

**Florida Intra-American Comparative Corporate Law – SPRING 2019**

**LAW 6930 - 2 credits**

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**Visiting Associate Professor of Law**  
**University of Florida Levin College of Law**

**Welcome to this course. I hope that you will all enjoy the semester as much as getting one step closer to becoming excellent corporate lawyers!!!**

**Course Duration:** Wednesday, Jan. 9 – Wednesday, April 17

**Class Meeting Time and Place:** Wednesdays evenings at 5:30-7:20 pm, in Room 355C

**Office Hours:** As needed (after class, by office appointment or skype)

My office is in 312H across from the Graduate Programs Office and my skype name is sethchertok

**Exam Date:** Friday, April 26 at 8:30 AM

## Course Overview

The central question in corporate law is, from an internal corporate governance perspective, how to make the corporate system successful, for both the shareholder owners of the corporation and the broader society. Unlike in a standard corporations class, we'll examine this question "Florida" comparatively against other American jurisdictions, i.e., how major corporate laws such as Delaware, California and the MBCA compare with Florida's largely MBCA-modeled system. The goal of this exercise will be to adapt students for Florida business law practice and the bar exam.

Our course will start with a few articles on comparative as well as Florida corporate law, then we'll proceed to work through comparative corporate law relevant cases and statutes from major American states as compared to Florida.

## Course Objectives

### General thinking skills

- Learn to piece together the individual "trees" that we study to develop a compass to find your own "stars"
- Understand the interrelationships of the different corporate law topics that we study, and how you might apply those interrelationships to novel problems in law and business
- Improve critical thinking skills, so that you will have the intellectual foundation to quickly learn additional business law areas as well as new areas, beyond business
- Develop comparative knowledge, skills, and attitudes that improve inter-cultural competence
- Learn to find ex ante solutions for clients – in short, learn how to counsel corporate clients

### Corporate law skills

- Read, understand, apply and strategize about how to proceed in the face of Delaware, California, MBCA and Florida comparative corporate law statutes and cases, which are essential for corporate lawyers, like physicians that need to understand physiology and pathology, i.e. the law of the body, to diagnose and solve problems
- Learn how to evaluate the theoretical soundness of corporate law, in the light of its purposes, and think about how the law might change in relation to alternative states' corporate law purposes
- Master the higher-level principles prized by senior corporate counselors - state law corporate governance rights, duties and responsibilities of those who are part of the corporation

(shareholders, controlling shareholders, boards, executives and stakeholders), in the face of corporate decision making as well as nonfeasance

**Florida-specific skills**

- Prepare yourself to ace the corporate law portions of the Florida bar
- Make the jump from other states' to Florida corporate law practice as Florida lawyers

## Course Grading

The projected weight of each of the components of your Course Grade is as follows:

	<b>Weighting</b>
<b>Class Participation</b>	Roughly 9-14% ( <i>though I reserve the right to make a slightly different adjustment</i> )
<b>Seminar Paper</b>	Roughly 86-91%

This class adheres to UF's posted grading policy:

<b>Letter Grade</b>	<b>Point Equivalent</b>
A (Excellent)	4.0
A-	3.67
B+	3.33
B	3.0
B-	2.67
C+	2.33
C (Satisfactory)	2.0
C-	1.67
D+	1.33
D (Poor)	1.0
D-	0.67
E (Failure)	0.0

Further information for UF grading policies for assigning points can be found at:

<https://catalog.ufl.edu/ugrad/current/regulations/info/grades.aspx>

## Other UF Policies

### Honesty Policy

UF students are bound by The Honor Pledge which states, "We, the members of the University of Florida community, pledge to hold ourselves and our peers to the highest standards of honor and integrity by abiding by the Honor Code. On all work submitted for credit by students at the University of Florida, the following pledge is either required or implied: 'On my honor, I have neither given nor received unauthorized aid in doing this assignment.'"

The Honor Code (<http://www.dso.ufl.edu/sccr/process/student-conduct-honor-code/>) specifies a number of behaviors that are in violation of this code and the possible sanctions. Furthermore, you are obligated to report any condition that facilitates academic misconduct to appropriate personnel. If you have any questions or concerns, please consult with Prof. Chertok.

### **Class Attendance, Make-Up Exams, Etc.**

Per ABA requirements, please attend all classes, unless you e-mail me in advance with a legitimate excuse. Requirements for class attendance and make-up exams, assignments, and other work in this course are consistent with university policies that can be found at:

<https://catalog.ufl.edu/ugrad/current/regulations/info/attendance.aspx>

### **ABA Standard 310 Policy**

Students should expect to spend, on average, approximately two hours preparing for every hour of class. It is expected that you will spend time preparing the Q&A in the Pre-Class Slides, as well as the readings, all per the Syllabus.

### **Disability Policy**

Students with disabilities requesting accommodations should first register with the Disability Resource Center (352-392-8565, [www.dso.ufl.edu/drc/](http://www.dso.ufl.edu/drc/)) by providing appropriate documentation. Once registered, students will receive an accommodation letter which must be presented to Student Affairs (Dean Rachel Inman). Students with disabilities should follow this procedure as early as possible in the semester. Please don't e-mail your request to Prof. Chertok, to preserve student anonymity.

### **Online Course Evaluations Policy**

Students are expected to provide feedback on the quality of instruction in this course by completing online evaluations at <https://evaluations.ufl.edu>. Evaluations are typically open during the last two or three weeks of the semester, but students will be given specific times when they are open. Summary results of these assessments are available to students at <http://evaluations.ufl.edu/results/>.

