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伊曼纽尔法律精要影印系列 law outlines

# 公司法

[美] 史蒂文·L·伊曼纽尔/著  
(Steven L. Emanuel)

Corporations



中信出版社  
CITIC PUBLISHING HOUSE

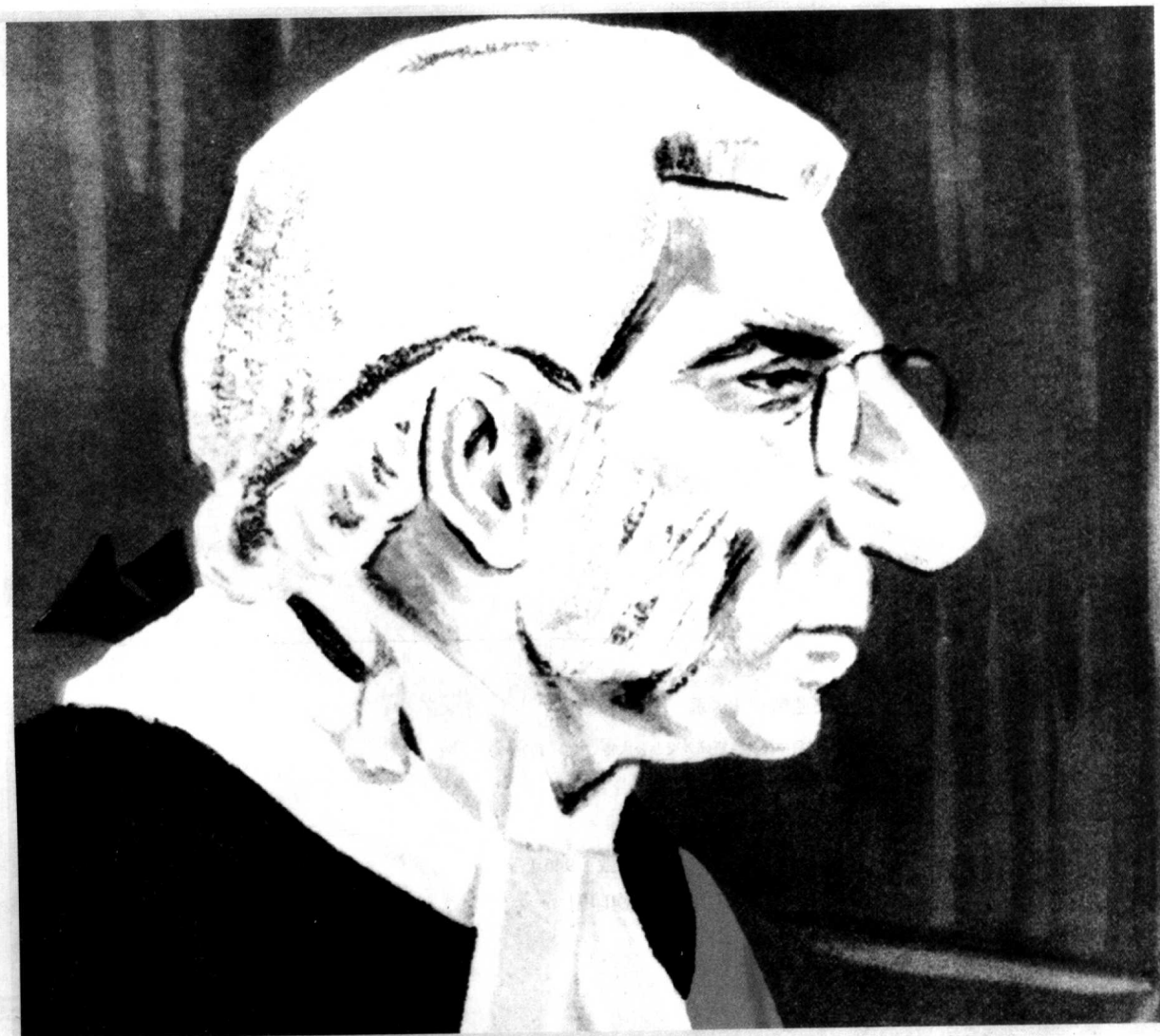
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## 公司法

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著 者: [美] 史蒂文·L·伊曼纽尔

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# 总 序

吴志攀

加入世界贸易组织表明我国经济发展进入了一个新的发展时代——一个国际化商业时代。商业与法律的人才流动将全球化,评介人才标准将国际化,教育必须与世界发展同步。商业社会早已被马克思描绘成为一架复杂与精巧的机器,维持这架机器运行的是法律。法律不仅仅是关于道德与公理的原则,也不单单是说理论道的公平教义,还是具有可操作性的精细的具体专业技术。像医学专业一样,这些专业知识与经验是从无数的案例实践积累而成的。这些经验与知识体现在法学院的教材里。中信出版社出版的这套美国法学院教材为读者展现了这一点。

