

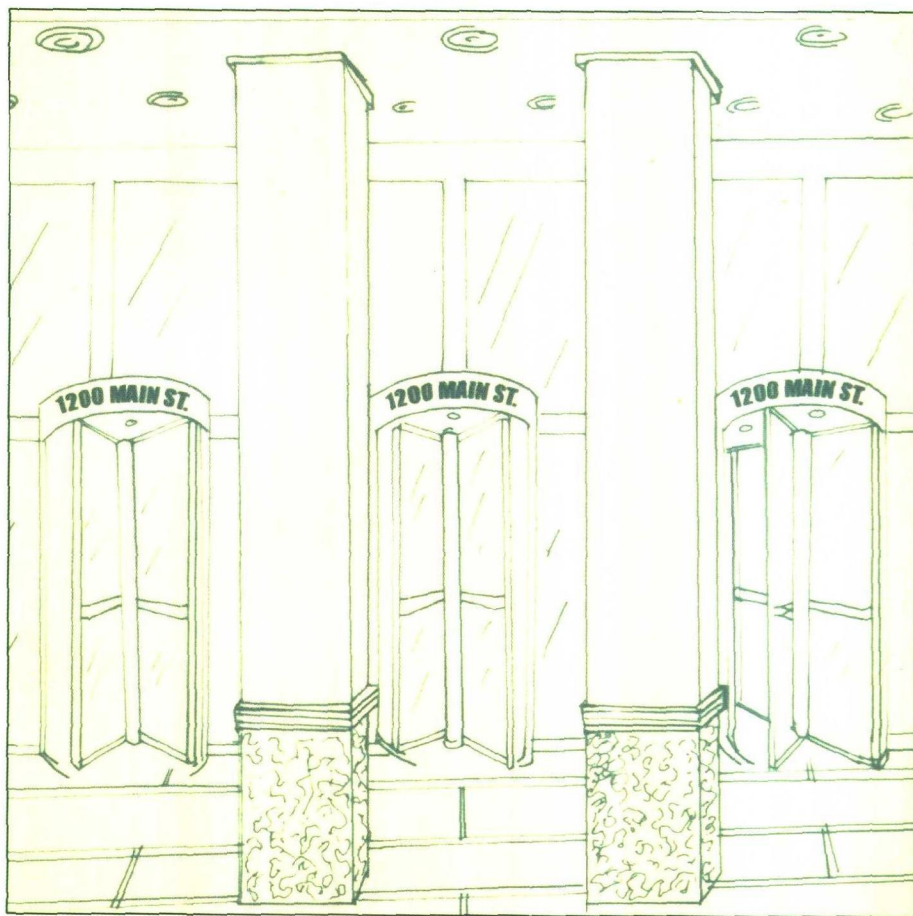
EXAMPLES & EXPLANATIONS

公司法 案例与解析 影印系列 Corporations

第四版

[美] 艾伦·R·帕尔米特/著

Alan R. Palmiter



中信出版社
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公司法 Corporations

案例与解析影印系列

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本丛书是美国哈佛、耶鲁等享誉世界的大学法学院广受欢迎的学习用书，是学习英美法律知识和提高职业技能的极好范本。

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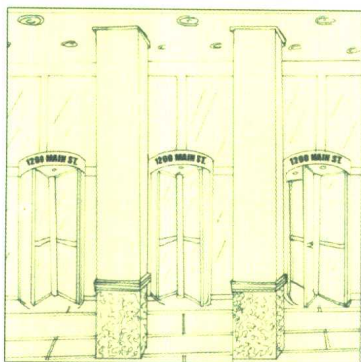
- 由著名的、富有经验的教授提供行之有效的学习方法
- 简明生动的语言阐述美国基本法律制度，是读者准确快捷了解美国法律精髓的有效途径

- 精心设计的案例使理论与实际相结合，锻炼法律思维

- 透彻的讲解评析有助于加深理解，提高多角度分析问题的能力

- 图表、图例直观易懂，浓缩出法律知识的简洁逻辑结构

本书是《公司法》，主要从公司的设立、股东投票权、诚信义务、封闭型公司、对公司债权人的保护、公司变更等方面进行讲授。第四版新增了《示范公司法》对董事的行为标准、评估权的最新修订；《美国证券交易委员会规则》关于内幕交易的新规定等。



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公司法

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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学术研究成果，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。

CORPORATIONS

Examples and Explanations

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To my special counsel – Fabiola, Andrés, and Erica

Preface

For many students corporate law is an uninviting mystery. Notions such as debt/equity ratios, proxy solicitations, stock markets, leveraged buyouts, and staggered boards cause many to freeze. Besides its unfamiliar business setting, corporate law draws from a jumble of topics and analytic techniques. It mixes civil procedure, contracts and agency rules, tort concepts, some constitutional and property principles, and even criminal law. In addition, statutory interpretation combines with case synthesis and regulatory analysis, all flavored by policy debates. Adding to the conceptual miasma, some corporations' case-books are organized according to a stylized corporate life cycle — beginning with incorporation, moving to the corporation's early formative phase, continuing with its ongoing business activities, and ending in its cataclysmic takeover or dissolution.

