholders
  c. Continuity of Existence
     - Death of shareholders doesn’t terminate entity since shares can be transferred
  d. Management and Control
     - Centralized w/ officers and directors
  e. Corp Power
     - As legal entity, can sue or be sued, K, own prop etc.
Limited Liability
- Incurs debts/obligations in its own name

**EXCEPTIONS**
- "Piercing the Corp Veil"
  1. Fraud or injustice to outside parties
  2. Disregard of corp reqs
     - Where shareholders do not maintain the corp as a separate entity but use it for personal purposes

- Undercapitalization
  - Risks piercing where corp is undercapitalized due to liabilities/debts/risks it reasonably could be expected to incur

**Liability Insurance as Evidence of Undercapitalization:**
*WALKOVSKY v. CARLTON* (1966)
- Pedestrian struck by cab sued corp in whose name taxi was registered; and many other cabdrivers/cabs/corps
  - Absent an allegation that the D was conducting business in his individual capacity, complaint charging that an individ D organized a fleet of cabs in a fragmented manner to limit his liability for personal injury claims is insufficient to hold the individ liable for the claim

  - Requirements of Fairness
    - Veil may also be pierced in any other situ where It is only “fair” that the corp form be disregarded

**Cannot Differentiate b/w Corp and Individ (PIERCING TEST)**
*SEA-LAND v. PEPPER SOURCE* (1991)
- D owed P for cost of shipping peppers; however D was dissol b4 P could enforce judgment against it
  - In order to pierce veil, creditor must show that
    1. There was such a unity of interest b/w the individ and the corp entity that separate identities no longer existed, and (2) that a failure to do so would promote “injustice” in some way beond simply leaving a creditor unable to satisfy its judgment

**Voluntary Creditor Ignorant of Unusually Small Equity Financing:**
*KINNEY SHOE v. POLAN* (1991)
- P sublet prop to Industrial Realty Co. after negotiating w/ D, the company’s sole shareholder, and industrial defaulted on the lease
  - If corps shareholder took no stock in corp, undercapitalized it, kept no minutes, elected no officers, and attempted to protect assets by placing them in a nother co, a party may pierce!
Liability of Parent to Subsidiary:

**IN RE SILLICONE GEL BREAST**

-Breast implant recipients brought a products liability action against Bristol-Meyers Squibb (D) which was the sole shareholder of Medical Engineering Co (D), a major supplier of implants
-If parent corp uses subsid co as its alter ego, as demonstrated by shared common directors or business depts, consolidated financial statements and tax returns, and an inadequately capitalized subsid, a P may assert claims against the parents

No Improper Actions:

**FRIGIDAIRE v. UNION PROPERTIES (1977)**

-P a creditor of a limited partnership brought action against the corp general partner and its limited partners individually when the pship failed to pay installments due on K
-Limited partners are not liable for the debts of a limited pship simply by their status as officers, directors, or stockholders of the corp general partner

SHAREHOLDER DERIVATIVE ACTIONS

1. Direct and Derivative Suits
   -Shareholder may enforce management’s duties in a derivative or direct suit depending on the nature of the claim
   -Derivative
     -If the manager’s breach reduced the residual value of the corp
       -Sue in the corp’s name
         -e.g. Shirking, self-dealing
   -Direct
     -If the manager’s breach deprived the shareholder of some right
       -Sue directly in own name
         -e.g. right to inspect shareholder list
           -NOT based on her contingent right to that residual value

   -“Strike Suits”  Complainer must pay corp, maybe security deposit to corp too
     -LEGALINES p.73
     -Many statutes limit the shareholders who may bring derivative suits

Application in Fed Diversity Cases:

**COHEN v. BENEFICIAL INDUS LOAN CORP (1949)**

-P brought derivative suit against Ds and D brought motion seeking to have P’s executrix post security for expenses associated w/ prosecuting the lawsuit
-NJ statute req a holder of less than 5% of a corp’s outstanding shares who bring derive suit to pay for all expenses of defending the suit, and req security for payment of these expenses should be enforced in cases prosec under fed diversity jurisdiction
Determining Whether Statute is Applicable on its Terms:
EISENBERG v. FLYING TIGE LINE (1971)
-Stockholder in corp that ceased to exist post-merger, brought an action on behalf of himself and all other stockholders of dissolved corp to enjoin the plan of reorganization and merger
-An action seeking to overturn a reorg and merger that deprived an acquired corp’s shareholders from having a voice in the surviving corp’s business operations is a personal action rather than a derivative action under NY statute req the posting of security for the corp’s costs

-Settlements and Attorney’s Fees
  -On settlement, corp can pay parties’ attorney’s fees
  -On judgment, except as covered by insurance, D is generally responsible for fees
    -Attorney is real winner recovering big fees on settlement

-Individual Recovery
  -Allowed b/c corporate recovery would merely put the money back in the hands of the wrongdoers

-The Demand Requirement (LEGALINES p. 76)
  -All corp statutes reg settlement of derivative claims as well as req complaining shareholders to exhaust internal remedies before brining suit
    -Typical is FRCP 23.1
  -Delaware Approach
    -“Universal Demand”
  -NY Approach

Abdication Claims:
GRIMES v. DONALD (1996)
-P who learned of extremely generous compensation package D had extended to other D demanded that D cancel the package K
-Shareholder need not make a demand that a company’s board institutes a lawsuit before bringing a derivative suit on behalf of the corp on showing the demand would be futile, and if a demand is made and rejected, a shareholder may still proceed by establishing that the board’s refusal was wrongful

Futility Exception:
MARX v. AKERS (1996)
-Shareholder bought a derivative action charging breach of fid duty and corp waste by IBM’s board for excessive compensations of execs and outside directors
-P establishing that a demand on the company’s board would have been futile must show either that the measure furthered the board’s self-interest, that the directors did not fully inform themselves about the challenged transaction, or that the challenged transaction was so egregious on its face that it could not have been the product of the directors’ sound business judgment
Special Committees
-Committee Recommendation Valid:
_AUERBACH v. BENNETT_ (1979)
-Corp appointed special committee to investigate the basis of a shareholders’ deriv suit charging mismanagement of corp funds and the committee determined that the suit should be terminated
-A special litigation committee’s determination forecloses further inquiry into a matter, provided the committees investigation is bona fide

Termination by a Special Litigation Committee:
_ZAPATA CO. v. MALDONADO_ (1981)
-P, shareholder of D sued Zapata’s officers and directors for breach of fid duty, but P did not ask Zapata’s board to bring the action considering the request to be futile
-While majority of a board may lack the independence to eval a deriv claim, the taint of self-interest is not necessarily sufficient to prevent the board from delegating the eval to an independent committee comprised of distinterested board members who may recommend dismissal of a shareholder’s action

THE ROLE AND PURPOSE OF THE CORP
(LEGALLINES SEE p. 82)
-Business Theory
-Legal Theory
-Powers of a Corp
-Express/Implied
  -Express: any act authorized by the laws of that state
  -Implied: Anything “reasonably necessary” for the purpose of promoting their express purposes
-Social Responsibility

Charitable Contributions:
_A.P. SMITH CO. v. BARLOW_
-P, shareholder of D, brought action seeking invalidation of donation made by D
-Corp may make reasonable charitable contributions even in absence of express statutory provisions