教育部早在2001年1月2日下发的《关于加强高等学校本科教学工作提高教学质量的若干意见》中指出:“为适应经济全球化和科技革命的挑战,本科教育要创造条件使用英语等外语进行公共课和专业课教学。对高新技术领域的生物技术、信息技术等专业,以及为适应我国加入WTO后需要的金融、法律等专业,更要先行一步,力争三年内,外语教学课程达到所开课程的5%-10%。暂不具备直接用外语讲授条件的学校、专业,可以对部分课程先实行外语教材、中文授课,分步到位。”

引进优质教育资源,快速传播新课程,学习和借鉴发达国家的成功教学经验,大胆改革现有的教科书模式成为当务之急。

按照我国法学教育发展的要求,中信出版社与外国出版公司合作,瞄准国际法律的高水平,从高端入手,大规模引进畅销外国法学院的外版法律教材,以使法学院学生尽快了解各国的法律制度,尤其是欧美等经济发达国家的法律体系及法律制度,熟悉国际公约与惯例,培养处理国际事务的能力。

此次中信出版社引进的是美国ASPEN出版公司出版的供美国法学院使用的主流法学教材及其配套教学参考书,作者均为富有经验的知名教授,其中不乏国际学术权威或著名诉讼专家,历经数十年课堂教学的锤炼,颇受法学院学生的欢迎,并得到律师实务界的认可。它们包括诉讼法、合同法、公司法、侵权法、宪法、财产法、证券法等诸多法律部门,以系列图书的形式全面介绍了美国法律的基本概况。

这次大规模引进的美国法律教材包括:

**伊曼纽尔法律精要 (Emanuel Law Outlines)** 美国哈佛、耶鲁等著名大学法学院广泛采用的主流课程教学用书,是快捷了解美国法律的最佳读本。作者均为美国名牌大学权威教授。其特点是:内容精炼,语言深入浅出,独具特色。在前言中作者以其丰富的教学经验制定了切实可行的学习步骤和方法。概要部分提纲挈领,浓缩精华。每章精心设计了简答题供自我检测。对与该法有关的众多考题综合分析,归纳考试要点和难点。

**案例与解析 (Examples and Explanations)** 由美国最权威、最富有经验的教授所著,这套丛书历经不断的修改、增订,吸收了最新的资料,经受了美国成熟市场的考验,读者日众。这次推出的是最新版本,在前几版的基础上精益求精,补充了最新的联邦规则,案例也是选用当今人们所密切关注的问题,有很强的时代感。该丛书强调法律在具体案件中的运用,避免了我国教育只灌输法律的理念与规定,而忽视实际解决问题的能力的培养。该丛书以简洁生动的语言阐述了美国的基本法律制度,可准确快捷地了解美国法律的精髓。精心选取的案例,详尽到位的解析,使读者读后对同一问题均有清晰的思路,透彻的理解,能举一反三,灵活运用。该丛书匠心独具之处在于文字与图表、图例穿插,有助于理解与记忆。

**案例教程系列 (Casebook Series)** 覆盖了美国法学校院的主流课程,是学习美国法律的代表性图书,美

国著名的哈佛、耶鲁等大学的法学院普遍采用这套教材，在法学专家和学生中拥有极高的声誉。本丛书中所选的均为重要案例，其中很多案例有重要历史意义。书中摘录案例的重点部分，包括事实、法官的推理、作出判决的依据。不仅使读者快速掌握案例要点，而且省去繁琐的检索和查阅原案例的时间。书中还收录有成文法和相关资料，对国内不具备查阅美国原始资料条件的读者来说，本套书更是不可或缺的学习参考书。这套丛书充分体现了美国法学教育以案例教学为主的特点，以法院判例作为教学内容，采用苏格拉底式的问答方法，在课堂上学生充分参与讨论。这就要求学生不仅要了解专题法律知识，而且要理解法律判决书。本套丛书结合案例设计的大量思考题，对提高学生理解概念、提高分析和解决问题的能力，非常有益。本书及时补充出版最新的案例和法规汇编，保持四年修订一次的惯例，增补最新案例和最新研究成果，保证教材与时代发展同步。本丛书还有配套的教师手册，方便教师备课。

**案例举要 (Casenote Legal Briefs)** 美国最近三十年最畅销的法律教材的配套辅导读物。其中的每本书都是相关教材中的案例摘要和精辟讲解。该丛书内容简明扼要，条理清晰，结构科学，便于学生课前预习、课堂讨论、课后复习和准备考试。

除此之外，中信出版社还将推出教程系列、法律文书写作系列等美国法学教材的影印本。

美国法律以判例法为其主要的法律渊源，法律规范机动灵活，随着时代的变迁而对不合时宜的法律规则进行及时改进，以反映最新的时代特征；美国的法律教育同样贯穿了美国法律灵活的特性，采用大量的案例教学，启发学生的逻辑思维，提高其应用法律原则的能力。