### **Technical Issues**

If you have technical problems, please contact the UF Help Desk at <http://helpdesk.ufl.edu>

### **Wellness**

If you or a friend is in distress, please contact [umatter@ufl.edu](mailto:umatter@ufl.edu) or 352-392-1575 so that a team member can reach out to you or your friend.

## Reading List

**Statutory Supplement:** My version will be the latest version of: Commentaries and Cases on the Law of Business Organizations, Statutory Supplement, by William T. Allen, Reinier Kraakman and Guhan Subramanian, but you should feel free to use another if you so desire

### **Florida Business Corporation Act (FBCA):**

[http://www.leg.state.fl.us/statutes/index.cfm?App\\_mode=Display\\_Statute&URL=0600-0699/0607/0607.html](http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&URL=0600-0699/0607/0607.html)

**Corporate Lawyer Tactics:** Due Diligence + Contracting + Regulations ->

### **Supplementary Readings for Law Practice (all on reserve in the library):**

- **Due Diligence**
  - ABA's Manual on Acquisition Review  
(on reserve in the library)
  
- **Contracting**
  - Charles M. Fox, Working with Contracts: What Law School Doesn't Teach You (2d ed. 2008)  
(for students interested in how real lawyers would draft corporate contracts – useful to hit the ground running as corporate associates)  
(available as e-book from Bloomberg, w/ password -  
<http://uf.catalog.fcla.edu/permalink.jsp?20UF032817458>)
  
  - ABA's Model Merger Agreement for the Acquisition of a Public Company  
(access through Bloomberg Law)
  
  - ABA's Model Asset Purchase Agreement (vol. 1 and 2)  
(access through Bloomberg Law)
  
  - ABA's Model Stock Purchase Agreement with Commentary, 2nd ed., vols. I, II  
(access through Bloomberg Law)
  
  - The M&A Process: A Practical Guide for the Business Lawyer  
(access through Bloomberg Law)
  
- **Regulations**
  - **Corporate Law** - Rainier Kraakman, et al., The Anatomy of Corporate Law: A Comparative and Functional Approach (3<sup>rd</sup> ed. 2017)  
(available as e-book from Oxford University Press -  
<http://uf.catalog.fcla.edu/permalink.jsp?20UF035138809>)
  
  - **Securities Regulation** – Louis Loss & Joel Seligman, Fundamental of Securities Regulation (6<sup>th</sup> ed. 2011)  
(on reserve at LIC)
  
  - **Antitrust Regulation** – Phillip Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and their Application  
(on reserve at LIC)

## Syllabus

### Preliminary Notes

- Reading assignments are supplemented with my own slides about the materials, which will be posted on the course portal – to prepare for each class, please work through the questions and problems in my slides, apart from the readings
- **Section assignments below WILL NOT track how much we'll cover each class – estimate our pace, by preparing typically up to 60-80 slides in advance, per class!!!**

#### a. Introduction:

- i. Lesson 1 Slides
- ii. Intro to Business Law:
  1. What is Business?
  2. Intro to Agency
  3. The Corporate Players
  4. Types of Corporations
  5. Other Business Entities
  6. Intro to Securities
  7. Intro to Valuation
    - a. Basic Valuation Principles
    - b. Market Valuations / ECMH:
      - i. William J. Carney, Signalling and Causation in Insider Trading, 36 Cath. U. L. Rev. 863, 877-883 (1987)
- iii. Sources of American Corporate Law:
  1. State Law
  2. Federal Law
- iv. The Baseline: Delaware State Corporate Law
  1. Chertok, article Lessons from the Greeks – From Corporate Anatomy toward Metaphysics (Part I) (posted on course portal)
- v. Intro to Comparative Law:
  1. Lawrence A. Cunningham, Comparative Corporate Governance and Pedagogy, 34 Ga. L. Rev. 721 (2000)
- vi. State-By-State Comparisons
  1. MBCA Corporate Law
    - a. In the Abstract
      - i. Dooley & Goldman article, Some Comparisons between the Model Business Corporation Act and the Delaware General Corporation Law, 56 Bus. Law. 737 (2001)
    - b. Florida Corporate Law (MBCA sub-set)

- i. Cohn article, Dover Judicata: How Much Should Florida Courts Be Influenced by Delaware Corporate Law Decisions?, 83-APR Fla. B.J. 20 (2009):

1. BUT ONLY READ:

- a. Intro Section
- b. Reasons for Caution Section

b. Pre-Corporate Birth

- i. Lesson 2 Slides
- ii. Promoter Fiduciary Duties

1. Florida:

- a. Hot Areas = Pre-Incorporation "Conflicts of Interest":

- i. Warehoused Deals:

1. Ft. Myers Development v. J.W. McWilliams, 97 Fla. 788 (Fla. 1929)

- ii. Promoter Compensation v. Expenses:

1. 18 Am. Jur. 2d Corporations § 101

- iii. Conflicts Subject to "Cleansing"

- iii. Contractual Liabilities

1. Florida:

- a. Promoters' Liabilities:

- i. Joint and Several:

1. FBCA § 607.0204

- ii. Extinguishing Promoters' Liabilities = Novations:

1. Ratner v. Central National Bank, 414 So. 2d 210 (Fla. App. 1982)

- b. Corporation's Liabilities:

- i. Only by Ratification/Adoption:

1. Meyer v. Nator Holding Co., 102 Fla. 689 (Fla. 1931)

c. The Corporate Birth

- i. Lesson 2 Slides
- ii. Formation Process = Corporate Birth:

1. Delaware:

- a. Charter Filing, DGCL § 101
- b. Taxes, DGCL § 103

2. Florida:

- a. Charter Filing, FBCA § 607.0203
- b. Taxes, FBCA § 607.0120(10)

