Weekly Information Sheet 01

THE NATURE OF CORPORATIONS

What is a "Corporation"

A corporation is a legal entity (an artificial person), separate and distinct from the legal personalities of those who own and manage the corporation.

A creature of law, it's existence and attributes arise from state-enabling statutes, which give business participants significant freedom to choose their own customized relationships.

In New York, as elsewhere, corporate law is mostly statutory, and most of the statutory law relating to general business corporations (i.e., corporations for profit) is contained in the New York Business Corporation Law ("BCL").

The Rise of the Corporation:

Founded in Rome: The modern corporation is actually of ancient origin, and like most things created from Rome, it arose as a practical solution to fill a need.

Based in Roman Law: The first corporation arose when Roman commerce and trade grew to a sophisticated level, and traders and merchants needed a business organization that could last beyond a person's natural lifetime, and have its own identity before the courts.

An Artificial, Separate, Person Under the Law: This Roman legal invention was treated as if it had a distinct personality apart from that of its owners or members, continued to exist beyond their lifetime, and was allowed to bring an action in law before Roman courts, as a distinct entity rather than under the name of any individual.

What's in A Name: This Roman legal invention was termed "corporation", meaning a business entity which is viewed as a separate and independent legal person under the law. It is a derivation of the Latin term "corpus" meaning "body".

English Law:

England Evolves Roman Law: These Roman principles were resurrected in England, a former roman colony, as early as the 12th century.

Paralleled the Common Law: The corporation was first brought into the Anglo-American Legal System by Henry the Second. His innovations also developed much of we know today as the English Common Law.

More than Just Business: King Henry adapted the concept of the Roman corporation to meet his needs of governmental organization and public infrastructure development. He used the sovereign authority to create fictitious legal persons through the granting of Royal charters.

Application to Business: Later rulers, then expanded this idea of the corporation by employing the corporate mechanism to establish trade guilds. These organizations would establish by-laws to govern all persons engaged in a specified field (such as weavers, tailors, goldsmiths, and haberdashers).

A British Staple of Law: By the time of the founding of Colonial America, the corporation attained a status in the social constitution of Great Britain and its colonies.

Expanded to Meet Economic Needs: As the needs of English society changed, the corporation was further developed. To meet these needs, British royal sovereigns began to grant charters for such purposes as constructing public works projects such as churches, hospitals, universities, waterways and canals.

A Means to Colonize: By the start of the 17th century, as England arose to the stature of a world superpower, Queen Elizabeth decided to deploy the corporation format to extend national influence into the area of colonization. Chartering such entities as the East India Trading Company, the Hudson's Bay Company, the Virginia Company and the Massachusetts Bay Company, England became the British Empire, using corporate powers to develop, settle and institute commercial operations all across the globe.

The Rise of the Corporation Continued:

English Law Continued:

Corporations as a Tool of Government and Business: These corporations were thus developed into a tool, granted by a king, to extend his rule and power, using the initiative of private individuals, to accomplish certain public purposes.

The Rise of Limited Liability: Most importantly, starting with the joint stock corporation, such charters could also provide, as aforementioned, for an extension of sovereign immunity, so as to limit the liability and financial exposure of corporate investors to only the amount of their investment.

A Powerful Mechanism: Accordingly, perhaps the most important factor, which has led to the dominance of the corporation as a business organization entity, is the development of this limited liability attribute. Moreover, at the time of its first inclusion in corporate charters, the concept of limiting one's liability to only the amount of their capital investment was not otherwise anywhere else recognized at common law.

Colonial America:

British Law Operated in the Colonies: By the time of the founding of Colonial America, the corporation was a well settled institution within the English Common Law. Under such, it had attained extensive acceptance and application in the domain of business. As a result, it is therefore not surprising that from a very early date, the corporation played a prominent role in American life.

Most Businesses Were Not Corporations: Despite the myriad of business organizations available under English Law, the business landscape of Colonial America contained only a handful of Corporation and was dominated by sole proprietorship businesses.

A Small But Growing Economy: As the American Colonies began to grow and prosper, they began to move toward independence from England. The pull of freedom was very strong. From farmers to merchants, single persons owned and worked their own businesses. Their sense of self reliance and independence was very strong. Although most people still were engaged in small businesses, with the growth of the economy, their new sense of an independent future, many began to envision a day when a growing number of businesses, would grow large enough to need a corporate charter.

Another Reason for Rebellion: In all of America, however, there were only 335 corporate charters granted by the British sovereign. This unwillingness to treat American businesses as equal their English Counterparts, only underscored America's desire for independence. They wanted freedom, including freedom to pursue their economic dreams in the manner they wished.

Competitive Advantage for Corporations: Those businesses, that did maintain the corporate form had a competitive advantage. They operated with the formidable strength and capital of limited liability, and the purpose and power of the state.