从历史上看，我国的法律体系更多地受大陆法系的影响，法律渊源主要是成文法。在法学教育上，与国外法学教科书注重现实问题研究，注重培养学生分析和解决问题的能力相比，我国基本上采用理论教学为主，而用案例教学来解析法理则显得薄弱，在培养学生的创新精神和实践能力方面也做得不够。将美国的主流法学教材和权威的法律专业用书影印出版，就是试图让法律工作者通过原汁原味的外版书的学习，开阔眼界，取长补短，提升自己的专业水平，培养学生操作法律实际动手能力，特别是使我们的学生培养起对法律的精细化、具体化和操作化能力。

需要指出的是，影印出版美国的法学教材，并不是要不加取舍地全盘接收，我们只是希望呈现给读者一部完整的著作，让读者去评判。“取其精华去其糟粕”是我们民族对待外来文化的原则，我们相信读者的分辨能力。

是为序。



## Abbreviations Used in Text

### CASEBOOKS

- C&E — Cary & Eisenberg, *Cases and Materials on Corporations*  
(7th Ed., Unabridged, 1995)
- Hamilton — Robert Hamilton, *Cases and Materials on Corporations*  
(5th Ed. 1994)
- Hamilton (7th) — Robert Hamilton, *Cases and Materials on Corporations*  
(7th Ed. 2001)
- S,S,B&W — Solomon, Schwartz, Bauman & Weiss, *Corporations — Law and Policy*  
(3rd Ed. 1994)
- C,C&G — Choper, Coffee & Gilson, *Cases and Materials on Corporations*  
(4th Ed. 1995)

### HORNBOOKS

- Clark — Robert Clark, *Corporate Law* (1986)
- Gevurtz — Franklin A. Gevurtz, *Corporation Law* (2000)
- H&A — Henn & Alexander, *Law of Corporations* (3d Ed. 1983, w/1986 supp.)

### OTHER MATERIALS

- ALI Prin. Corp. Gov. — American Law Institute, *Principles of Corporate Governance* (1994)
- Brode — George Brode, Jr., *Tax Planning for Corporate Acquisitions* (1988)
- Del. GCL — Delaware General Corporations Law
- F,B&H — Ferrara, Brown & Hall, *Takeovers — Attack and Survival* (1987)
- K&C — Klein & Coffee, *Business Organization and Finance* (4th Ed. 1990)
- Loss — Louis Loss, *Fundamentals of Securities Regulation* (2d Ed. 1988)
- Nutshell — Robert Hamilton, *The Law of Corporations in a Nutshell*  
(3d Ed. 1991)
- NY BCL — New York Business Corporation Law
- Ratner — David Ratner, *Securities Regulation in a Nutshell* (3d Ed. 1988)
- MBCA — Model Business Corporations Act (1999)
- '33 Act — Securities Act of 1933, 15 U.S.C. §§ 77a *et seq.*
- '34 Act — Securities Exchange Act of 1934, §§ 78a *et seq.*

## Preface

Thanks for buying this book.

Here are some of its special features:

- **“Casebook Correlation Chart”** — This chart, located just after this Preface, correlates each section of our Outline with the pages covering the same topic in the four leading Corporations casebooks.
- **“Capsule Summary”** — This is a 79-page summary of the key concepts of the law of Corporations, specially designed for use in the last week or so before your final exam.
- **“Quiz Yourself”** — Within or at the end of nearly every chapter we give you short-answer questions so that you can exercise your analytical muscles. There are over 100 of these questions. Most are from the *Law in a Flash* Corporations title.
- **“Exam Tips”** — These tips, at the end of nearly every chapter, alert you to what issues repeatedly pop up on real-life Corporations exams, and what factual patterns are commonly used to test those issues. We created these Tips by looking at literally hundreds of multiple-choice and essay questions asked by law professors and bar examiners. You'd be surprised at how predictable the issues and fact-patterns chosen by profs really are!

While this book concentrates on Corporations, we give some coverage to Partnerships as well as to two newer forms of business organization, LLC's and LLPs.

I intend for you to use this book both throughout the semester and for exam preparation. Here are some suggestions about how to use it:<sup>1</sup>

1. During the semester, use the book in preparing each night for the next day's class. To do this, first read your casebook. Then, use the *Casebook Correlation Chart* to get an idea of what part of the outline to read. Reading the outline will give you a sense of how the particular cases you've just read in your casebook fit into the overall structure of the subject. You may want to use a yellow highlighter to mark key portions of the *Emanuel*.
2. If you make your own outline for the course, use the *Emanuel* to give you a structure, and to supply black letter principles. You may want to rely especially on the *Capsule Summary* for this purpose. You are hereby authorized to copy small portions of the *Emanuel* into your own outline, provided that your outline will be used only by you or your study group, and provided that you are the owner of the *Emanuel*.
3. When you first start studying for exams, read the *Capsule Summary* to get an overview. This will probably take you all or part of two days.
4. Either during exam study or earlier in the semester, do some or all of the *Quiz Yourself* short-answer questions, supplied at the end of most sub-chapters. You can find these quickly by looking

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1. The suggestions below relate only to this book. I don't talk about taking or reviewing class notes, using hornbooks or other study aids, joining a study group, or anything else. This doesn't mean I don't think these other steps are important — it's just that in this Preface I've chosen to focus on how I think you can use this outline.

for *Quiz Yourself* entries in the Table of Contents. When you do these questions: (1) record your short "answer" on the small blank line provided after the question, but also: (2) try to write out a "mini essay" on a separate piece of paper. Remember that the only way to get good at writing essays is to write essays.