- iii. First Acts:

1. Delaware:



- a. DGCL, § 108
  - 2. Florida:
    - a. FBCA, § 607.0205
- iv. Formation Imperfections:
- 1. Alternative “Corp” Theories
    - a. Florida:
      - i. De Facto Corps:
        - 1. Municipal Bond v. Bishop’s Harbor, 154 Fla. 246 (Fla. 1944)
      - ii. Corps By Estoppel:
        - 1. FBCA § 607.1904
    - 2. What if “No Corp” under Any Theory???
- v. Birth Effects:
- 1. Annual Filings + Taxes
    - a. Delaware:
      - i. <https://corp.delaware.gov/paytaxes/>
    - b. Florida:
      - i. FBCA, § 607.1622
      - ii. <https://dos.myflorida.com/sunbiz/manage-business/efile/annual-report/instructions/>
      - iii. <http://floridarevenue.com/taxes/taxesfees/Pages/corporate.aspx>
  - 2. “Substantive” Choice of Law
    - a. Theory:
      - i. America State of Incorporation Theory v. EU Real Seat Doctrine
    - b. American “Choice of Law” Cases:
      - i. Delaware:
        - 1. “Regulatory” Free Markets, Examen v. VantagePoint, 873 A.2d 318 (Del. Ch. 2005)
      - ii. Florida:
        - 1. Banco Industrial v. De Saad, 68 So.3d 895 (Fl. 2011)
      - iii. Exception # 1 - Pseudo-Foreign Corporation Statutes:
        - 1. California:
          - a. “Regulatory” Paternalism, Wilson v. Louisiana-Pacific, 183 Cal.App.3d 216 (Cal. App. 1982)
      - iv. Exception # 2 – Non-Internal Affairs Issues:
        - 1. Connecticut:
          - a. John Carbone v. Nxegen Holdings, 2013 WL 5781103 (Ct. 2013)

- c. “Regulatory Arbitrage” Conclusions
    - 3. “Procedural” Choice of Law
      - a. The Rise of Multi-Forum Litigation:
        - i. Delaware:
          - 1. “Regulatory” Paternalism, Exclusive Forum Clauses
        - ii. Florida???
- d. Corporate “Entity” Matters
  - i. Lesson 3 Slides
  - ii. “Entity” Powers
    - 1. Laundry List of “Powers”:
      - a. Delaware:
        - i. DGCL, § 122
      - b. Florida:
        - i. FBCA, § 607.0302
    - 2. Questionable Areas:
      - a. Ultra Vires Acts (w/o “Powers”)
        - i. Florida:
          - 1. FBCA § 607.0304
        - ii. Delaware:
          - 1. DGCL § 124
      - b. Political Contributions
        - i. “Powers”
          - 1. Florida:
            - a. FBCA § 607.0302(14)
        - ii. “Limits”
          - 1. Florida:
            - a. Candidate Spending:
              - i. Florida Stat. § 106.08
          - 2. U.S. Constitution:
            - a. Candidate “Independent” Spending:
              - i. Citizens United v. Federal Election Commission, 558 U.S. 310 (2010)
          - 3. Market / ISS checks
  - iii. “Entity” Liabilities
    - 1. Tort Law
      - a. Direct Torts
        - i. Negligence v. Strict Liability Theories – recall Tort Law
      - b. Vicarious Liability
        - i. For Employees:

1. Florida:
      - a. Sussman v. Florida East Coast Properties, 557 So.2d 74 (Fl. App. 1990)
    - ii. For Independent Contractor Agents:
      1. Florida:
        - a. Roessler v. Novak, 858 So.2d 1158 (Fl. App. 2003)
    - c. Punitive Damages:
      - i. Florida:
        1. Florida Stat. § 768.72
  - iv. “Shareholder” Liabilities
    1. Debtor-Creditor Law
      - a. Limited Liability
        - i. Criticisms:
          1. 1824 London Times article (posted on course portal)
        - ii. Apology:
          1. Easterbrook & Fischel, Limited Liability and the Corporation, 52 U. Chi. L. Rev. 89 (1985)
      - b. Piercing the Corporate Veil / Limited Liability “Exceptions”
        - i. Voluntary Creditors (Contracts)
          1. Major Cases:
            - a. Sea-Land Services v. The Pepper Source, 941 F.2d 519 (7<sup>th</sup> Cir., 1991)
            - b. Kinney Shoe v. Polan, 939 F.2d 209 (4<sup>th</sup> Cir., 1991)
          2. Florida:
            - a. Futch v. Head, 511 So. 2d 314 (Fla. App. 1987)
        - ii. Involuntary Creditors (Tort Victims)
          1. Major Case:
            - a. Walkovszky v. Carlton, 18 N.Y.2d 414 (N.Y. 1966)
          2. Florida:
            - a. Dania Jai-Alai Palace v. Sykes, 450 So.2d 1114 (Fl. 1984)
  - e. Governance (Money and Power)
    - i. Lesson 4a Slides
    - ii. The Charter
      1. Mandatory Terms
        - a. Delaware

- i. DGCL § 102(a)
    - b. Florida
      - i. FBCA § 607.0202(1)
    - c. MBCA:
      - i. Eliminates Capital Regulation
  - 2. Flexible Terms
    - a. Delaware
      - i. DGCL § 102(b)
    - b. Florida
      - i. FBCA § 607.0202(2)
  - 3. Amendments:
    - a. Delaware:
      - i. DGCL § 242
    - b. MBCA:
      - i. MBCA § 10.03(e)
    - c. Florida
      - i. FBCA § 607.1003-06
- iii. The Bylaws
- 1. Flexible Terms
    - a. Delaware
      - i. DGCL § 109(b)
    - b. Florida
      - i. FBCA § 607.0206
  - 2. Amendments
    - a. Delaware
      - i. DGCL § 109(a)
    - b. Florida
      - i. FBCA § 607.1020
    - c. “Equitable: Limitations:
      - i. Vertically:
        - 1. Management “Limits”:
          - a. Delaware:
            - i. DGCL § 109(a) + (b)
            - ii. Democracy Protections, Schnell v. Chris-Craft, 285 A.2d 437 (Del. 1971)
            - iii. Slow Hand / Dead Hand Pills, Quickturn v. Shapiro, 721 A.2d 1281 (Del. 1998)
          - b. Florida:
            - i. FBCA § 607.1020(1)(a) + (b)
            - ii. Democracy Protections???