Another Unfair Power of the Crown: With the dawn of the American Revolution, all edicts of the Crown, including the corporation, became circumspect. As the denunciation of the king, and "his long train of abuses", became a rallying cry for American independence, this unfettered exercise of the state's authority by the British King, selectively granting corporate charters to British businesses, while denying them to Americans, was seen by the founders as another impediment against a truly free society.

British Parliament Began Granting Charters Too: Concurrently, at this same time the British Parliament also began to more frequently deploy its own legislative power to create corporations through the issuing of charters by statute. They were, however equally stingy in granting them to American concerns.

State Legislatures Began to Grant Corporate Charters: After the Revolution, corporate charters throughout America, began to be granted to individuals by special acts of their state legislature.

New York's General Incorporation Policy:

A New Law: In 1846 a modern method of forming business corporations was born in New York State:

> ***"Corporations may be formed under general laws; but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed."*** **(Art X, Section1).**

Through this provision, New York State established the policy of allowing businesses to incorporate by filing, pursuant to qualified rules established by statute. (known as the Business Corporation Law).

As a result, businesses no longer needed a special act of the state legislature to obtain corporate personhood through a charter granted by an individual dedicated law.

The Rise of the Corporation Continued:

New York's General Incorporation Policy Continued:

Effect of the Constitutional Amendment: This constitutional amendment, and the enabling statutes that followed, had the effect of transferring the monitoring of corporations from the legislature (through the crafting of a special laws awarding a charter) to the courts (through the administration of justice for statutory compliance).

Exponential Increase In Corporations: The amendment further resulted in an exponential increase in corporate organizations and provided the impetus to make New York State the commercial capital of the nation.

As Corporations Grow, Business Grows: As a consequence, by the time of the civil war, just fifteen years later, New York State developed a gross domestic product index over four times that of all the confederate states combined.

Corporate Personhood: In addition to the provisions outlined in Article 10, Section 1, the 1846 State Constitutional Convention also provided for a direct expression of corporate personhood. This section 4 of Article X reads as follows:

"The term corporations as used in this section and in sections 1 (the power to make general incorporation statutes), 2 (the power to hold incorporators liable for dues of the corporation) and 3 (limiting the legislature's ability to make special charters just for banking purposes) of this article shall be construed to include all associations and joint-stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships. And all corporations shall have the right to sue and shall be subject to be sued in all courts in like cases as natural persons."

Present Status of Corporations in New York: Almost immediately, upon the ratification of these amendments, enabling corporation statutes also began to evolve. From that time to the present we have thereupon seen the enactment of such controlling corporation laws as:

- ***the Business Corporation Law,***
- ***the Benevolent Orders Law;***
- ***the Cooperative Corporations Law;***
- ***the Limited Liability Companies Law;***
- ***the Not for Profit Corporations Law;***
- ***the Religious Corporations Law; and***
- ***the Transportation Corporation Law.***

Definition of a "Corporation"

"A corporation is an artificial person or legal entity created by or under the authority of the laws of the state or nation, which has an existence distinct from that of its associated individuals, and has a duration that is either perpetual or for a limited term of years, and which acts as a unit in matters relating to the common purpose of the association and within the scope of the powers conferred upon it by law."

Types of Corporations:

- *Private Corporations*
  - ***Business Corporations***
    - ***Foreign / Domestic***
    - ***Close / Publically Traded***
  - ***Professional Corporations***
  - ***Subchapter S Corporations***
- *Public Corporations*
  - ***Public Benefit Corporations***
    - ***Public Authorities***
  - ***Municipalities***
- *Not- for – Profit Corporations*

Types of Corporations Continued:

Private Corporations: A private corporation is a corporation organized under state law for purposes of finance, industry, and commerce. Often called "public" in business circles, when their stock is sold, due to the fact that such stock is offered for sale to the general public. They can be ***foreign corporations*** (meaning they are formed and chartered outside of the state), ***domestic corporations*** (meaning they are formed and chartered inside the state), ***publically traded corporations*** (meaning any person over the age of 21 may purchase their stock), or ***close corporations*** (meaning only their stock is not publically traded and that only select persons may purchase their shares, such as family members, employees or members of a certain class – including people with the same characteristics or locations or hobbies or vocations).

Business Corporations: are corporations organized under the New York State Business Corporation Law, to operate a business for profit.

Professional Corporations: are corporations where one or more individuals, duly authorized by law to render the same professional service within the state, may organize, or cause to be organized, a professional service corporation for pecuniary profit.

Public Benefit Corporations: are corporations (often called public authorities) that are chartered by an act of the State Legislature or Congress, to perform the work of the chartering entity for the benefit of the public.