Accumulation of Surplus:
_DODGE v. FORD MOTOR CO._
-D made extraordinary profits and its founder Henry Ford D intended to use those profits to lower the price of its cars and expand its factories capabilities by adding a steel plant, but Ford’s shareholders (P) objected to these policies claiming that the company first obligation was to make profits for its shareholders
-Although a corp’s directors have discretion in the means they choose to make products and earn a profit, the directors may not reduce profits or withhold dividends from the corp’s shareholders in order to benefit the public

**Absence of Misconduct:**

*SHLENSKY v. WRIGLEY* (1968)

-P brought deriv suit against Cubs and its directors for neg’l and mismanagement and for an order that the D install lights for night games

-Shareholder fails to state a cause of action unless it alleges that a corp’s directors’ conduct was causing financial loss to the shareholder and was based upon fraud, illegality, or conflict of interest

**CHAPTER 4. THE LIMITED LIABILITY COMPANY**

**INTRO**

-No LLC statute contains a “control rule”

-LLC was designed for key actors seeking:
  1. The opportunity to participate in day-to-day management
  2. Limited liability
  3. Pship “flow-thru” tax treatment

-Subchapter S status (LEGALINES p. 88)

-To form, file materials necessary to create an LLC

**No Limited Liability for LLC Members Who Fail to Disclose Existence of their Business Organization to Third Parties**

*WALTER, WASTE & LAND v. LANHAM* (1998)

-P negotiated with Clark (D) believing that Clark was D’s agent but both were actually part of Preferred Income Investors, an LLC

-If an LLC’s agent fails to inform a third party that he is acting as the company’s agent, the LLC Act’s notice provision does not relieve the agent of personal liability to the third party

**LIMITED LIABILITY PARTNERSHIPS**

-Grants limited liability to partners from other partners’ misconducts
  -Unless the misacting person was under the partner’s direct supervision and control

-Though LLCs are governed by statute, LLCs can adopt an operating K that is different than the LLCs statute
  -In disputes, generally the operating K will control

**Operating Agreement Controls if no Conflict with Statute:**

*ELF ATOCHEM v. JAFFARI AND MALEK LLC* (1999)
P engaged in JV w/ D president of Malek Inc. and the two entities formed an LLC, but the company did not sign its operating agreement. An LLC is bound by the terms of an operating K that is signed by some of its members and that defines the LLC’s governance and operation, even if the LLC did not execute the agreement.

**PIERCING THE LLC VEIL**

- States are unclear when this is allowed

**LLC Veil May Be Pierced:**

*KAYCEE LAND v. FLAHIVE* (2002)

- D thru D LLC, leased undeveloped prop from P and contaminated the prop
- Common Law doctrine of piercing the corporate veil is not abrogated by the LLC Act and may be used against LLC members in appropriate cases

**Fiduciary Obligation**

- Limiting Fid Duties by Agreement:

*McCONNELL v. HUNT SPORTS* (1999)

- Several individs formed an LLC to try to attract an NHL team to Columbus, OH, but when the company’s principal did not enter into the nece K in time to be considered by the NHL, a subgroup of the company secured the needed facilities and was awarded the NHL franchise
- LLC members are bound by the terms of their operating K, and if the K expressly allows them to engage in “any other business venture of any nature,” they are not prohibited from participating in a competing venture

**DISSOLUTION**

- An LLC will dissolve upon:
  1. The expiration of any period of duration stated in the articles
  2. The consent of all members
  3. The death, retirement, resignation, bankruptcy, incompetency, etc. of a member unless the remaining members vote to continue the business; or
  4. A judicial decree or administrative order dissolving the LLC for vio of law

- The filing of articles of dissol and notification of creditors is normally req

**Personal Liability Following Dissol:**

*NEW HORIZONS SUPPLY v. HAACK* (1999)

- Kickapoo LLC (D) obtained a credit card for gas purchases from P’s predecessor, and when D was no longer able to make payments P sought payment from Haack (D)
- An LLC member may be responsible for the company’s debts if the member fails to take the appropriate steps to dissolve the company when it winds up its operations

**CHAPTER 5. THE DUTIES OF OFFICERS, DIRECTORS, AND OTHER INSIDERS**

1. DUTY OF CARE
   - Directors are normally by law held to have duty of management of the corp

- 32 -
-Directors’ fid duty to the corp:

(1) Duty of Loyalty or Good Faith

(2) Duty of Reasonable Care in their Management

(3) Business Judgment
   -Directors must exercise honest, good-faith, unbiased judgment
   -When this std is applied a director acting in good faith would only be liable for gross neg’l or worse

-Damages

-Cause of Action
   -To show a course of action, it must be shown that the director failed to exercise reasonable care and that, as a direct and proximate result the corp has suffered damages

-Joint and Several Liability
   -Either one director may be held liable for her own acts, or all directors may be held liable
   -All those participating in the neg’l act
   -If more than one director is held responsible, liability is joint and several

-The Duty of Reasonable Care
   → Represented by *Hun v. Cary* (1880)

-Specific Traits, Background, and Abilities of Directors
   -Language in the court opinions that indicates that specific circumstances of each director must be considered in determining whether the director vio his duty of due care
   -Ex: Director is not a resident of the state where the corp is located, maybe director’s duty of care is less than that for resident directors
   -Ex: If director is lawyer w/ experience in corp matters, perhaps his std of care would be higher than that for a schoolteacher w/o corporate experience

-The Std Really Used
   -What Cts really do is look at all of the facts and determine whether the total situation is one in which directors or officers should be held liable
   -Thus, they determine whether the director knew or reasonably should have known of the situation, and whether the director could reasonably have done anything about it
   -Std applied to each director individually
- Reliance On Advice of Counsel
  - Normally when there is no conflict of interest involved, directors may rely on the advice of counsel in making business decisions and not violate the duty of due care
  - Although there are EXCEPTIONS to the rule

Informed Business Judgment
  (1) In Declaring a Dividend:
  
  **KAMIN v. AMERICAN EXPRESS** (1976)
  - Stockholders brought a deriv action asking for a declaration that a certain dividend in kind was a waste of corporate assets
  - A complaint alleging that some course of action other than that taken by the board would have been more advantageous does not give rise to a cause of action for damages

Informed Judgment in Merger Proposals:
  **SMITH v. VAN GORKOM** (1985)
  - D Stockholders brought a class action suit against the company’s board of directors for neg’l decision-making
  - The Business Judgment Rule presume that, when making business decisions, directors act on an informed basis, in good faith and in the company’s best interests

Informed Judgment in Compensation and Severance Packages:
  **BREHM v. EISNER** (2000)
  - Shareholders sued Disney directors for breach of fid duty in committing waste by agreeing to an agreement’s severance terms
  - In order to constitute waste, an exchange must be so one-sided that no person of a reasonable mind would have entered into it

Director Must be Familiar with the Company and Business:
  **FRANCIS v. UNITED JERSEY BANK** (1981)
  - The bankruptcy trustee of various creditors brought suit against Pritchard’s estate to recover misappropriated funds
  - Directors have the duty to act honestly and in good faith and w/ the same degree of diligence, care, and skills that a reasonably prudent person would use in similar circumstances

- Duty to Act Lawfully
  - Directors have a duty to act lawfully
  - Also have a duty to ensure that the corp has effective internal controls to prevent employees from engaging in illegal acts

Duty to Oversee Actions of Employees:
  **IN RE CAREMARK** (1996)
Corp’s shareholders brought consolidated derivative action against corp’s board alleging breach of fid duty related to allegations of vio of fed and state laws by D’s employees. Although directors have a duty to monitor a corp’s ongoing operation, they are not liable for wrongdoings of which they had no real or constructive knowledge.