2. Shareholder "Limits":

a. Delaware:

- i. Centralized Management, DGCL § 141(a)

b. Florida:

- i. Centralized Management, FBCA § 607.0801(2)

ii. Horizontally:

1. Controlling Shareholder "Limits":

a. Delaware:

- i. Hollinger v. Black, 844 A.2d 1022 (Del. Ch. 2004)

b. Florida???

iv. Board Decisions

1. Delaware:

a. Board Committees:

- i. Transaction Committees v. Independent Committees / SLCs
- ii. DGCL § 141(c)

b. Actions at Meetings:

- i. DGCL § 141(b)

c. Actions without Meetings:

- i. DGCL § 141(f)

d. Key "Powers":

- i. Strategic Decisions, DGCL § 141(a)
- ii. Elect and Remove Officers, DGCL § 142
- iii. Dividends – see below
- iv. Stock Issuances – see below
- v. Fundamental Deals – see below

2. Florida:

a. Board Committees:

- i. FBCA § 607.0825

b. Actions at Meetings:

- i. FBCA § 607.0820 + .0824

c. Actions without Meetings:

- i. FBCA § 607.0821

d. Key "Powers":

- i. Strategic Decisions, FBCA § 608.0801(2)
- ii. Elect and Remove Officers, FBCA § 607.0302(10) + .08401(1) + (2) + .0842(2)
- iii. Dividends – see below
- iv. Stock Issuances – see below

v. Fundamental Deals – see below

v. A Note on Fundamental Matters:

1. Kraakman - Theoretical Concept
2. Laundry List:
  - a. Charter + Certain Bylaws Amendments – see above
  - b. Director Elections – see below
  - c. Fundamental Deals – see below
  - d. Dissolution – see below
3. Implications = More Shareholder Rights:
  - a. Voting
  - b. Statutory Appraisal
  - c. Extra Fiduciary Duties – Revlon/Weinberger “Deal” Maximization

vi. Voting:

1. “Who” Votes?
  - a. Delaware:
    - i. DGCL § 212(a)
  - b. Florida:
    - i. FBCA § 607.0721
  - c. Dual Class Stock / Controlling Minority Structures (“CMS”)
    - i. Good and Bad – Democracy Re-Alignments v. K-H Efficiency Problems
    - ii. State Law Fiduciary Duties
      1. Clearly Illegal CMS:
        - a. Delaware / “Unilateral” Circular Control Structures:
          - i. DGCL, § 160(c)
          - ii. Speiser v. Baker, 525 A.2d 1001 (Del. Ch. 1987)
        - b. Florida???
      2. Possibly Legal CMS:
        - a. Delaware / “Bilaterally” Re-Allocated Dual Class Stock:
          - i. But What If “Coercion”?, Lacos Land v. Arden Group, 517 A.2d 271 (Del. Ch. 1986)
        - b. Florida???
      - iii. Listing Rules [quasi-SEC old Rule 19c-4]:
        1. Pre-IPO v. Post-IPO Regulation
      - iv. ISS / Market Checks
2. “Manners” of Voting:
  - a. Annual Meetings

- i. Delaware:
      - 1. Matters, DGCL § 211(b)
    - ii. Florida:
      - 1. Matters, FBCA § 607.0701(1)
  - b. Special Meetings
    - i. Delaware:
      - 1. “Who” Can Call, DGCL § 211(d)
      - 2. Matters
    - ii. Florida:
      - 1. “Who” Can Call, FBCA § 607.0702(1)
      - 2. Matters, FBCA § 607.0702(3)
  - c. Requirements for All Meetings
    - i. Delaware
      - 1. Notice, DGCL § 213(a)
      - 2. Record Date, DGCL § 213(a)
      - 3. Approval:
        - a. Proxy Voting, DGCL § 212(b) + (c) + (e)
        - b. Proxy Revocability:
          - i. DGCL § 212(e)
          - ii. Haft v. Haft, 671 A.2d 413 (Del. Ch. 1995)
        - c. Quorum, DGCL § 216(1)
        - d. Approval Percentage:
          - i. Most Matters, DGCL § 216(2)
          - ii. Election of Directors, DGCL § 216(3)
    - ii. Florida
      - 1. Notice, FBCA § 607.0705
      - 2. Record Date, FBCA § 607.0707
      - 3. Beneficial Owners as Record Holders, FBCA § 607.0723
      - 4. Approval:
        - a. Proxy Voting, FBCA § 607.0722
        - b. Proxy Revocability, FBCA § 607.0722(5)
        - c. Quorum, FBCA § 607.0725(1)
        - d. Approval Percentage:
          - i. Most Matters, FBCA § 607.0725(3)
          - ii. Election of Directors, FBCA § 607.0728(1)
  - d. Written Consents in Lieu of Meetings
    - i. Delaware:

1. DGCL § 228
  - ii. Florida:
    1. FBCA, § 607.0803
  - iii. Takeovers - Why the Difference in Philosophy???
  - e. Proxy Fights (Either Side Seeking “Proxies” / “Voting”)
    - i. Key Fights = Election of Directors, Corporate Social Responsibility (CSR) and Dividends
    - ii. Federal Securities Law (Proxy Rules) (not likely to be Bar tested)
      1. Regulation 14A + Schedule 14A
      2. Management Disclosures:
        - a. Rule 14a-9 (Anti-Fraud Rule):
          - i. Virginia Bankshares v. Sandberg, 501 U.S. 1083 (1990)
    - iii. The Expanding Delaware State Law Duty of Disclosure:
      1. Management Disclosures:
        - a. Gantler v. Stephens, 965 A.2d 695 (Del. 2009)
3. Additional Election of Directors Matters:
  - a. Number of Directors
    - i. Delaware:
      1. DGCL § 141(b)
    - ii. Florida:
      1. FBCA § 607.0803
  - b. Term:
    - i. Normal Boards:
      1. Delaware:
        - a. DGCL § 141(d)
      2. Florida:
        - a. FBCA § 607.0805
    - ii. Staggered / Classified Boards:
      1. Delaware:
        - a. DGCL § 141(d)
      2. Florida:
        - a. FBCA § 607.0806
  - c. Cumulative Voting:
    - i. Delaware:
      1. DGCL § 214
    - ii. Florida:
      1. FBCA § 607.0728(2) + (3)
  - d. Staggered Boards + Cumulative Voting as Takeover “Defenses”:
    - i. Kraakman Problem:



1. The Unfireable CEO
- e. Board Vacancies:
  - i. Delaware:
    1. DGCL § 223
  - ii. Florida:
    1. FBCA § 607.0809
- f. Removal of Directors:
  - i. Normal Boards:
    1. Delaware:
      - a. DGCL § 141(k)
    2. Florida:
      - a. FBCA § 607.0808
  - ii. Staggered / Classified Boards:
    1. Delaware:
      - a. DGCL § 141(k)(1)
    2. Florida:
      - a. FBCA § 607.0808(1)
  - iii. Cumulative Voting Boards:
    1. Delaware:
      - a. DGCL § 141(k)(2)
    2. Florida:
      - a. FBCA § 607.0808(3)
4. "Class" Vetoes:
  - a. Root = "Class" Conflicts of Interest
  - b. Delaware:
    - i. Matters, DGCL § 242(b)(2)
    - ii. Class Quorum and Approval Percentage, DGCL § 216(4)
  - c. Florida:
    - i. Matters, FBCA § 607.1004
    - ii. Class Quorum and Approval Percentage, FBCA § 607.0725(1)
  - d. Why the Philosophical Differences???
  - e. Kraakman Problem:
    - i. When the Preferred Prefers Not
5. Voting "Consolidations":
  - a. Voting Trusts:
    - i. Delaware:
      1. DGCL § 218(a)
    - ii. Florida:
      1. FBCA § 607.0730
    - iii. Subject to "Strict" Contract Law
  - b. Pooling Agreements:

- i. Delaware:
      - 1. DGCL § 218(c)
    - ii. Florida:
      - 1. FBCA § 607.0731
    - iii. Subject to “Strict” Contract Law
  - vii. Lesson 4b Slides
  - viii. Stock Issuances
    - 1. Types of Securities Finance:
      - a. Stock (Equity)
      - b. Bonds (Debt)
      - c. Preferred (Hybrid)
    - 2. Board “Powers”
      - a. Delaware:
        - i. Means - DGCL § 151:
        - ii. Terms of Issuance – DGCL § 151:
          - 1. Classes / Series (Special Money or Power Rights)
        - iii. Valid Consideration - DGCL § 152
          - 1. Valid Type - Cash or Tangible/Intangible Property or any Benefit
          - 2. Adequacy of Consideration – MBKS Co. Ltd. V. Reddy, 924 A.2d 965 (Del. Ch. 2007)
        - iv. Capital Regulation – DGCL § 154
      - b. Florida:
        - i. Means - FBCA § 607.0621:
        - ii. Terms of Issuance - FBCA § 607.0602:
          - 1. Classes / Series (Special Money or Power Rights)
        - iii. Valid Consideration - FBCA, § 607.0621:
          - 1. Valid Type - Cash or Tangible/Intangible Property or Labor Services
          - 2. Adequacy of Consideration???
        - iv. Capital Regulation – FBCA § 607.0202(2)(b)(4)
    - 3. Board “Limits”
      - a. Delaware:
        - i. Charter Limits, DGCL § 151(a)
        - ii. Authorized Shares, DGCL § 151(g)
        - iii. Pre-Emption Rights, DGCL § 102(b)(3)
        - iv. Fiduciary Duties / “Dilution” Issues:
          - 1. Non-Unocal Mode:
            - a. Duty to Deal Fairly with all Shareholders - Condec v. Lunkenheimer, 43 Del. Ch. 353 (Del. Ch.1967)
          - 2. Unocal Mode:

- a. Poison Pill “Discriminatory” Dilution – Moran v. Household, 500 A.2d 1346 (Del. 1985)
    - 3. Open Question – How Far Can Pill “Threat” Logic Be Pushed against Shareholders???
  - b. Florida:
    - i. Charter Limits, FBCA § 607.0602
    - ii. Authorized Shares, FBCA § 607.0603
    - iii. Pre-Emption Rights, FBCA § 607.0630
    - iv. Fiduciary Duties / “Dilution”???
  - c. MBCA:
    - i. Certain Mergers, MBCA § 6.21(f)(1)
      - 1. BUT Florida gloss – provision eliminated???
  - d. Securities Laws:
    - i. Federal:
      - 1. 1933 Act
    - ii. State:
      - 1. Blue Sky Laws
      - 2. Pre-Emption / National Capital Markets Efficiency Act
    - iii. NYSE Listing Rules:
      - 1. Significant Stock Issuances, NYSE Listed Company Manual § 312.03(c)
- 4. Shareholder “Law”:
  - a. Subscription Agreements:
    - i. Florida:
      - 1. FBCA § 607.0620
  - b. Stock Certificates:
    - i. Florida:
      - 1. Shares with Certificates, FBCA § 607.0625
      - 2. Shares without Certificates, FBCA § 607.0626
- ix. Dividends
  - 1. Board “Powers”
    - a. Delaware:
      - i. DGCL § 170(a)
      - ii. Types of Dividends:
        - 1. DGCL § 173
    - b. Florida:
      - i. FBCA § 607.06401(1)
      - ii. Types of Dividends:
        - 1. FBCA § 607.0623
  - 2. Board “Limits”

- a. Delaware:
    - i. Charter
      - 1. DGCL § 170(a)
    - ii. Creditor Protections:
      - 1. Nimble Dividends Test, DGCL § 170(a)
    - iii. Fiduciary Duties:
      - 1. Fairness Review, if Conflicted:
        - a. Blaustein v. Lord Baltimore Capital, 2013 WL 1810956 (Del. Ch. 2013), at FN 94
    - iv. Liability for Improper Dividends?
      - 1. Common Sense = Go after Board + SHs
  - b. Florida:
    - i. Charter Limits
      - 1. FBCA § 607.06401(1)
    - ii. Creditor Protections:
      - 1. Insolvency Test, FBCA § 607.06401(3) + (4)
      - 2. Definition of “Distribution” (Excluding Stock Dividends), FBCA § 607.01401
    - iii. Fiduciary Duties???
3. “Who” Receives Dividends?
- a. Delaware:
    - i. Record Date, DGCL § 213(c)
  - b. Florida:
    - i. Record Date, FBCA § 607.06401(2)
  - c. Beneficial Owners
- x. Stock Repurchases
- 1. Board “Powers”
    - a. Delaware:
      - i. Non-Unocal Mode:
        - 1. DGCL § 141(a) + 160(a)
        - 2. Subject to Distribution Constraints (Money Kicked out is Money Kicked Out)
    - b. Florida:
      - i. Non-Unocal Mode:
        - 1. FBCA § 607.0631
        - 2. Subject to Distribution Constraints (Money Kicked out is Money Kicked Out)
  - 2. Thorny Areas:
    - a. Delaware:
      - i. Unocal Mode:

1. AC Acquisitions v. Anderson, Clayton, 519 A.2d 103 (Del. Ch. 1986)
2. But see Unitrin v. American General, 651 A.2d 1361 (Del. 1995)

xi. Fundamental Deals

1. A Note on Takeovers
2. Mergers

a. Effects

i. Delaware

1. DGCL § 259

ii. Florida:

1. FBCA § 607.1106

b. Bilateral Approval

i. Delaware

1. DGCL § 251

ii. MBCA:

1. MBCA § 11.04(e)

iii. Florida:

1. FBCA § 607.1103

c. Other Voting Issues

i. Meeting Notice:

1. Delaware:

- a. DGCL § 262(c)

2. Florida:

- a. FBCA § 607.1103(4)

ii. Approval Percentages:

1. Delaware

- a. DGCL § 251(c)

2. MBCA

- a. MBCA § 11.04(e)

3. Florida:

- a. FBCA § 607.1103(5)

iii. Voting Exceptions:

1. Acquirer Insignificant Transactions

a. Delaware

- i. DGCL § 251(f)

b. Florida:

- i. FBCA § 607.1103(7)

2. Acquirer Triangular Mergers

a. Delaware

- i. DGCL § 251(b)(5)

b. Florida:

- i. FBCA § 607.1101(c)
  - iv. Class “Vetoos”:
    - 1. Delaware
      - a. DGCL § 242(b)(2)
    - 2. Florida:
      - a. FBCA § 607.1103(6) + .1004
    - 3. Solutions around “Class” Hold-Up???
    - a. Sugar, Schreiber v. Carney, 447 A.2d 17 (Del. Ch. 1982)
      - b. Stick, Kirschner Brothers Oil v. Natomas, 185 Cal.App. 3d 784 (Cal. App. 1986)
  - v. Filing Articles of Mergers:
    - 1. Delaware
      - a. DGCL § 251(c)
    - 2. Florida:
      - a. FBCA § 607.1105
- d. Statutory Appraisal
  - i. Delaware:
    - 1. DGCL § 262
    - 2. Notice of Dissenting Rights, DGCL § 262(d)(1)
    - 3. Demand + Dissent, DGCL § 262(d)(1)
    - 4. Second Dissenter’s Notice, DGCL § 262(d)(2)
    - 5. Court Petition, DGCL § 262(e)
    - 6. Valuation Proceedings, DGCL § 262(h)
      - a. How Does Delaware Understand “Fair Value”?
        - i. Golden Telecom v. Global GT, 11 A.3d 214 (Del. 2010)
    - 7. Zero-Outs, DGCL § 262(b)(1)
  - ii. Florida:
    - 1. FBCA § 607.1301-1333
    - 2. Notice of Dissenting Rights, FBCA § 607.1320
    - 3. Demand + Dissent, FBCA § 607.1321
    - 4. Second Dissenter’s Notice, FBCA § 607.1322
    - 5. Final Payment Demand, FBCA § 607.1323
    - 6. Corp Must Pay Fair Value, FBCA § 607.1324
    - 7. Court Action (if Shareholder is Dissatisfied), FBCA § 607.1330(1)
    - 8. Valuation Proceedings, FBCA § 607.1330(4)
      - a. How Does Florida Understand “Fair Value”?







