

Law School Survival Guide

Business Organizations
Outlines and Case Summaries

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BUSINESS ORGANIZATIONS

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**BUSINESS ORGANIZATIONS:
*Outlines and Case Studies™***

Law School Survival Guides



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ABBREVIATED CONTENTS

Part I: Introduction and General Principles

1	Introduction	11
2	Agency.....	15
3	Accounting and Finance	23

Part II: The Sole proprietorship and Partnerships

4	Sole Proprietorships	31
5	Partnerships.....	35

Part III: The Corporation

6	Introduction to the Corporation	47
7	Obligations of Directors and Officers.....	53
8	Corporate Accountability	63
9	Problems of Control	71
10	Mergers and Acquisitions	81

Part IV: The Limited Liability Company

11	Limited Liability Companies	89
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Appendices

TABLE OF CONTENTS

Part I: Introduction and General Principles

1	Introduction	11
1.1	The Business Organization: an Overview	11
1.2	Factors to Consider When Choosing a Business Entity	11
2	Agency	15
2.1	Defining Agency	15
2.2	Liability of Principals to Third Parties in Tort	15
2.3	Liability of Principals to Third Parties in Contract	18
2.4	Fiduciary Obligations of Agents	21
3	Accounting and Finance	23
3.1	Principles of Accounting	23
3.2	Principles of Finance	24

Part II: The Sole proprietorship and Partnerships

4	Sole Proprietorships	31
4.1	Characteristics	31
4.2	Credit, Financing and Unlimited Liability	31
4.3	Employees, Relationships and Duties	32
5	Partnerships	35
5.1	Characteristics	35
5.2	Partnership Variations	35
5.3	The Partners	37
5.4	Binding the Partnership	39
5.5	Fiduciary Obligations	40
5.6	Partnership Dissolution	41

Part III: The Corporation

6	Introduction to the Corporation	47
6.1	Characteristics	47
6.2	The Internal Affairs Rule	49
6.3	The Scope of Corporate Purpose	49
6.4	Corporate Modalities	50
7	Obligations of Directors and Officers	53
7.1	Liability and the Business Judgment Rule	53

Business Organizations

7.2	Fiduciary Duties Generally	55
7.3	Duty of Loyalty	56
7.4	Insider Information	58
7.5	Piercing the Corporate Veil.....	60
7.6	Indemnification and Insurance.....	61
8	Corporate Accountability	63
8.1	The Appraisal Right	63
8.2	Takeover Bids.....	63
8.3	Securities Monitoring: Disclosure and Fairness	63
8.4	Shareholder Derivative Litigation.....	68
9	Problems of Control	71
9.1	The Special Context of Closely Held Corporations	71
9.2	Control in Non-Closely Held Corporations	74
10	Mergers and Acquisitions	81
10.1	Introduction	81
10.2	Distinction between Mergers and Acquisitions.....	81
10.3	Classification of Mergers and Acquisitions	81
10.4	<i>De Facto</i> Merger Doctrines	83
10.5	Freeze-Out Mergers	84

Part IV: The Limited Liability Company

11	Limited Liability Companies	89
11.1	Characteristics	89
11.2	Similarity to the S Corporation	89
11.3	Formation.....	89
11.4	The Operating Agreement	90
11.5	Piercing the “LLC Veil”.....	90
11.6	Fiduciary Duties	90
11.7	Dissolution	91

Appendices

ABBREVIATIONS

BVI company	British Virgin Islands company
Exchange Act.....	Securities Exchange Act of 1934
IPO.....	Initial public offering
IRC.....	Internal Revenue Code
L Corp	Used in the examples presented to represent a fictitious large corporation
Lat.....	Latin
LLC	Limited Liability Company
LLP.....	Limited Liability Partnership
LP.....	Limited Partnership
MBCA	Model Business Corporation Act
NASD.....	National Association of Securities Dealers
NASDAQ.....	National Association of Securities Dealers Automated Quotations
NYSE	New York Stock Exchange
RLA.....	Restatement of the Law (Second) of Agency
RUPA.....	Revised Uniform Partnership Act (of 1994 or 1997)
S Corp ¹	Used in the examples presented to represent a fictitious small corporation
S. Ct.....	Supreme Court
SEC.....	Securities and Exchange Commission
Securities Act.....	The Securities Act of 1933
SLC.....	Special Litigation Committee
ULLCA	Uniform Limited Liability Company Act
UPA.....	Uniform Partnership Act of 1914
USC	United States Code

¹ The abbreviation “S Corp” should not be confused with the “S corporation,” a type of tax-exempt corporation. To avoid confusion, “S corporation” will always be fully written out.