**DUTY OF LOYALTY**

- Problem occurs when directors have other business involvements
- Dealing to directors is okay under certain rules

1. Self-Interested Transactions

- See Legalines p. 106 for older rules

- The Liberal Rule
  - Most courts now hold that it makes no difference whether the board is disinterested or not
  - The issue is whether the transaction is fair to the corp
  - Part of the “fairness” req is that the director’s interest be fully disclosed
  - If the board is not disinterested, the K will be given very close scrutiny
    - Many states have adopted statutes that combine elements from all of the previous judicial positions

**Action Benefiting Corporate Officer’s Relative:**

**BAYER v. BERAN** (1944)

- Shareholders brought a derivative suit against the Celanese Corp’s directors (D) for breach of fid duty for approving and extending a $1 Mil/year radio advertising program
- A director does not breach his or her dif duty by approving a radio advertising program in which the wife of the corp president who was also member of the board, was one of the featured performers

**Burden of Proof to Show Fairness:**


- Ps brought a shareholder deriv action against Ds alleging waste
- A transaction in which a director has an interest, other than as the corp’s director, is automatically suspect and subject to further review

2. Corporate Opportunities

- The duty of loyalty of directors and officers to the corp prevents them from taking oppors for themselves that should belong to the corporation

  1. Use of corporate property
    - Ex: director may not use corp prop or assets to develop his own business or for other personal uses

  2. Corp Expectancies
Director may not assume for himself props or interests in which corp is “interested” or in which the corp can be said to have a tangible “expectancy,” or which are important to the corps business or purposes

-Ex: Corp has leased a piece of prop, director cannot buy prop for himself

-“Reasonably Foreseeable” that the corp would be interested in the prop, then there is nece expectancy
  -If oppors relate very closely to the business of the corp, there is also nece expectancy

(3) Defenses to Charge of Usurping a Corp Oppor

-Individual Capacity
  -Ds may claim that the oppor was presented to them in their individ capacities, and not as fiduciaries of the corp

-Corp Unable to Take Advantage of the Oppor
  -Law is now that an officer/director may take advantage of a corp oppor if it is disclosed to the corp first and the corp is unable to take advantage of it

If the Corp is Financially Unable to Act on the Oppor:

*BROZ v. CELLULAR INFO SYSTEMS* (1996)
-D filled suit against P for breach of fid duty alleging he put his own interests b4 that of the corp
-Under the doctrine of corp oppor, a corp fid must place the corp’s interests before his or her own interests in appropriate cirumstaces, but a corp fid does not breach his or her fid duty by not considering the interests of another corp proposing to acquire the corp in deciding to make a corp purchase

(4) Corporations Refused the Oppor
  -If the corp by independent directors or shareholders turns down an oppor, then the fids may take advantage of the oppor

(5) Remedies
  -If the fid has usurped a corp oppor then the corp has the following remedies:
    a. Damages
      -Profits made by resold oppor may be recovered by the corp
    b. Constructive Trust
      -Corp may force the fid to convey the prop to the corp at fid’s cost

(6) Competition w/ the Corp
  -Arises when director/officer enters into competition w/ the corp
    a. Use of corp assets, property, trade, secrets, etc
      -A fid may not use these things to form a competing business
b. Formation of a competing business
   - However, a fid (w/o using corp assets) may leave the corp and form competing business
   - Sometimes conduct of fid while still at the corp and preparing to leave is questioned

4. Dominant Shareholders
   - Shareholders are not nece free all the time to cast their votes as they desire
   - Have responsibilities to other shareholders sometimes
     - Ex: Can’t sell his vote for bribes
   - Majority vote is not always effective where it is “unfair” to minority holders

   - Duty of Loyalty and Good Faith
     - Majority shareholders have fid relationship to corp and minority shareholders
     - Actions of majority will be closely scrutinized to see if fair to minority or acted in good faith

**The Standard to be Applied:**
*Sinclair Oil v. Levi (1971)*
- Shareholders brought a deriv action against Oil to require accounting for damages sustained by its subsid
- If, in a transaction involving a parent company and its subsidiary, the parent company controls the transaction and fixes the terms, the transaction must meet the intrinsic fairness test
  - Test puts the burden on the majority shareholder to show that the transaction with the subsid as objectively fair (i.e. no self-dealing)
  - Business Judgment Rule applies

**Liquidation:**
*Zahn v. Transamerica (1947)*
- Stockholders of a tobacco company sued D claiming D caused the Co to redeem its Class A stock at $80.80 per share, instead of allowing them to participate in the liquidation of company assets, in which case they contend they would have received $240 per share
- If a stockholder who is also a director is voting as a director, he or she represents all stockholders in the capacity of a trustee and cannot use the director’s position for his or her personal benefit to the stockholders detriment

5. Ratification

   - DE Corp Statute (§144)
     - K or transaction b/w a corp and one of its directors/officers will not be void or voidable solely for this reason if the K is fair to the corp at the time it is authorized, approved, or ratified by the board of directors, a committee, or the shareholders
     - See LEGALINES p. 114 for more
Interested Directors Still must Prove Transaction was Fair:
*FLIEGLER v. LAWRENCE* (1976)
- SH brought a deriv action against the d/o of Agau Mines and the USAC to recover 800,000 shares of Agau stock transferred to USAC
- A majority of disinterested SHs must ratify the corp transactions w/ an interested director

Ratification and the Business Judgment Rule: NOT COVERED
*IN RE WHEELABRATOR* (1995)
- SHs of D sued company’s directors for breach of fid duty alleging proxy statement issued in connection w/ its merger was misleading
- An interested transaction b/w a corp and its directos is not voidable if it is approved in good faith by a majority of fully informed, disinterested SHs

**DISCLOSURE AND FAIRNESS**
- Insiders can’t trade corp shares w/o disclosing material, nonpublic info in their possession

*The Securities Act of 1933*
- See LEGALINES p.117

“Howey Test”
- p.119

- Definition of a Security is BROAD!
  - Can be almost anything (i.e. mortgages, stocks, bonds)

***What is a Security***:
*GREAT LAKES v. MONSANTO* (2000)
- P sued D and its subsid for failure to disclose info relating to sale of NSC Tech to P
- Interests in limited liability Co. are not securities if they lack the give common features of stock:
  1. Right to receive dividends contingent upon an appointment of profits
  2. Negotiability
  3. Ability to be pledged or hypothecated
  4. Voting rights in proposition to the number of shares owned; and
  5. Ability to appreciate in value