5. A couple of days before the exam, review the *Exam Tips* that appear at the end of nearly every chapter. You may want to combine this step with step (4), so that you use the *Tips* to help you spot the issues in the short-answer questions.
6. Some time during the week or so before the exam, do some or all of the full-scale essay exams at the back of the book. Write out a full essay answer under exam-like conditions (e.g., closed-book if your exam will be closed book.) If you can, exchange papers with a classmate and critique each other's answer.
7. The night before the exam: (1) do some *Quiz Yourself* questions, just to get your writing juices flowing; and (2) re-read the various *Exam Tips* sections (you should be able to do this in 1-2 hours).

Good luck in your Corporations course. If you'd like any other publication of Aspen Law & Business, you can find it at your bookstore or at [www.aspenpublishers.com](http://www.aspenpublishers.com).

Steve Emanuel

Larchmont NY

July, 2002



## CASEBOOK CORRELATION CHART

(Note: general sections of the outline are omitted from this chart. NC = not directly covered by this casebook.)

<b>Emanuel's Corporations Outline (by chapter and section heading)</b>	<b>Eisenberg Corporations &amp; Other Bus. Orgs. (8th ed. Unabr., 2000)</b>	<b>Choper, Coffee &amp; Gilson Cases and Materials on Corporations (5th ed. 2000)</b>	<b>Solomon, Schwartz, Bauman &amp; Weiss Corporations — Law and Policy (4th ed. 1998)</b>	<b>Robert Hamilton Corporations, Incl. Partnerships &amp; LLC's (7th ed. 2001)</b>
<b>Ch. 2 — THE CORPORATE FORM</b>				
<b>I. Where and How To Incorporate</b>	100-114	235-243	163-164, 172-185	243-262
<b>II. Ultra Vires and Corporate Powers</b>	126-132	67-74	91-107	262-271
<b>III. Pre-Incorporation Transactions by Promoters</b>	114-117	283-302	168-172	271-283
<b>IV. Defective Incorporation and Its Consequences</b>	117-126	243-253	164-168	283-297
<b>V. Piercing the Corporate Veil</b>	219-254	253-278	300-346	298-355
<b>VI. Insider Claims in Bankruptcy (Including Equitable Subordination)</b>	258-261	278-282	232-237, 345-346	NC
<b>Ch. 3 — THE CORPORATE STRUCTURE</b>				
<b>I. General Allocation of Power: Shareholders, Directors and Officers</b>	166-203	5-12, 55-57	347-349, 394-408	618-673
<b>II. Board of Directors</b>	203-210	56-59, 597-601, 605-609, 764-770	363-368, 421-424, 619-657	496-506, 568-581
<b>III. Officers</b>	210-214	59-67	349-363	581-602
<b>IV. Formalities for Shareholder Action</b>	214-219	548-564, 589-593	368-369, 391-394	496
<b>Ch. 4 — SHAREHOLDERS' INFORMATIONAL RIGHTS, AND THE PROXY SYSTEM</b>				
<b>I. Shareholder Inspection of Books and Records</b>	264-279	622-634	408-416	1173-1191
<b>II. Reporting Requirements For Publicly-Held Companies</b>	279-285	309-310	NC	673-677
<b>III. The Proxy Rules Generally</b>	285-291	312-332, 583-588, 634-682	558-573	492-496, 677-695
<b>IV. Implied Private Actions Under the Proxy Rules</b>	291-313	347-359, 676-689	827-893	695-726
<b>V. Communications by Shareholders</b>	313-327	656-676	594-618	726-746
<b>VI. Proxy Contests</b>	327-337	542-544, 594-597, 609-622, 655	1169-1174	1076-1079