Municipal Corporations: are Municipalities that have been formed by corporate charter. Some were chartered by the state government, but many were chartered before the formation of the United States, pursuant to a charter granted by a king. The City of Albany, and the City of New York, were both formed by Royal Charter in 1686.

Not-for-Profit Corporations: are a Corporation formed pursuant to the New York State Not-for-Profit Corporation Law, exclusively for an authorized purpose (such as civic, charitable, educational, scientific, religious, or other non-business purpose and not for pecuniary profit or financial gain.

Elements of Corporation

Principal Characteristics:

In general, corporations have the following principal characteristics:

Limited Liability: Because a corporation is a separate legal entity, its debts and obligations are treated as being distinctly its own; its shareholders and managers are ordinarily not liable for corporate indebtedness. One exception is the liability of the 10 largest shareholders of non-publicly traded corporations for the wages of corporate employees. [BCL §630]

Entity Powers: Since the time of their establishment under Roman Law, corporations have been held to be an Artificial Person under the Law. This Corporate "Personhood" means that the corporation is viewed as separate entity, a corporation can contract in its own name, sue or be sued, own or convey property, and be held criminally liable for crimes that it commits. (BCL §202]

Centralized Management: Control of a corporation is centralized in a board of directors elected by shareholders. In general, the shareholders have only extremely limited power to make management decisions (except insofar as they may elect and remove directors).

Continuity of Existence: Unless duration is specifically limited in the certificate of incorporation, a corporation's duration is "perpetual"; i.e., it continues until dissolved, merged. or consolidated in accordance with the BCL. The death, withdrawal, bankruptcy, or incapacity of any of its shareholders or managers has no effect on the corporation's existence. [BCL §202(a)(l)]

Free Transferability of Interests: The interest of the corporation's owners is divided into shares, and these shares may be freely transferred; that is, another person may be fully substituted in the place of the transferor as the holder of ownership interests (shares) in the corporation.

Statutory Sources of Authority: A corporation is a creature of statute; it and its managers and agents have only such authority to act as is conferred by or pursuant to statutes (principally the BCL), the case law (to a lesser extent), or legally permitted provisions of the certificate of incorporation or bylaws.

Constitutional Status: A corporation is an "artificial person" under the law. Accordingly, it is a "person" entitled to due process and equal protection of the law under the 5th and 14th Amendments. It has also been held to have similar civil rights afforded to people, such as protections under the 1st Amendment. But Courts have also held that corporations are not a "citizen" referred to by the Privileges and Immunities Clause of Article IV or the Fourteenth Amendment (meaning states can discriminate against out of state corporations), and that it holds no right against self incrimination under the 5th Amendment.

Comparison With Other Forms of Business

Comparison with Partnership:
A partnership is not a separate entity distinct from its owners, the partners. Each partner is jointly and severally liable for the debts of the partnership. (NYPL §26). Each partner has a voice in management unless the partners all agree to the contrary. The existence of the partnership cannot be perpetual, and the ownership interests are not freely transferable. Its statutory authority in New York is the Partnership Law.

Comparison with Limited Liability Company (LLC): A limited liability company in many ways is similar to a cross between a partnership and a corporation. Its owners, known as members, do enjoy limited liability, but it is not centrally managed as the members, like partners, provide the management of the company. Formed by means of an articles of organization, and managed in accordance with an operating agreement signed by all members, the LLC is a much less powerful, more streamlined, and more affordable to operate a small business with limited liability. Its statutory authority in New York is the Limited Liability Company Law.

Comparison with Sole Proprietorships: Sole proprietorships have no statutory requirements for formation, ownership or operation. There is no limited liability, and financial protections must be procured by means of the purchase of insurance. The owner is the sole manager, and all profits and all losses inure to their benefit or detriment.

Powers of a Corporation:

Transfer Property: This includes the power to transfer or mortgage all or any part of the corporation's assets. [BCL §202 (a)(5)];

Lend Money: A corporation has the power to lend money, invest its funds. and to take collateral therefor in connection with a business operation other than banking. Unless it is a banking corporation, it has no banking powers. [BCL §202 (a)(8)];

Buy and Sell Securities: A corporation has the power to acquire, hold, vote, and dispose of bonds, shares. and other securities of any other issuer (regardless of the issuer's business). [BCL §202 (a)(6)];

Contract and Borrow: A corporation has the power to make contracts, to borrow money, to issue notes, bonds and other obligations, and to give mortgages of its property as security. [BCL §202 (a)(7)];
Compensate Employees: A corporation has the power to fix compensation of employees. officers. and directors, and to pay pensions and establish retirement, incentive. and benefit plans and trusts for its employees, officers, and/or directors (including pension, profit sharing, share purchase. options, and bonus plans). [BCL §202 (a)(10) and (13)];

Participate in Other Ventures: A corporation also has the power to be a (i) promoter, (ii) partner, (iii) associate, or (iv) manager of other business enterprises or ventures. Also a New York corporation may also act as an incorporator of foreign corporations if permitted by the jurisdiction of incorporation. [BCL §202 (a) (15)];

Major Residuary Power: In addition to other specified powers, corporations may further exercise all powers that are necessary and convenient to effect any or all purposes for which the corporation is formed. [BCL §202(16)].