PRIVATE OFFERINGS UNDER 4(2) of the Act
- The Fact Questions
  - Whether an offering is a private or public offering is a question of fact
  - To be exempt from registration under the Act, offering must be private
  - Issuers must register public offerings of stock
(2) Primary Factors Considered
- Following are primary factors considered by Cts in making determination whether offering is public or private one

a. Need for Protection of the Act
   - Many Cts say primary question is whether there appears in the circumstances of offering of securities the need for protection of the Act to be given to the purchasers

b. Access to Investment Information
   - Cts have indicated that for private offering exemption to apply, it must be shown that offerees were given or had access to the same kind of info that would have been contained in a registration statement
   - Offerees must be in or have close relationship to the issuer and its management

c. Distribution of Material Information
   - Mere access to material info is not enough
     (1) Issuer may have to actually distribute to offerees same type of material info as in formal registration statement
     (2) Also, issuer may have to give the offerees access to any additional info they request

d. Number of Offerees
   - Private offering seems to imply the number will be few
     - Sup Ct says number is moot, Ct suggested S.E.C. adopt rule of 25 persons max
     - The more offerees the more public it looks
     - When number gets really large, no mater how sophisticated offerees are or how much info they have, its public and registration is req

- If an offering looks like a public one, it is one for the purposes of the 1933 Act
  a. Size (amount) of the offering
     - Bigger in dollar amt the more public it looks
  b. Marketability of the Securities
     - More marketable, the more public it looks
     - i.e. $1 pre share
     - More accessible than to a few private peops
  c. Diverse Group Rule
     - The more unrelated the group of investors is more public it looks
     - Unrelated = w/o knowledge of or relationship to each other
d. The Manner of Offering
   - Manner in which the offering is made may also be important
   - i.e. public advertising

***Private Offerings are Exempted***:
*DORAN v. PETROLEUM MANAGEMENT CORP.* (1997)
-P sued D for breach of K and rescission of K based on viols of Securities Acts of ’33 and ’34
-In determining whether an offer to participate in a limited pship was a private offer, the court
   must consider the number of offerees and their relationship to each other and to the issuer, the
   number of units offered, the offering’s size, and the manner of the offering

OTHER EXEMPTIONS
   - See Legalines p. 128

SECURITIES ACT CIVIL LIABILITIES
   → Liability for *material misstatements or omissions* in an effective prospectus unless the
      Ds can show (after having made a reasonable investigation of the facts) reasonable
      grounds to believe and actually did believe that statements made in registration
      statement were accurate
      - LL p.128 for more

The *BarChris* Case:
*ESCOTT v. BARCHRIS* (1968)
- Purchasers of convertible subordinated debentures of D sued D claiming filed registration
  statement contained material false statements and omissions
- If false statements made in a registration statement or omitted facts that should have been
  included are material, the registration is “misleading.”

LIABILITY FOR OFFERS OR SALES IN VIOL OF §5 - Section §12(1) of the Act
   → Liable for (1) the consideration paid (w/ interest), less the amt of any income received
      on the securities, or (2) damages if the purchaser no longer owns the security
   LL p. 139

RULE 10(b)-5
   → Unlawful in connection w/ the purchase or sale of security for any person, directly or
      indirectly via INTERSTATE COMMERCE to:
      (1) Employ any device, scheme, or artifice to defraud
      (2) Make any untrue statement of material fact or to omit a state material fact nece
          in order to make the statements made, in light of the circumstances under which
          they were made, not misleading
      (3) Engage in any act, practice, or course of business conduct which operators or
          would operate as a fraud or deceit upon any person
TRANSACTIONS COVERED BY THE RULE
- Purchases and Sales
- Remedies
  - Private party may bring an action for an injunction, for damages, or for rescission
- Securities
- Jurisdiction
  - Some means of interstate commerce must be involved
- Statute of Limitations
  - State’s statute governs
- Liable parties
  - Extremely broad rule
  - Applies to “any person” who is “connected with” a securities transaction
  - Lawyers and Accountants may thus be somehow liable

ELEMENTS OF 10(b)-5’s CAUSE OF ACTION

a. Fraud, deception, misrep, etc.

b. THE “INSIDER” CONCEPT
   (1) Person must have a relationship giving access, directly or indirectly, to info intended to be available only for a business purpose and not for the personal benefit of anyone
   (2) There must be the presence of an inherent unfairness where a party takes advantage of such info, knowing it is unavailable to those with whom he is dealing

c. Materiality
   - Misrep or undisclosed fact must be “material”
     - Reasonable person std for determining whether a fact is material or not
   - Consider all of the facts
   - Examples of material facts:
     - Intention of Co. management to pay a dividend
     - A significant drop in the profit level of the Co.

***Preliminary Merger Negotiations***:
BASIC, INC. v. LEVINSON (1988)
- Former Basic SHs brought class action against Basic and its directors claiming the directors issued three false statements and forced the former SHs to sell their shares at depressed prices based on their reliance on Basic’s statements that it was not engaged in merger discussions
An omitted fact is material if there is substantial likelihood that the avg, reasonable SH would have considered it important knowledge to have before deciding how to vote

"FRAUD-ON-THE-MARKET" doctrine

False Non-Public Information:
WEST v. PRUDENTIAL SECURITIES (2002)
-P brought a class action suit against D for securities fraud alleging that a stockbroker had falsely told several clients that a corp’s stock was certain to be acquired at a premium, artificially inflating its price
-The “fraud-on-the-market” doctrine and its presumption of reliance on misstatements do not apply in a securities fraud class action against a securities brokerage firm alleging that a stockbroker had falsely told several clients that a particular corporation was certain to be acquired at a premium near the future

Statement that a Co Owns a Patent Materially Misleading:
POMMER v. MEDTEST CO (1992)
-D’s investors sued the Co under §10(b) of the ’34 Act claming they were victims of fraud
-Statements are material if a substantial likelihood exists that the whole of info, as considered by a reasonable investor, would have been significantly altered if the omitted fact had been disclosed

RELIANCE
⇒ A showing by the P that he personally actually relied on the material fact that was misreped
-Modern trend is to abolish/limit this req

(1) Affirmative reps and open-market transactions, two types of cases arise:
   a. Actual Reliance
   b. Effect on the Market
      -Allege that D’s statement affected the market price at which the P sold his stock; don’t need to show reliance here

(2) Nondisclosures
-When material facts are not disclosed

CAUSATION AND CAUSATION-IN-FACT
⇒ Causation is a nece element in a private action for damages under 10(b)-5
-Gradually disappearing just like Reliance
   -CAUSATION/RELIANCE/MATERIALITY ALL ARE CONNECTED
Causation-In-Fact
⇒ The nondisclosed fact would have been material had it been disclosed
-Heavily related to Materiality
-Can be rebutted by showing that P would have followed same course of action even w/ full and honest disclosure

THE PURCHASE OR SALE REQUIREMENT
→ 10(b)-5 expressly covers only the actual purchase or actual sale
   -Does not cover actions where P alleges that misrep depreciated his stock even though hasn’t sold it yet
   -EXCEPTION:
     -Where a P seeks an injunction against the continuance of the D of market manip viol of 10b-5
       -Like a deriv suit

Trading Stock Options:
*DEUTSCHMAN v. BENEFICIAL CORP* (1988)
-P sued D and two of its directors for breach of fid duty, alleging a viol of the ’34 Act and claiming that he suffered losses when call options he purchased on D’s stock in reliance on the market price became worthless
-An options trader purchases or sells a security and has standing to sue for damages under §10-b and the related rules

-Scientoer
  -For liability under 10(b)-5, D must be scienter
    →Mental state embracing the “intent to deceive, manipulate, or defraud”
      -Some Cts say reckless satisfies too

-Reremes
  -Rule says nothing about remedies

-Rescission Damages
  -Seller can recover his securities and buyer can recover amt paid for securities
    -Limited by if D purchaser has already sold it, etc.