## CASEBOOK CORRELATION CHART (continued)

<b>Emanuel's Corporations Outline (by chapter and section heading)</b>	<b>Eisenberg Corporations &amp; Other Bus. Orgs. (8th ed. Unabr., 2000)</b>	<b>Choper, Coffee &amp; Gilson Cases and Materials on Corporations (5th ed. 2000)</b>	<b>Solomon, Schwartz, Bauman &amp; Weiss Corporations — Law and Policy (4th ed. 1998)</b>	<b>Robert Hamilton Corporations, Incl. Partnerships &amp; LLC's (7th ed. 2001)</b>
<b>Ch. 5 — CLOSE CORPORATIONS</b>				
<b>II. Shareholder Voting Agreements: Voting Trusts and Classified Stock</b>	354-371	725-745	426-435	506-533
<b>III. Agreements Restricting the Board's Discretion</b>	371-384	745-755	436-449	463-492
<b>IV. Super-Majority Voting and Quorum Requirements</b>	384-387	604-605	449-450	NC
<b>V. Share Transfer Restrictions</b>	422-440	714-723	451-464	534-545
<b>VI. Resolution of Disputes, Including Dissolution</b>	388-403, 440-479	771-790	464-514	545-567
<b>Ch. 6 — THE DUTY OF CARE AND THE BUSINESS JUDGMENT RULE</b>				
<b>II. The Standard of Care</b>	520-536	74-76	658-685	747-754
<b>III. The Business Judgment Rule</b>	536-589	76-108	685-721	754-781
<b>IV. Modern Statutory Modifications to the Rules of Director Liability</b>	589-590	108-112	721-728	781-801
<b>Ch. 7 — THE DUTY OF LOYALTY</b>				
<b>I. Fiduciary Status of Directors, Officers and Controlling Shareholders</b>	64-70	NC	658	NC
<b>II. Self-Dealing Transactions</b>	599-637	112-130	747-788	848-890
<b>III. Executive Compensation</b>	637-670	138-163	NC	857-869
<b>IV. The Corporate Opportunity Doctrine and Related Problems</b>	670-697	163-176	796-817	890-902
<b>V. The Sale of Control</b>	736-767	1018-1038	1022-1167	581-602
<b>VI. Other Duties of Controlling Shareholders</b>	697-736	130-138, 755-764	817-826	902-906
<b>Ch. 8 — INSIDER TRADING</b>				
<b>II. State Common-Law Approaches</b>	768-774	527-538	909-927	907-930
<b>III. Sec. Rule 10b-5 and Insider Trading</b>	774-855	347-428, 437-597	927-947	907-924, 930-947, 991-999
<b>IV. Rule 10b5 — Who Is an "Insider", "Tippee", or "Misappropriator"?</b>	855-866	463-493	947-999	947-991
<b>V. Rule 10b5 — Misrepresentations or Omissions Not Involving Insider Trading</b>	866-876	428-437, 495-502	852-862, 999-1007	924-930
<b>VI. Short-Swing Trading Profits and § 16(b)</b>	876-912	502-526	1007-1013	999-1006

## CASEBOOK CORRELATION CHART (continued)

<b>Emanuel's Corporations Outline (by chapter and section heading)</b>	<b>Eisenberg Corporations &amp; Other Bus. Orgs. (8th ed. Unabr., 2000)</b>	<b>Choper, Coffee &amp; Gilson Cases and Materials on Corporations (5th ed. 2000)</b>	<b>Solomon, Schwartz, Bauman &amp; Weiss Corporations — Law and Policy (4th ed. 1998)</b>	<b>Robert Hamilton Corporations, Incl. Prtnrshps &amp; LLC's (7th ed. 2001)</b>
<b>Ch. 9 — SHAREHOLDERS' SUITS</b>				
<b>II. Distinguishing Derivative from Direct Suits</b>	934-946	877-882	51-52, 1023-1028	NC
<b>III. Requirements for Maintaining a Derivative Suit</b>	951-961	838-857	1028-1042	NC
<b>IV. Demand on the Board; Early Termination Based on Board or Committee Recommendation</b>	963-993	807-838	1042-1092	801-847
<b>V. Security-for-Expenses Statutes</b>	1026-1028	857-861	1092-1093	697
<b>VI. Settlement of Derivative Suits</b>	1044-1051	872-875	1093-1110	NC
<b>VII. Plaintiff's Attorney's Fees</b>	994-1026	889-899	1110-1115	704-707
<b>VIII. Miscellaneous Procedural Issues</b>	1051-1054	861-872, 875-877, 882-888	1023-1028, 1115- 1133	597-599
<b>IX. Indemnification and D&amp;O Insurance</b>	590-592, 1028- 1044	899-912	728-747	1049-1073
<b>Ch. 10 — STRUCTURAL CHANGES, INCLUDING MERGERS AND ACQUISITIONS</b>				
<b>I. Corporate Combinations — Generally</b>	1061-1080	913-917	373-377	NC
<b>II. Corporate Combinations — Protecting Shareholders</b>	1080-1109	563-564	369-373, 378-391, 1310-1356	886-887, 1167- 1170
<b>III. Recapitalizations — Hurting the Preferred Shareholders</b>	NC	601-604	49-51	NC
<b>IV. Freezeouts</b>	1109-1130	1068-1092	1291-1310	874-902
<b>V. Tender Offers — Generally</b>	1132-1136	918-921	1168-1173	1074-1092
<b>VI. Tender Offers — The Williams Act, and Other Federal Regulation</b>	1136-1140	1038-1068	1173-1176	1081-1084
<b>VII. State Anti-Takeover Statutes</b>	1230-1233	1092-1115	76-87	1092-1109
<b>VIII. Hostile Takeovers — Defensive Maneuvers, and the Judicial Response</b>	1140-1230	921-1018	1180-1248	1109-1170
<b>IX. Pros and Cons of Takeovers</b>	NC	1115-1118	1176-1180	NC