- i. Financial Statements:
  - 1. Federal Securities Laws:
    - a. Public Edgar Database,  
<https://www.sec.gov/edgar/searchedgar/webusers.htm>
  - 2. Delaware:
    - a. No Automatic Financial Statements
  - 3. Florida:
    - a. Automatic Financial Statements, FBCA § 607.1620
- ii. Books and Records + Shareholder Lists:
  - 1. Federal Securities Laws:
    - a. Public Edgar Database,  
<https://www.sec.gov/edgar/searchedgar/webusers.htm>
  - 2. Delaware:
    - a. Books and Records = Undefined / Open Ended, DGCL § 220(b)
    - b. Proper Purpose Approach, DGCL § 220(c)
    - c. SH “Proper Purpose” definition:
      - i. Stockholder Lists, General Time v. Talley, 43 Del. Ch. 531 (Del. 1968)
      - ii. Books and Records, Rock Sold v. SmartPill, 2012 WL 4841602 (Del. Ch. 2012)
    - d. Burden of Proof
    - e. Beneficial Owners
    - f. The Rise of Activist SHs / 220 Litigation
  - 3. Florida:
    - a. Absolute Rights Matters, FBCA, § 607.1602(1)
    - b. Definition of Books and Records, FBCA § 607.1602(2)
    - c. Conditional “Proper Purpose” Rights Matters, FBCA § 607.1602(2) + (3)
    - d. SH “Proper Purpose” Definition:
      - i. News-Journal Corp. v. Gore, 187 So. 271 (Fla. 1939)
    - e. Burden of Proof

f. Fiduciary Duties

- i. Lesson 5 Slides
- ii. Vertical Axis
  - 1. Duty of Care
    - a. Statutes:
      - i. Duty of Care:
        - 1. Scholars:
          - a. ALI Principles § 4.01 (a)
        - 2. Delaware:
          - a. No “Care” Statute – All Case Law
        - 3. Florida:
          - a. FBCA § 607.0830
      - ii. Business Judgment Rule:
        - 1. Scholars:
          - a. ALI Principles § 4.01 (c)
    - b. Ordinary Decisions:
      - i. Delaware:
        - 1. Gagliardi v. Trifoods, 683 A.2d 1049 (Del. Ch. 1996)
      - ii. New York:
        - 1. Kamin v. American Express, 86 Misc.2d 809 (N.Y. 1976)
    - c. Takeover Decisions:
      - i. Delaware:
        - 1. Gross Negligence Liability, Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985)
    - d. The Exculpation Question:
      - i. Delaware:
        - 1. Charter Exculpations, DGCL § 102(b)(7)
      - ii. MBCA:
        - 1. Charter Exculpations, MBCA § 2.02(b)(4)
      - iii. Florida:
        - 1. “Blanket” Zero Gross Negligence Liability:
          - a. Director Liability, FBCA § 607.0831(1)(b)
          - b. F.D.I.C. v. Gonzalez-Gorrondona, 833 F.Supp. 1545 (S.D. Fla. 1993)
    - e. Back-Up Business Judgment Rule “Lite”
      - i. Indemnification + Insurance (Twin Is)
        - 1. Delaware:
          - a. DGCL § 145
          - b. Mandatory Indemnification:
            - i. Merritt-Chapman v. Wolfson, 264 A.2d 358 (Del. Ch. 1970)

- c. Additional Indemnification:
              - i. Waltuch v. Conticommodity Services, 88 F.3d 87 (2d Cir. 1996)
2. MBCA:
  - a. MBCA § 8.51-.57
3. Florida:
  - a. FBCA § 607.0850
  - b. Would Florida Embrace Delaware Case Law???
2. Duty of Loyalty
- a. Loyalty to Whom?
    - i. Old Days:
      - 1. Major Case:
        - a. Short-Term Value Shareholder Primacy, Dodge Bros., 204 Mich. 459 (Mich. 1919)
    - ii. Modern Day:
      - 1. Kraakman / Timberland Case Study
      - 2. Delaware = Mode Dependent:
        - a. Regular/Defensive Situations:
          - i. Unocal v. Mesa, 493 A.2d 946 (Del. 1985)
        - b. Takeovers:
          - i. Revlon mode, Revlon v. MacAndrews & Forbes, 506 A.2d 173 (Del. 1986)
        - c. Insolvencies:
          - i. Credit Lyonnais mode, Credit Lyonnais v. Pathe (Del. Ch. 1991)
      - 3. Corporate Constituency Statutes:
        - a. Pennsylvania:
          - i. PCBL § 1715(a)
        - b. Florida:
          - i. FBCA § 607.0830(3)
- b. Conflicted Deals:
  - i. Standard of Review:
    - 1. Washington:
      - a. Void Approach (for Non-Disclosure), State ex Rel. Hayes Oyster v. Keypoint Oyster, 64 Wash.2d 375 (Wash. 1964)