-Damages
  -Restitution available restoring what the P has lost
  -No punitive damages available

*INSIDE INFORMATION*

Materiality Depends on Probability of Occurrence and Magnitude:
*SEC v. TEXAS GULF* (1968)
-P filed suit against D for viol of the insider trading provision of 10b-5
-Person who is trading a corp’s securities for his own benefit and who has access to info intended to be available for business use only may not take advantage of the info, knowing it is not avail to those w/ whom he is dealing
***Tippee Analyst’s Duty to Disclose or Refrain from Trading***:

DIRKS v. SEC (1983)

- SEC accused Dirks of violating the antifraud provisions of the federal securities laws for disclosing to investors material nonpublic information he received from insiders.
- A tippee does not inherit a duty to disclose material non-public information merely because he knowingly received the information.
  - Only illegal if insider stands to personally gain from his information.
  - Here it was insider information about the corporation’s fraudulent actions.

The Misappropriation Theory:


- SEC indicted an attorney for 57 counts, including 17 counts of securities fraud and 17 counts of fraudulent trading in connection with a tender offer, for trading on nonpublic information in breach of the duty of trust and confidence he owed to his law firm and its clients.
- An attorney who based his trading on inside information he acquired as an attorney representing an offeror, purchased stock in a target corporation before the corporation was purchased in a tender offer is guilty of securities fraud in violation of 10b-5 under the misappropriation theory.

***SHORT-SWING PROFITS (DISGORGING ETC.)***

§16 of ’34 Act is designed to prevent corporation insiders from unfairly using information about their corporation.

- Insiders must report their transactions in securities in their own companies.
- Insiders must forfeit any profit resulting from short-term trading.
  - In some cases, the statute deems a profit to exist when the defendant actually lost money.

- Strict Liability
  - No defense to §16(b) actions if all elements of the cause of action are present.
    - i.e., Insider, registered equity securities, matching purchase and sale within the required time period.

- Insiders Defined
  - Any Director or Officer with a class of equity securities registered under §12 of the ’34 Act.
  - Or all people who beneficially own more than 10% of any class of the corporation’s equity.

ELEMENTS OF §16(b) CAUSE OF ACTION

TEST:

1. Transactions involving equity securities.
3. Time Requirement
   - Matching purchase and sale must occur within less than six months.
4. Damages
  → Generally: Profit Realized
  - Difference b/w purchase price and sale price

  Ex: Director buys 100 shares of XYZ stock on June 1 for $10/share
  - Sells stock for $9/share on July 1
  - On Aug 1 buys 100 shares for $8/share
  - On Sept 1 sells stock for $7/share
  - Has lost $300 in three months
  - But still liable since $9 sale can be matched w/ $8 buy
    - $100 liability!!!

  - Profit Maximized
  → Wherever matching of purchase and sale transaction that will
  produce the maximum profit is the one used
  - Ex: If 100 shares are bought at $1 and 100 at $2
  - Six mo later 100 shares are sold at $10 share
  - Thus, profit is $9 per share

Sales by Former 10% Holder not Covered:

REL i a n c E E l e c t r i c v. E M E R S O N E L E C T R I C (1972)
- Emerson acquired 13.2% of outstanding stock of a Co which later merged w/ Reliance and was
  faced w/ the failure of its takeover attempt, disposed of enough shares to bring its holdings below
  10% in order to avoid liability under §16b
- A Corp may recover the profits realized by an owner of more than 10% of its outstanding shares
  from a purchase and sale of its stock w/in any six mo period, provided the owner held more than
  10% at both the purchase and the sale

***When Investor Becomes 10% Owner as Result of Purchase***:
FOREMOST-MCKESSON v. PROVIDENT SECURITIES (1976)
- P sued D to recover profits realized on sale of debentures to the underwriters
- A corp may capture for itself the profits realized on a purchase and sale of its securities w/in six
  mo by a director, officer, or beneficial owner, but a beneficial owner is accountable to the issue
  only IF IT WAS A BENEFICIAL OWNER BEFORE THE PURCHASE!!!

Granting an Option Not a “Sale” Under §16(b):
KERN COUNTY LAND v. OCCIDENTAL PETROLEUM (1973)
- P sued D under 16b to recover the profits D realized from its sale of P stock alleging that the
  execution of the Occidental-Tenneco option and exchange of P share for Tenneco shares were
  both subject to §16(b)
- Corp is liable for short-swing profits only if sale creating the pforits resulted from inside
  information
INDEMNIFICATION AND INSURANCE

→ To what extent may the corp properly indemnify and insure D/Os for expenses incurred in defending suits against them for conduct undertaken in their official capacity?
  - Statutes apply to deriv suits and direct actions by the corp, its shareholders, or third parties (i.e. State for criminal sanctions, SEC, injured party from tort)
    - Articles or bylaws or shareholder agreement may control also

  - If D wins most states say its okay for corp to reimburse for reasonable fees/expenses
    - Discourages minority SHs from filing frivolous deriv suits
    - In some states discretionary or mandatory
      - Board may have discretion over reimbursement

  - If D loses or settles, states are very different on what to do
    - In third-party suits, statutes generally permit full indemnification
      - As long as directors or SHs determine that D acted in good faith

Indemnification Requires Good Faith:
WALTUCH v. CONTICOMMODITY (1996)
- P sued his employer for indemnification of legal expenses he incurred in defending himself from numerous civil suits and an enforcement proceeding brought by the Commodity Futures Trading Commission
- A corp must indemnify its officers, directors, and employees against legal expenses related to the defense of any legal action brought against them by reason of their position or capacity provided the individual acted in good faith

Advancement of Expenses:
CITADEL HOLDING v. ROVEN (1992)
- Roven, a former director of Citadel, sued Citadel for indemnification of sums he paid to defend a fed court action D brought against him
- A corporation may advance a director the costs of defending a lawsuit

- Derivative Suits
  - Statutes are stricter in indemnifying D/O in these suits charging him w/ wrongdoing

- Judgment Against the D
  - When D/O found to have breached his duty to the corp no expenses paid
    - Certain states have statutes allowing insurance to D/Os for deriv suits
CHAPTER 6. PROBLEMS OF CONTROL

PROXY FIGHTS

→ SHs may allocate the right to vote to others not owning the share through a proxy or voting trust
- Proxy is a power of attorney to vote shares owned by someone else revocable at any time

- §14 regs the solicitation of voting proxies from shareholders of companies registered under §12

-Rules Adopted by the SEC

a. Full Disclosure
- Those soliciting proxies or attempting to prevent others from soliciting them must give full disclosure of all material info to shareholders being solicited

b. Fraud
- Resort to the use of fraud in the solicitation is made unlawful

c. Shareholder Solicitation
- SHs may solicit proxies from other SHs, and management must include in its proxy statement proposals made by SHs