## CASEBOOK CORRELATION CHART (continued)

<b>Emanuel's Corporations Outline (by chapter and section heading)</b>	<b>Eisenberg Corporations &amp; Other Bus. Orgs. (8th ed. Unabr., 2000)</b>	<b>Choper, Coffee &amp; Gilson Cases and Materials on Corporations (5th ed. 2000)</b>	<b>Solomon, Schwartz, Bauman &amp; Weiss Corporations — Law and Policy (4th ed. 1998)</b>	<b>Robert Hamilton Corporations, Incl. Partnerships &amp; LLC's (7th ed. 2001)</b>
<b>Ch. 11 — DIVIDENDS AND SHARE REPURCHASES</b>				
<b>I. Dividends — Protection of Creditors</b>	1234-1242	221-229	252-279	424-434
<b>II. Dividends — Protection of Shareholders; Judicial Review of Dividend Policy</b>	1242-1264	209-210	258-279	454-459
<b>III. Stock Repurchases</b>	1267-1284	221-229	257	434-454
<b>Ch. 12 — ISSUANCE OF SECURITIES</b>				
<b>I. State-Law Rules on Share Issuance</b>	1285-1293	221-223	237-252	364-380, 414-424
<b>II. Public Offerings — Introduction</b>	1293-1308	306-308	280-282	390-391
<b>III. Public Offerings — Mechanics</b>	1351-1362	308	283-284	391-395
<b>IV. Public Offerings — Exemptions</b>	1308-1362	308	291-298	395-413
<b>V. Public Offerings — Civil Liabilities</b>	1362-1392	334-342	284-291	391
<b>VI. Public Offerings — State Regulation</b>	1392-1394	310-312, 334-335	298-299	390

# CAPSULE SUMMARY

This Capsule Summary is intended for review at the end of the semester. Reading it is not a substitute for mastering the material in the main outline. Numbers in brackets refer to the pages in the main outline where the topic is discussed.

## CHAPTER 1 INTRODUCTION

### I. CHOOSING A FORM OF ORGANIZATION

- A. **Partnership vs. corporation:** Choosing a form of organization usually comes down to choosing between a *partnership* and a *corporation*. [2]
- B. **Nature of partnerships:** There are two kinds of partnerships: "general" partnerships and "limited" partnerships. [3]
  1. **General partnership:** A "*general*" partnership is any association of two or more people who carry on a business as co-owners. A general partnership can come into existence by operation of law, with no formal papers signed or filed. Any partnership is a "general" one unless the special requirements for limited partnerships (see below) are complied with. [3]
  2. **Limited partnerships:** A "*limited*" partnership can only be created where: (1) there is a *written agreement* among the partners; and (2) a formal document is *filed* with state officials. [3]
    - a. **Two types of partners:** Limited partners have two types of partners: (1) one or more "*general*" partners, who are *each liable* for all the debts of the partnership; and (2) one or more "*limited*" partners, who are *not liable* for the debts of the partnership beyond the amount they have contributed.
- C. **Limited liability:** Corporations and partnerships differ sharply with respect to *limited* liability. [4]
  1. **Corporation:** In the case of a corporation, a shareholder's liability is normally *limited to the amount he has invested*. [4]
  2. **Partnership:** The liability of partners in a partnership depends on whether the partnership is "general" or "limited." [5]
    - a. **General:** In a *general* partnership, *all partners are individually liable for the obligations of the partnership*.
    - b. **Limited:** In a limited partnership, the general partners are personally liable but the limited partners are liable *only up to the amount of their capital contribution*. (But a limited partner will lose this limit on his liability if he *actively participates* in the management of the partnership.)

- c. **Limited Liability Partnership (LLP):** Most states now allow a third type of partnership, the "*limited liability partnership*" or "*LLP*." In an LLP, each partner may participate fully in the business' affairs without thereby becoming liable for the entity's debts. [5]

**D. Management:**

1. **Corporation:** Corporations follow the principle of *centralized* management. The shareholders participate only by electing the board of directors. The board of directors supervises the corporation's affairs, with day-to-day control resting with the "officers" (i.e., high-level executives appointed by the board). [6]
2. **Partnership:** In partnerships, management is usually *not* centralized. In a general partnership, all partners have an equal voice (unless they otherwise agree). In a limited partnership, all general partners have an equal voice unless they otherwise agree, but the limited partners may not participate in management. [6]