But corporate law is actually more coherent. An investment vehicle that pools money and labor, the corporation seeks to resolve the conflicts among money contributors (shareholders and creditors) and labor contributors (management). *Corporations: Examples and Explanations* presents you with a full and clear understanding of the legal rules that address the conflicts among corporate participants. The book organizes these legal rules into eight different parts:

- **I— Overview** introduces the history and attributes of the U.S. corporation and describes other noncorporate forms of business organization—such as partnerships, limited partnerships, and limited liability companies.
- **II— Formation of the Corporation** explains the incorporation process, the financial rights in the corporation (characteristics of corporate securities and the relation of debt and equity), and the information rights of investors who buy securities.
- **III— Shareholder Voting Rights** gives an overview of the role of shareholders in corporate governance. It describes the state statutory rules on shareholder voting and judicial protection of the voting process, as well as the federal disclosure and antifraud regime that applies to voting in public corporations.
- **IV— Corporate Fiduciary Duties** summarizes the rules on management accountability. It considers when judges intervene in management decisions and when they defer to business judgment, focusing on specific corporate activities: self-dealing transactions, executive compensation,

Preface

indemnification, corporate opportunities, parent-subsidary dealings. It also considers the procedures by which fiduciary duties are enforced.

- **V—Shareholder Liquidity Rights** describes the shareholders' right to freely transfer their shares. It considers protections meant to facilitate this right (such as disclosure in securities trading markets) and exceptions to the rule of free transferability (such as insider trading restrictions).
- **VI—Closely Held Corporations** discusses the dilemma of close corporations, which lack a market for their shares. It describes the special contractual arrangements, and sometimes judicial intervention, that substitute for stock markets.
- **VII—Protections for Corporate Creditors** explains the rule of limited liability and its allocation of risks between corporate insiders and outside creditors. It describes how limited liability arises during the incorporation process, when the corporation can be bound in dealings with outsiders, and how insiders are constrained in corporate dealings that affect outside creditors.
- **VIII—Corporate Fundamental Changes** considers how the various corporate rights and duties can be changed. It describes (and illustrates) the mechanics of amendments to the articles, corporate restructurings, mergers, sales of assets, and tender offers, as well as the various protections for shareholders. It summarizes federal regulation of takeovers and state regulation of takeover defenses.

As you can see, *Corporations: Examples and Explanations* is meant to illuminate the essential building blocks of the corporation — that is, the basic rights and duties of corporate constituents. The book strives to be accessible to students who possess no background in business.

This new edition covers recent changes in the Model Business Corporation Act — revisions to director standards of conduct, approval of fundamental transactions, and appraisal rights. It also describes new SEC rules on insider trading, including Regulation FD, and the many reforms introduced by the recent Sarbanes-Oxley Act.

The book gives you an opportunity to probe and test your understanding of corporate law concepts. The textual discussion provides a framework for your understanding, and the follow-up examples and explanations reinforce and illuminate the text. You will find that reading the relevant chapter and composing answers to the examples, before comparing them to mine, will go a long way in helping you prepare for class, the exam, and beyond.

Alan R. Palmiter
January 2003

Acknowledgments

Thank you to the many students whose curiosity and insights inspired much of this book. Your observations about the course have helped me to organize the subject, your comments in class to focus my coverage, and your questions to frame my own.

I owe a special thanks to Hilary Wilcox ('03), whose research and editorial suggestions on this fourth edition were invaluable.

Finally, I thank the many professors who have suggested this book to their students, and for their many helpful comments and kind words of encouragement.

Special Notice

To reduce the distraction of citations, this book departs from standard citation form:

1. **Dates.** References to statutory sources and SEC rules are usually undated. All such references are to compilations as of 2002, unless the book gives a different date.

2. **State statutes.** The book abbreviates the citations to corporation statutes:

MBCA §8.50	Model Business Corporation Act, Section 8.50 (as approved in 1984, with revisions through 2002)
Cal. Corp. §317	California Corporations Code, Section 317
Del. GCL §145	Delaware General Corporation Law, Section 145
N.Y. BCL §721	New York Business Corporation Law, Section 721

The American Law Institute's "Principles of Corporate Governance: Analysis and Recommendations" (as approved in 1993) is cited as "ALI Principles."

3. **Case citations.** For state cases, the book cites only to the West regional reporters. An unadorned abbreviation of the state's name means the decision was by the state's highest court. For example,

"493 A.2d 946 (Del. 1985)" cites to a decision of the Delaware Supreme Court,

"316 A.2d 599 (Del. Ch. 1974)" cites to a decision of the Delaware Chancery Court.

The book usually does not indicate subsequent case histories, such as *certiorari denied* or *remanded on other grounds*. For cases decided by the U.S. Supreme Court, the book cites only to the "U.S." reports.

4. **Federal securities law.** The book abbreviates references to the major federal securities acts by giving the section number of the act, but not the U.S. Code citation:

Securities Act of 1933, compiled at 15 U.S.C. §77a et seq.,

Securities Exchange Act of 1934, compiled at 15 U.S.C. §78a et seq.

Special Notice

For example, section 10 of the Securities Exchange Act of 1934 is cited as “Exchange Act § 10,” without a cross-citation to 15 U.S.C. § 78j.

Likewise, the references to rules of the Securities and Exchange Commission are abbreviated by giving the rule number, but not the Code of Federal Regulations citation.

Rules promulgated under the Securities Act can be found at 17 C.F.R. §§ 230.____.

Rules promulgated under the Exchange Act can be found at 17 C.F.R. §§ 240.____.

For example, Rule 10b-5 (the fifth rule promulgated pursuant to Exchange Act § 10(b)) can be found at 17 C.F.R. § 240.10b-5.

This book went to press in January 2003. Corporate law, however, continues to change. To keep up with these changes, I plan to post updates to this book on an Internet web page that may be accessed from the Wake Forest School of Law’s web site or directly at —

<http://www.law.wfu.edu/faculty/palmiter/corp-e&c.htm>

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