2. Delaware:
  - a. Fairness Approach, *Gottlieb v. Heyden Chemical*, 33 Del. Ch. 82 (Del. 1952)
- ii. Both Sides Conflicts / Cleansing / Fairness:
  1. Scholars:
    - a. ALI Principles § 5.02
  2. Delaware:
    - a. DGCL § 144
    - b. *Lewis v. S.L. & E*, 629 F.2d 764 (2d. Cir. 1980)
  3. MBCA:
    - a. MBCA § 8.61
  4. Florida:
    - a. FBCA § 607.0831(3) + .0832
  5. Federal Securities Laws:
    - a. Regulation S-K, Item 404 (not likely Bar tested)
- iii. Beyond Both Sides Conflicts:
  1. Delaware:
    - a. *Cooke v. Oolie*, 2000 WL 710199 (Del. Ch. 2000)
  2. Florida???
- iv. The Amorphous “Corporate Opportunity” Doctrine:
  1. Delaware:
    - a. *Sinclair Oil v. Levien*, 280 A.2d 717 (Del. 1971)
  2. Florida:
    - a. *Cohen v. Hattaway*, 595 So.2d 105 (Fl. App. 1992)
- c. Takeover Decisions:
  - i. Delaware:
    1. *Revlon v. MacAndrews & Forbes - revisited*, 506 A.2d 173 (Del. 1986)
- d. The Exculpation Question:
  - i. Delaware:
    1. No Charter Exculpations, DGCL § 102(b)(7)
  - ii. MBCA:
    1. Charter Exculpations, MBCA § 2.02(b)(4)
  - iii. Florida:
    1. Director Liability, FBCA § 607.0831(1)(b)
3. “Knowing” Violations of Law
  - a. Delaware:

- i. No Charter Exculpations, DGCL § 102(b)(7)
    - ii. Indemnification, DGCL § 145(a)
  - b. Florida:
    - i. Director Liability, FBCA § 607.0831(1)(b)
    - ii. Indemnification, FBCA § 607.0850
  - c. Major Case:
    - i. Miller v. AT&T, 507 F.2d 759 (3<sup>rd</sup> Cir. 1974)
- 4. Duty of Corporate Monitoring (Nonfeasance)
  - a. State Law:
    - i. How Strong of a Duty to Monitor – Triggers + Effects?
      - 1. The Old Days – State-by-State:
        - a. Delaware
          - i. Soft Duties, Graham v. Allis-Chalmers, 41 Del. Ch. 78 (Del. 1963)
        - b. New Jersey:
          - i. Harsh Duties, Francis v. United Jersey Bank, 87 N.J. 15 (N.J. 1981)
      - 2. Post-Enron:
        - a. Delaware - Stronger Duties???
          - i. In re Caremark, 698 A.2d 959 (Del. Ch. 1996)
          - ii. Stone v. Ritter, 911 A.2d 365 (Del. 2006)
          - iii. Solution = Reasonable Compliance Program???
        - b. Florida???
    - b. Federal Criminal Liabilities:
      - i. Breaks for Monitoring:
        - 1. U.S. Sentencing Guidelines for Organizations
        - 2. DOJ Policy on Charging Organizations (a.k.a. “Thompson Memo”)
        - 3. Sarbanes-Oxley § 404
      - ii. Would Federal Law Require More Aggressive Monitoring than Delaware???
      - 1. In re Marchese, 80 S.E.C. Docket 86 (SEC 2003)
- iii. Horizontal Axis
  - 1. Public Shareholder Duties:
    - a. Norm = No Duties
    - b. Vote Buying “Exceptions”:
      - i. Delaware:

1. Schreiber v. Carney - revisited, 447 A.2d 17 (Del. Ch. 1982)
  2. Open Questions - Beyond Vote Buying???
  - ii. Florida???
2. Controlling Shareholder Duties:
- a. Freeze-Outs / Differential Standards:
    - i. Delaware:
      1. Sinclair Oil v. Levien - revisited, 280 A.2d 717 (Del. 1971)
    - ii. California:
      1. Wilson v. Louisiana-Pacific - revisited, 183 Cal.App.3d 216 (Cal. App. 1982)
    - iii. Florida???
  - b. Takeover Deals / Suspect Two Tier Bids:
    - i. First Step / Tender Offers:
      1. Federal Securities Williams Act (not likely to be Bar tested)
    - ii. Second Step / Freeze-Out Mergers:
      1. Delaware "Quasi-Appraisal", Weinberger v. UOP, 457 A.2d 701 (Del. 1983)
      2. Avoiding Delaware Weinberger:
        - a. No Cleansing / "Short-Form" Mergers:
          - i. DGCL § 253
          - ii. FBCA § 607.1104
          - iii. Glassman v. Unocal, 777 A.2d 242 (Del. 2001)
          - iv. Florida???
        - b. Delaware / Two-Step Controller Deals (at the Outset):
          - i. First Step, In re Siliconix, 2001 WL 716787 (Del. Ch. 2001)
          - ii. Second Step / Perfect Cleansing, In re CNX Gas, 4 A.3d 397 (Del. Ch. 2010)
          - iii. Back-Up Imperfect Cleansing, Kahn v. Lynch, 638 A.2d 1110 (Del. 1994)
        - c. Delaware / Two-Step Non-Controller Deals (at the Outset):
          - i. No Cleansing, Top-Up Options / In re Cogent, 7 A.3d 487 (Del. Ch. 2010)



- ii. "Effects" Differences
- b. Act I and ½:
  - i. Omnicare v. NCS Healthcare, 818 A.2d 914 (Del. 2003)
- 2. Florida???

**h. Later Possible Topics (To Be Specified in More Detail):**

- i. Agency Law / Officers' Corporate Authority
- ii. Closely Held / Private Corporations
- iii. Shareholder Lawsuits
- iv. Other Special Corporation Types
- v. Additional Securities Laws Topics
  - 1. Insider Trading (Rule 10b-5 + Florida Blue Sky Laws)
  - 2. Short Swing Trading (Section 16b)
  - 3. Public Companies (Sarbanes-Oxley)