- E. **Continuity of existence:** A corporation has "perpetual existence." In contrast, a general partnership *dissolved* by the *death* (or, usually, even the *withdrawal*) of a general partner. A limited partnership is dissolved by the withdrawal or death of a general partner, but not a limited partner. [6]

- F. **Transferability:** Ownership interests in a corporation are readily transferable (the shareholder just sells stock). A partnership interest, by contrast, is not readily transferable (all partners must consent to the admission of a new partner). [7]

**G. Federal income tax:**

1. **Corporations:** The corporation is *taxed as a separate entity*. It files its own tax return showing its profits and losses, and pays its own taxes independently of the tax position of the stockholders. This may lead to "double taxation" of dividends (a corporate-level tax on corporate profits, followed by a shareholder-level tax on the dividend). [8]
2. **Partnership:** Partnerships, by contrast, are *not separately taxable entities*. The partnership files an information return, but the actual tax is paid by *each individual*. Therefore, double taxation is avoided. Also, a partner can use losses from the partnership to shelter from tax certain income from other sources. [9]
3. **Subchapter S corporation:** If the owner/stockholders of a corporation would like to be taxed approximately as if they were partners in a partnership, they can often do this by having their corporation elect to be treated as a Subchapter S corporation. An "S" corporation does not get taxed at the corporate level, unlike a regular corporation; instead, each shareholder pays a tax on his portion of the corporation's profits. [10]

**H. Summary:**

1. **Corporation superior:** The corporate form is superior: (1) where the owners want to limit their liability; (2) where free transferability of interests is important; (3) where centralized management is important (e.g., a large number of owners); and (4) where continuity of existence in the face of withdrawal or death of an owner is important. [11]
2. **Partnership superior:** But the partnership form will be superior where: (1) simplicity and inexpensiveness of creating and operating the enterprise are important; or (2) the tax advantages are significant, such as avoiding double taxation and/or sheltering other income. [11]



- I. **Limited Liability Companies (LLC's):** The fastest-growing form of organization since the 1990s has been the *limited liability company*, or *LLC*. All states have enacted special statutes recognizing and regulating LLC's. The LLC is neither a corporation nor a partnership, though it has aspects of each. Many people think that LLC's incorporate the best features of both corporations and partnerships. [11]
  1. **Advantages vs. standard partnership as to liability:** The biggest advantage of the LLC compared with either a general or limited partnership is that in the LLC, a "member" (analogous to a partner) is liable *only for the amount of his or her capital contribution*, even if the member actively participates in the business.
  2. **Taxed as partnership:** The LLC's biggest advantage compared with a standard "C" corporation is that the LLC's members can elect whether to have the entity treated as a partnership or as a corporation. If they elect partnership treatment, the entity becomes a "*pass-through*" entity, and thus *avoids the double-taxation of dividends* that shareholders of a standard corporation suffer from.

## CHAPTER 2

## THE CORPORATE FORM

## I. WHERE AND HOW TO INCORPORATE

- A. **Delaware vs. headquarter state:** The incorporators must choose between incorporating in their headquarter state, or incorporating somewhere else (probably Delaware). [15]
  1. **Closely held:** For a *closely held* corporation, incorporation should usually take place in the state where the corporation's *principal place of business* is located. [16]
  2. **Publicly held:** But for a *publicly held* corporation, incorporation in Delaware is usually very attractive (because of Delaware's well-defined, predictable, body of law, and its slight pro-management bias.) [16]
- B. **Mechanics of incorporating:**
  1. **Articles of incorporation:** To form a corporation, the incorporators file a document with the Secretary of State. This document is usually called the "*articles of incorporation*" or the "charter." [17]
    - a. **Amending:** The articles can be amended at any time after filing. However, any class of stockholders who would be adversely affected by the amendment must *approve* the amendment by majority vote. See, e.g., MBCA § 10.04.
  2. **Bylaws:** After the corporation has been formed, it adopts *bylaws*. The corporation's bylaws are rules governing the corporation's internal affairs (e.g., date, time and place for annual meeting; number of directors; listing of officers; what constitutes quorum for directors' meetings, etc.). Bylaws are usually not filed with the Secretary of State, and may usually be amended by either the board or the shareholders. [18]

## II. ULTRA VIRES AND CORPORATE POWERS

A. *Ultra vires*:

1. **Classic doctrine:** Traditionally, acts beyond the corporation's articles of incorporation were held to be "*ultra vires*," and were unenforceable against the corporation or by it. (But there were numerous exceptions.) [20]

2. **Modern abolition:** Modern corporate statutes have generally *eliminated* the *ultra vires* doctrine. See, e.g., MBCA § 3.04(a). [21]

B. **Corporate powers today:** Most modern corporations are formed with articles that allow the corporation to take *any lawful action*. [21]

1. **Charitable contribution:** Even if the articles of incorporation are silent on the subject, corporations are generally held to have an implied power to make *reasonable charitable contributions*. See, e.g., MBCA § 3.02(13). [21]