-Remedies for Violation

a. Appropriate Remedies
- If the proxy rules are viol, Cts will fashion an appropriate remedy
  - The “fairness” of the transaction involved is taken into consideration

b. Actions by the SEC
- SEC may bring actions seeking administrative remedies
  - i.e. injunction preventing solicitation of proxies, preventing voting shares obtained thru improper proxy solicitation, or requiring resolicitation
  - May enforce in fed ct!

c. Private Actions
- Are implied under §14

    d. Materiality
- Need not show that the violation caused the outcome of voting on the matter
- Only need to show that such statements were material and could have the propensity to affect the voting

e. Relief Granted
- Ct will fashion the relief; damages, rescission of the transaction etc.
STRATEGIC USE OF PROXIES
- Solicitation ➔ “Communication to security holders under circumstances reasonably calculated to result in the procurement, withholding, or revocation of a proxy”

Solicitation Methods Employed During Proxy Fight:
LEVIN v. METRO-GOLDWYN-MAYER (1967)
-P and five SHs of D brought an action against its directors arguing the management was using illegal and unfair methods of communicating w/ SHs and had forced the corp to bear the expenses of a proxy solicitation
- Incumbent management may make reasonable use of corp assets to inform SHs of its position in a proxy contest involving corp policy issues

-Reimbursement of Costs
- Cts normally hold that if management is successful in the proxy contest, it can recover expenses from the corp
- Limitation is that expenses must have been incurred in good faith for the benefit of the corp

Reimbursement Approved:
ROSENFELD v. FAIRCHILD ENGINE (1995)
-SHs brought a deriv action arising out of money paid by the corp to defray rival factions’ expenses in a proxy fight
- Absent a claim that expenses were unwarranted, excessive, or otherwise improper, a corp may reimburse factions for costs associated w/ a proxy fight involving a policy contest, but not one involving a personal power contest

-Private Actions for Proxy Rule Violations
- Materially false or misleading statements or omissions in a proxy statement prohibited
- Private cause of action exists under §14

Implied Cause of Action to Further the Remedial Purposes of the Securities Laws:
J.I. CASE CO. V. BORAK (1964)
-P and other SHs found that proxy materials used by J.I. Case Co. D used their names as part of the Co’s efforts to obtain approval of a merger with another Co, and P sued to have merger declared void
- It is unlawful to solicit a proxy or consent authorization using false and misleading statements, and, in such event, a court may enforce a private right of action for rescission or damages

In Suit to Enjoin Voting of Proxies, Proof of Material Misstatement or Omission was Sufficient Causation:
MILLS v. ELECTRIC AUTO-LITE (1970)
-Ps brought suit to undo a merger b/c the proxy materials submitted to the SHs b4 the merger’s vote failed to disclose that the board members endorsing the merger were nominees of the
targeting company who had held a majority interest in the targeted company years before the merger was proposed
-To establish a cause of action under §14 of the Act, a P need show only the misstatement’s or omission’s materiality and it ability to influence a SH’s vote

Black-Scholes Calculations not Material as a Matter of Law:
*SEINFELD v. BARTZ* (2002)
-Cisco Systems (D) issued proxy statements that failed to value the stock options granted its directors as part of their compensation
-A corp’s failure to disclose in its proxy statements the value of stock options granted to its directors does not constitute a materially false and misleading statement under Rule 14a-9 of the SEC

SHAREHOLDER PROPOSALS

- As an alternative to an independent proxy solicitation, a shareholder may serve notice on management of his intention to propose action at the SHs’ meeting
  - SH may only propose such action if
    1. He would be entitled to vote at the SHs’ meeting to which the management’s proxy statement relates; and
    2. He is a SH at the time the proposal is submitted

  a. Inclusion in Management’s Proxy Statement
    - If SH notice of proposed action conforms to proxy rules, management must include proposal in its own proxy statement and make provisions in its proxy form for an indication of shareholder preference w/ respect to the proposal
      - At no expense to the proposing SH
      - Also, if management opposes, must include 200-word statement

  b. Management’s Omission of SH Proposals
    - If management opposes proposal, must file w/ SEC
      - SEC will say whether it agrees or not

      1. Proposal is not a “proper subject”
        - If may be omitted if not proper subject
          - Governed by state law of issuer’s domicile to determine def

      2. Proposal Relates to “Ordinary Business Operations”
        - Prohibits SH intervention in minute matters in the daily operation of the corp.

      3. Proposal Submitted for Noncorporate Purpose
        - Only if it clearly appears so may management properly omit it
          a. Personal Claims
          b. Matters Outside Issuer’s Control
c. Matters not Related to Business  
d. Elections of Directors  
e. Proposal Previously Submitted  
f. Burden of Proof  

-Management has BOP to prove SH proposal is not proper

**Operations Accounting for Less than 5%:**  
*LOVENHEIM v. IROQUOIS BRANDS* (1985)  
-P asked to have info about a resolution he proposed to make at an upcoming SHs’ meeting included in the company’s proxy materials, but the company refused  
-Under §14(a) of the Act, SHs may include in the company’s proxy statements certain materials that have limited, if any, econ impact on the company as long as they are “otherwise significantly realated” to the issuer’s business

**Matters Outside Corp’s Control:**  
*NYC EMPLOYEES’ RETIREMENT SYSTEM v. DOLE FOOD CO.* (1992)  
-A public pension fun sought permission from D to include info on a proposal to est a committee to investigate current fed health insurance proposals, but D refused request  
-SH’s proposal to form a committee to evaluate health insurance proposals b4 Congress does not realate to the company’s ordinary business operations, but the corporation must include the poropsals info in its proxy statements

**Matters Better Addressed Thru Collective Bargaining:**  
*AUSTIN v. CONSOLIDATED EDISON CO.* (1992)  
-Issuing Co’s Shareholders sought to force D to include info in its annual meeting proxy materieals about a proposal that would allow employees to retire after 30 years’ service regardless of age  
-SHs may not req a corp to include materials concerning a SH proposal supporting an employee’s right to retire w/ full pension benefits etc. b/c the proposal concerns “ordinary business operations”

**SH INSPECTION RIGHTS**  
⇒ Virtually all states allow SHs to inspect corp’s books and records if they have “proper purpose”

-LL p. 182

**Informing Shareholders about Drawbacks of Corporate Exchange Offer as a “Proper Purpose”:**  
*CRANE CO. v. ANACONDA CO.* (1976)  
-P sought to acquire 20% of D’s shares and asked to have access to D shareholder list to distrib info on the tender offer directly to D’s shareholders  
-Corp must grant a shareholder who wants to discuss a tender offer’s terms directly with corps shareholders access to the list unless the corp can establish a wrongful purpose
Shareholder must Demonstrate Proper Purpose:
STATE ex rel. PILLSBURY v. HONEYWELL (1971)
-P purchased D stock in order to bring suit to compel production of the D’s corporate books and records
-SH who purchased stock for the sole purpose of bringing suit to compel production of books and records, who was motivated by his belief that the corp should not be manuf ammo for ‘Nam and who had no concern for the corp’s econ well being, cannot compel production of the corp’s SH lists or business records