Part I: Introduction and General Principles

1 Introduction

1.1 The Business Organization: an Overview

1.1.1 Definition

- (a) A business organization is a legal entity through which investors and entrepreneurs provide goods and services and engage in trade and other wealth-generating activities. Traditionally, the menu of American business organizations was comprised of the general partnership and the corporation. Other entities, such as limited liability companies and limited liability partnerships, are in many ways hybrids or statutorily-created variations of partnerships or corporations.
- (b) Although a company may appear to be one business association, it may in reality prove to be a multi-tiered conglomerate comprised of many corporations, partnerships and other business entities. This is in fact the case of many large corporations and other organizations. In order to circumvent limitations as to the kinds of activities they may undertake, many such companies are organized with very general corporate charters whose language is articulated such that they may engage in “any lawful activity,” thus allowing them to serve as umbrella organizations of a large and diverse set of subsidiary companies.

1.1.2 The Variety of Business Organizations

- (a) Traditionally, there has been a tension between entrepreneurs, who have long sought to expand the menu of business forms available and governments, which have resisted such efforts by limiting the available menu. In the United States, the entrepreneur nonetheless has a wide variety of business organizations from which to choose, from small, closely held firms to large, public corporations.
- (b) The management practices of business organizations can be as diverse as the forms that business organizations can take. While in small firms, owners and managers are generally the same group of people, in large organizations, a large number of generally passive stockholders which is distinct from the managers usually owns the company.² Thus, in small firms, where a small number of managers own the business, decisions are usually made by consensus. In large organizations, in contrast, there may be tens of thousands of shareholders, thus rendering decisions by consensus impractical. In these organizations, policy is generally developed through majority voting.
- (c) As a final point of contrast, whereas small firms are usually run informally and without a hierarchy, large organizations are run under a formal set of rules establishing tiers of control and duties among shareholders, directors and officers. The relationships among these actors will be explored later on in the chapters that follow.

1.2 Factors to Consider When Choosing a Business Entity

1.2.1 General Overview

- (a) Any individuals who form a business must agree on such fundamental issues as control, ownership and dissolution of the business. When the individuals choose a specific entity through which to conduct the activity, many of these questions are automatically determined through the

² The managers may, however, as part of their compensation, own some level of stock in the company.

Business Organizations

respective entity's legally-prescribed default settings. The individuals forming the company may then contract around or customize the default settings in order to suit their business needs, as long as the new rules conform to public policy considerations. A clause whose content violates such policy considerations (*e.g.*, one denying the right of third parties to make claims against the reckless conduct of the owners) would be held null and void in the relevant jurisdiction and the default rules would spring into application.

1.2.2 Factors

Before choosing a business entity, the goals of the business owners should be assessed in light of the following factors:

(a) Tax Treatment

The form that a business association takes will have a significant impact on the tax treatment that it receives. The law taxes some business organizations, exempts others fully and offers a gray area for many others in between. Some associations that fall into this gray area include those that are exempted from taxes up until they reach a certain size or profit margin. When they reach such dimensions, they are taxed as ordinary incorporated entities. When this occurs, double taxation applies, since, in addition to the business organization, the dividends of the owners are also taxed. For example, if the business owners form a C corporation, taxation will apply to both the shareholders' dividends as well as to the corporation's profits. If, however, the owners opt for an S corporation, pass-through taxation will occur, with taxation applied only to the shareholders' dividends (the corporation itself will not be recognized under the law as a legal person and thus will not be subject to taxation). In addition to S corporations, limited liability companies and partnerships are subject to pass-through taxation. All of these organizations are "invisible" under the tax code, which taxes only the salaries or dividends of the respective partners or shareholders.

(b) Owners' Liability

The way that a business is organized affects the extent to which its owners could be held liable for the business's debts. Some organizations, such as the corporation, shield their managers from company debt whenever the managers exercise business judgment and reasonable investigation. In other organizations, the owners, managers or partners are held personally, jointly and severally liable for the debts of the enterprise, regardless of the extent to which business judgment was exercised. The incorporation of a business thus offers entrepreneurs a valuable protection that permits them to undertake activities that might otherwise prove to be too risky.

(c) Governance

Governance deals with the question of whom is given the right to participate in the management and decision making of a business. The rules of governance are substantially determined by the form that the owners of a company choose and these rules vary substantially among partnerships and corporations, with limited liability companies offering a regime that blends elements of both the corporate and partnership model. Governance may also influence whether the owners are directly responsible for the governance of the organization or whether they govern through others that they have selected. For example, in public corporations, the owners govern through their elected directors, who in turn select the corporation's officers (the president, treasurer, etc.). In contrast, the owners of a closely held corporation are directly responsible for the company's governance.

(d) Raising Capital

Yet another factor that the choice of entity affects is the extent of options available for entrepreneurs to raise funds for their business. Some organizations require business owners to raise capital directly with their own funds or through loans, while others permit them to raise funds indirectly by, for example, issuing shares of stock. The amount of funds needed to start a business may thus influence the choice of entity. For example, when modest start-up capital is needed, the owners may opt for a limited liability company, but when they must raise more substantial sums, they may form a corporation, which allows for outside investors to purchase company equity in the form of stock.

(e) Exit Strategies

Finally, business owners should consider the available exit strategies of their chosen business entity. In some organizations, such as the S corporation, the exit strategy is relatively cumbersome, since there is no ready market to sell shares of equity. In others, such as the public corporation, exiting is far simpler and consists of selling shares of stock on the public market.