2. **Other:** Similarly, corporations can generally give bonuses, stock options, or other *fringe benefits* to their employees (even retired employees). See, e.g., MBCA § 3.02(12). [22]

### III. PRE-INCORPORATION TRANSACTIONS BY PROMOTERS

A. **Liability of promoter:** A "*promoter*" is one who takes initiative in founding and organizing a corporation. A promoter may occasionally be *liable* for debts he contracts on behalf of the to-be formed corporation. [24]

1. **Promoter aware, other party not:** If the promoter enters into a contract in the corporation's name, and the promoter *knows* that the corporation has not yet been formed (but the other party does *not* know this), the promoter will be *liable* under the contract. See MBCA § 2.04. [25]

a. **Adoption:** But if the corporation is later formed and "*adopts*" the contract, then the promoter may escape liability.

2. **Contract says corporation not formed:** If the contract entered into by the promoter on behalf of the corporation *recites* that the corporation has not yet been formed, the liability of the promoter depends on what the court finds to be the parties' *intent*. [26]

a. **Never formed, or immediately defaults:** If the corporation is *never formed*, or is formed but then immediately *defaults*, the promoter will probably be *liable*.

b. **Formed and then adopts:** But if the corporation is formed, and then shows its *intent to take over* the contract (i.e., "*adopts*" the contract), then the court may find that both parties intended that the promoter be released from liability (a "*novation*").

B. **Liability of corporation:** If the corporation did not exist at the time the promoter signed a contract on its behalf, the corporation will not become liable unless it "*adopts*" the contract. Adoption may be *implied*. (Example: The corporation receives benefits under the contract, without objecting to them. The corporation will be deemed to have implicitly adopted the contract, making it liable and perhaps making the promoter no longer liable.) [27]

C. **Promoter's fiduciary obligation:** During the pre-incorporation period, the promoter has a *fiduciary obligation* to the to-be-formed corporation. He therefore may not pursue his own profit at the corporation's ultimate expense. (Example: The promoter may not sell the corporation property at a grossly inflated price.) [28]

#### IV. DEFECTIVE INCORPORATION

- A. **Common law “de facto” doctrine:** At common law, if a person made a “colorable” attempt to incorporate (e.g., he submitted articles to the Secretary of State, which were rejected), a “de facto” corporation would be found to have been formed. This would be enough to shelter the would-be incorporator from the personal liability that would otherwise result. This is the “*de facto corporation*” doctrine. [30]
1. **Modern view:** But today, most states have *abolished* the de facto doctrine, and expressly impose personal liability on anyone who purports to do business as a corporation while knowing that incorporation has not occurred. See MBCA § 2.04.
- B. **Corporation by estoppel:** The common law also applies the “corporation by *estoppel*” doctrine, whereby a creditor who deals with the business as a corporation, and who agrees to look to the “corporation’s” assets rather than the “shareholders’” assets will be estopped from denying the corporation’s existence. [31]
1. **May survive:** The “corporation by estoppel” doctrine probably survives in some states, as a judge-made doctrine.

#### V. PIERCING THE CORPORATE VEIL

- A. **Generally:** In a few very extreme cases, courts may “*pierce the corporate veil*,” and hold some or all of the shareholders *personally liable* for the corporation’s debts. [34]
- B. **Individual shareholders:** If the corporation’s shares are held by *individuals*, here are some factors that courts look to in deciding whether to pierce the corporate veil: [34]
1. **Tort vs. contract (“voluntary creditor”):** Courts are more likely to pierce the veil in a *tort* case (where the creditor is “*involuntary*”) than in a *contract* case (where the creditor is “voluntary”). [34]
  2. **Fraud:** Veil piercing is more likely where there has been a grievous *fraud* or *wrongdoing* by the shareholders (e.g., the sole shareholder siphons out all profits, leaving the corporation without enough money to pay its claims). [35]
  3. **Inadequate capitalization:** Most important, veil piercing is most likely if the corporation has been *inadequately capitalized*. But most courts do not make inadequate capitalization *alone* enough for veil piercing. [36]
    - a. **Zero capital:** When the shareholder invests *no money whatsoever* in the corporation, courts are especially likely to pierce the veil, and may require less of a showing on the other factors than if the capitalization was inadequate but non-zero.
    - b. **Siphoning:** Capitalization may be inadequate either because there is not enough *initial* capital, or because the corporation’s profits are systematically *siphoned out* as earned. But if capitalization is adequate, and the corporation then has unexpected liabilities, the shareholders’ failure to put in *additional* capital will generally *not* be inadequate capitalization.
  4. **Failure of formalities:** Lastly, the court is more likely to pierce the veil if the shareholders have *failed to follow corporate formalities* in running the business. (Example: Shares are never formally issued, directors’ meetings are not held, shareholders co-mingle personal and company funds.) [39]