Inspection of CEDE and NOBO Lists:
SADLER v. NCR CORP. (1991)
-SHs brought an action against a corp to obtain its SH list and to demand the corp create a list of nonobjecting beneficial owners
-A NY law entitling resident SHs to SH list and lists of nonobjecting beneficial owners does not subject the corp to inconsistent reg prohibited by the commerce clause nor discriminate against or burden interstate commerce

SHAREHOLDER VOTING CONTROL

RIGHT TO VOTE
-Who may vote?
  -SH of record who hold shares w/ voting rights
  -Must always be one class of shares w/ voting rights
  -Management sets a date when all those holding shares w/ voting rights on that date will be able to vote at a future date

-Proxy/Voting Trusts
  -Proxy are revocable
  -Trusts are not usually revocable regardless of whether consideration was given
    -LL p. 186

-Pooling Agreements
  -Absent illegalities SHs may exchange promises to vote in certain ways
  -Etc. LL p. 186

-Limitations on Voting Power of SHs
  -SHs cannot make agreements relative to their voting power that will interfere unduly w/ the interests of minority SHs or disrupt the normal operations of the corp system
    -Usually matters req SH approval need only majority
      -Sometimes corp wants to req more to give small percent owners more power
        -Most of these are invalid by Cts
          -But some are okay that req more than majority but less than unan
  -Some states allow corps to act based on unan written consent, or some specified % of SH
Stock Must have Voting Rights, non Necessarily Dividends:
**STROH v. BLACKHAWK HOLDING** (1971)
-P purchased shares of D’s Class B stock which permitted voting rights in corp matters but did not receive dividends or other corp assets
-Corps shares of Class B stock which permit voting rights are valid shares of stock notwithstanding the fact that the stock is not entitled to dividends

**Interference w/ SH Vote:**
**WI INVESTMENT BOARD v. PEERLESS SYSTEM** (2000)
-D sought SH approval of three measures at its annual meeting and board had hoped all resolutions would pass, but when the votes cast would have defeated the measure addressing stock options, the board adjourned the meeting and continued the proposal’s vote to another day
-If a board takes an action designed to “interfere w/ or impede exercise of the shareholder franchise” the action is not protected under the business judgment rule w/o a compelling justification

**CLOSELY HELD CORPORATIONS**
→ Corps w/ very few shareholders
-Like an incorporated pship
-LL p. 190 for problems

**Pooling Agreements:**
**RINGLING BROTHERS v. RINGLING** (1947)
-P agreed to vote her stock in agreement w/ D, but then refused to do so
-SH may agree w/ another SH to vote his or her stock in a particular way

-LL.192-193 for more on this

**Less than Unan SH K’s as to how they will Act as Directors are Invalid:**
**MCQUADE v. STONEHAM** (1934)
- P, corp treasure pursuant to shareholder’s K was discharged
-A SH K may not control board’s exercise of judgment

**Unan SH Ks as to how they will Act as Directors Generally are Valid:**
**CLARK v. DODGE** (1936)
-P who was employed as treasurer an gm of a corp pursuant to SHs’ K was discharged
-A SH K regarding employment of certain individs as officers is enforceable if the directors are the sole SHs

**SH Ks Enforceable Even if they Deviate from State Corp Law Practice:**
**GALLER v. GALLER** (1964)
-D entered into SH K w/ brother and later refused to abide by the K
-SH K’s that relate to management of a close corp will be upheld even if Ks violate corp norms
Voting Ks Enforceable:
RAMOS v. ESTRADA (1992)
-D did not vote her stock in accordance w/ a SHs’ K and P brought suit for B of K
-Voting Ks b/w two or more SHs of a corp are enforceable even if corp does not qualify as close corp

ABUSE OF CONTROL

-SHs in close corps have fid obls to each other

Breach of Duty:
WILKES v. SPRINGSIDE (1977)
-P who formed a real estate investment business w/ three other men who shared equally in the business, created disharmony and was fired when he struck a particularly hard bargain w/ one of the other SHs in the sale of some corp prop
-Majority SHs acting to “freeze out” a minority SH by terminating his employment w/o valid business purpose have breached their duty to act as fids

Minority SH Employment not Guaranteed:
INGLE v. GLAMORE MOTOR SALES (1989)
-P was a sales manager at and a SH of D and when company terminated his employment, his shares were bought back under a SHs’ K
-If a SHs’ K provides for the right to repurchase shares upon the termination of a SH’s employment w/ the issuing company, the employment is treated as employment at will and the SH has no claim for damages upon termination

Minority SHs Must Show Sufficient Evidence of Freeze Out:
SUGARMAN v. SUGARMAN (1986)
-Descendants of a corp’s original founders filed a claim for breach of fid duty after the majority SH exercised his position to direct profits to himself and his father rather than pay dividends or employ other family members, resulting in a freeze-out
-IF controlling SH uses corp assets for his own personal benefit, an offer to purchase minority SHs’ stock at an inadequate price will be viewed as part of a plan to freeze-out the minority SHs

Unreasonable Exercise of Veto Power:
SMITH v. ATLANTIC PROPERTIES (1981)
-D who owned part of corp that purchased prop for investment, blocked dividend payments to other shareholders, leading to substantial IRS penalties and limiting the others’ returns from their investments
-A minority SH may abuse his position by using measures designed to safeguard his position in a manner that fails to take into consideration his duty to act in the “utmost good faith and loyalty” toward the company and his fellow SHs
Duty to Disclose Merger Negotiations:
*JORDAN v. DUFF & PHELPS* (1987)
- P an employee of and SH of D left the closely held corp and cashed in his stock according to his SH K; a pending sale of the D firm would have made his stock more valuable
- If CHcorp w/holds from an employee-SH material info about possible increases in stock value in breach of its fid duty, the employee-SH may be entitled to damages if he or she can show that the nondisclosure caused the employee-SH to act to his or her financial detriment

CONTROL, DURATION, AND STATUTORY DISSOLUTION
- Best remedy for minority SHs is to ask to be bought out at a fair price
- Can occur in four ways:
  1. Articles or Bylaws may contain provisions
  2. Involuntary Dissolution
     - SH may petition court for invol dissol of corp
     - Cts reluctant to do so
  3. Sufficient Change
     - Upon sig’n change in corp structure such as merger, SH may demand a statutory right of appraisal
     - Allows SH to get value out of shares in cash rather than consideration as part of a major corp change
  4. Breach of Duty
     - Buyout may be used an equitable remedy upon a finding of a breach of fid duty

Mandatory Buyout Denied:
*AK PLASTICS v. COPPOCK* (1980)
- P received half of her husband’s shares in AK Plastics in a divorce; the company offered to buy her shares at a price P believed to be too low
- SH may require the corp to repurchase its own shares upon the corp’s breach of fid duty, but the remedy should be less than liquidation, if possible, and a fair price may be less than the appraised values

Expectations of Continuing Employment:
*PEDRO v. PEDRO*
- Members of a family-run business terminated one of the SH’s employment when he refused to ignore a substantial accounting discrepancy
- SH-Employee of a closely held corp, who was fired by other SHs in a breach of fid duty is entitled to damages equal to the total of the difference b/w his stock’s fair value and an lesser amt required by stock retirement K, in addition to the damages arising from loss of life-time employment

Involuntary Dissolution:
*STUPARICH v. HARBOR FURNITURE* (2000)
- Ps, minority SHs in D received regular dividends, but wanted to be bought out b/c they were not on good terms with the other SHs and their family members
Court will not order dissol of close corp if the Ps fail to show the dissol was reasonably nece to protect their rights

**TRANSFER OF CONTROL**
- SH may sell his stock to whomever he wants to at the best price he can get
  - LL p. 208

Types of Purchase Transactions
- Purchase of Control may Occur in Several Ways:
  a. Direct from SHs – Purchase of Stock
  b. Purchase of Assets
     - Majority vote req to sell
  c. Merger or Consolidation
     - Majority vote req to merge

EXCEPTIONS to the General Rule
- Minority SHs due same deal as majority SHs
  - See LL p. 209

**Merger Versus Sale of Assets:**
*FRANDSEN v. JENSEN-SUNDQUIST* (1986)
- The majority block of shares in D was owned by a group of individs that entered into a SHs’ K providing them w/ protection in the event of a sale of the corp’s stock, and when the company attempted to transfer its primary asset, one of the shareholders demanded to exercise his right of first refusal
- A minority SH’s right of first refusal that is triggered by the majority SHs’ sale of their stock does not apply to a transaction in which an acquiring entity purchases the corp’s principal asset, after which the corp is liquidated

**Special Price for Control:**
*ZETLIN v. HANSON HOLDINGS* (1979)
- P owned two percent of Gable Industries when Ds, which owned controlling interest in Gable, sold their shares to Fintkote Co for $15/share at a time the common stock was trading at $7.38
- In the absence of an allegation that a shareholder is looting corp assets or has committed fraud or other acts of bad faith, an SH may obtain a premium price for the sale of a controlling block of shares

**Sale of a Corporate Asset:**
*PERLMAN v. FELDMAN* (1955)
- D, a majority shareholder in a steel mill business, sold a controlling interest in the mill to a company that req steel in the fabrication of its products, and the minority SHs brought a deriv action against D to recover the amts he received in excess of shares’ market price
An SH w/ a controlling interest who transfers his or her shares is accountable to the minority SHs for the amt in excess of the market price if the premium is attributable to the sale of a corporate asset.

Sale of Corporate Office:
ESSEX UNIVERSAL v. YATES (1962)
-D agreed to sell a controlling block of shares in Republic Pictures to P and the sale agreement required D to deliver a board of directors filled with members nominated by P
-If the transfer of shares is sufficient to constitute the transfer of a controlling interest, a seller may lawfully agree to assist the buyer in installing a favorable board of directors.

CHAPTER 7. MERGERS, ACQUISITIONS, AND TAKEOVERS

MERGERS AND ACQUISITIONS

The Many Ways of Gaining Control:

a. Buy stock of company A from SHs of A for cash
   -“Cash Tender Offer”

b. Buy stock of company A from SH of A for stock from company B
   -“Stock Tender Offer”

c. Merge one company into another
   -State laws apply
   -A takes title to assets of B, assumes B’s liabilities, B dissolves, and B’s shareholders receive A’s stock
   -In a consolidation, a new firm C is formed
      -Gets title to the assets of both A and B; they dissol, A and B SHs get C stock

d. Buy assets of one company with cash

e. Buy assets of one company with stock of another

f. Gain voting control thru a proxy contest

-Mergers and Consolidations
   -A merger occurs when one or more corps arbsorbed into another existing corp
   -A consolidation involves the formation of a new corp that takes over the assets and liabilities of one or more existing corps
      -They are in effect the same thing as they rich a similar result
      -Surviving corp issues its stock for the stock of the absorbed corps and has assets of all the combined companies
- Shareholders of all corps involved must consent
- Different states, different rules
- All directors of all companies must approve

-Dissenters’ Rights
- Most states permit shareholders who vote against the merger to elect to have their shares appraised and purchased by the corp

- The De Facto Merger Doctrine
- See LL p. 216

**Treatment as a De Facto Merger:**
*
**FARRIS v. GLEN ALDEN CORP** (1958)
- List Industries, which purchased almost forty percent of the outstanding shares of D and characterized its purchases as an asset purchase rather than a merger, proposed a reorganization whereby List would operate D
- If a contemplated transaction’s result is the same as a merger, the transaction is a “**De Facto Merger**”, and the target corps’ SHs have the right to dissent and receive fair value for their shares

**“Entire Fairness”:**
*
**WEINBERGER v. UOP** (1983)
- Signal Corp (D) which wanted to acquire other D corp, offered to buy a majority of D corp’s shares and then used its nominees on D corp’s board to help it obtain more D corp stock
- Minority SHs in a cash-out merger are entitled to damages based on their shares’ fair value, as determined by taking into account all relevant factors (including damages based on rescission), if the merger’s approval was obtained on less than full disclosure and the merger’s terms were unfair

**Eliminating Public Ownership:**
*
**COGGINS v. NE PATRIOTS** (1986)
- Original founder of the Pats, wanting to reclaim full ownership of the team, structured a merger requiring other shareholders to exchange their stock for cash, and P challenged the merger
- If a company cannot show that a freeze-out merger served a valid corporate objective beyond advancing the majority SH’s personal interests, the minority SHs who were “frozen-out” by the merger are entitled to relief

**Remedies:**
*
**RABKIN v. PHILLIP A. HUNT CHEMICAL** (1985)
- Shareholders brought an action to enjoin a proposed merger, arguing that the acquiring company, which was already a majority SH in the targeted company, purposely timed the transaction to avoid paying the minority SHs a fair price
- Majority SHs owe a fid duty to minority SHs and may not unfairly manipulate the timing of a merger to avoid paying minority SHs the price agreed upon as part of an earlier transaction
- De Facto Non-merger
  → The opposite of a de facto merger…DOES NOT EXIST

**De Facto Non-Merger Argument Rejected:**

*Rrauch v. RCA* (1988)

- P, an acquired corp’s SH, challenged the propriety of a merger accomplished thru the conversion of shares to cash
- Pursuant to DE General Corp law and the independent legal significance doctrine, a SH in a corp undertaking to convert shares into cash as part of a merger is not entitled to rights provided SHs under a distinct provision of the corp law addressing the redemption

**LLC Mergers**

- Ct will Enforce Provisions of LLC Agreement Unless it Allows Breach of Fid Duties

*Vgs v. Castiel* (2001)

- Limited liability company members fought over the company’s direction and distrusted the majority owner’s ability to further their company’s goals, so the remaining members secretly arranged to merge the company to shut out the majority owner
- Managers that fail to provide notice to all board members of their intent to hold a meeting or seek consent to a written resolution violate their fid duties to each other, even if the believe that keeping an individual member from voting at the meeting is in the company’s best interests

**TAKEOVERS**

- See LL p. 226

**Early Doctrine:**

*Cheff v. Mathes* (1964)

- SHs brought a deriv suit against the company’s directors after the board authorized a series of expensive actions to ward off an outside shareholder’s attempts to take over the company
- If a company’s board sincerely believes that buying out a dissident stockholder is necessary to maintain proper business practices, the board is not liable for the decision even if, in hindsight, the decisions may not have been the best course

- Defensive Tactics
  - “second-step” merger usually eliminates target’s remaining shareholders
    - Req SH approval