Contributions: The Business Corporation Law further authorizes corporations to make the following contributions:

> **Charitable Contributions:** A corporation may make donations, irrespective of corporate benefit, for the public welfare or for charitable, educational, scientific, civic or similar purposes, subject to a certificate of incorporation. [BCL §202 (a)(12)];
>
> **Political Contributions:** A corporation has the power to political contributions subject to campaign finance limits under federal and State Election Law. Federal law prohibits direct contributions to candidates from corporations and New York State Election Law (section 14-116) limits corporate contributions to a total of $5000 for any calendar year;

Guarantees: The Business Corporation Law additionally authorizes corporations to give guarantees in furtherance of corporate purposes [BCL §202 (a)(7)], and also give a guarantee not in furtherance of corporate business when authorized by a vote of two-thirds of the shares entitled to vote [BCL §908];

Practice of Law: An ordinary business corporation may not engage in the practice of law.

> **Note:** A professional corporation consisting of attorneys can engage in the practice of law [BCL – Article 15], as well as a court approved charitable organization helping indigents pursue civil remedies [N.Y. Jud. Law §495].

Indemnification of Directors and Officers: The Business Corporation Law also authorizes corporations to indemnify directors and officers, but the extent to which a corporation may (and must) indemnify its directors and officers for litigation related expenses is strictly controlled by law.

Acquisition of Its Own Shares: The Business Corporation Law further authorizes corporations to acquire, hold and dispose of (but not vote) its own shares, subject to certain limitations.

Weekly Information Sheet 02

CORPORATE FORMATION

Defined

"Corporation" Defined

Black's Law Dictionary defines a "Corporation" as

"An artificial person or legal entity created by or under the authority of the laws of the state or nation, which has an existence distinct from that of its associated individuals, and has a duration that is either perpetual or for a limited term of years, and which acts as a unit in matters relating to the common purpose of the association and within the scope of the powers conferred upon it by law."

Meaning

Legal Entity of to Itself: An Artificial Person Under the Law

A corporation is a legal entity (an artificial person) created in accordance with statutes.

The corporate entity is separate and distinct from the legal personalities of those who own and manage the corporation.

In New York, as elsewhere, corporate law is mostly statutory, and most of the statutory law relating to general business corporations *(i.e.,* corporations for profit) is contained in the New York Business Corporation Law ("BCL").

Principal Characteristics

In general, corporations have the following characteristics:

- **Limited Liability**
- **Entity Powers (Corporate Personhood)**
- **Centralized Management**
- **Continuity of Existence**
- **Free Transferability of Interests**
- **Statutory Sources of Authority**
- **Constitutional Status**

Corporation Attributes and Activities

• Business Corporations

Under New York Law [Section 201 of the Business Corporation Law], a Business Corporation is:

- A private corporation under the law;
- A corporation that is established to conduct a business for profit; and
- Limited in the liability of its shareholders.

• Pre-incorporation Activities

Pre-incorporation activities of promoters, such as those activities necessary to establish the corporation, or the business in which it will engage, can be ratified by the adoption of such by the board of directors, after the corporation is established.

• Formation of Corporations

Pursuant to a general incorporation acts (such as the provisions of the Business Corporation Law) incorporation of a new corporate entity can be accomplished by:

- **Having incorporators (natural people over 18) prepare a certificate of incorporation which conforms to all state laws;**
- **Filing the certificate of incorporation with the office of the secretary of state; and**
- **Paying all necessary state incorporation fees**

• Corporate Ownership

An ownership interest in a corporation is represented by shares of stock in the Corporation. Voting shares allow the shareholder to elect members of the board of directors of the corporation and control certain decisions of corporation policy.

• Limitation of Investment

Financial Investments in a corporation are made by purchasing shares of stock in the corporation.

The monies used to purchase the shares of stock, inherently limit the exposure of the investor, and the shares so purchased give investors certain rights with respect to the corporation

Corporate Formation

• In General

A corporation is formed by compliance with the formalities prescribed in the New York State Business Corporation Law (BCL).
The creation of corporations by special act of the legislature is prohibited except for municipal purposes or for cases where, in the judgment of the legislature, the corporation's objectives cannot be attained under the general laws. [See N.Y. Const., art. 10, §1].

• Rules for Corporate Formations

The rules that govern a corporation come from the following sources:

- **States Constitutions**
- **State Statutes**
- **Articles of Incorporation**

Corporate Formation

• *STEPS AND ENTITIES INVOLVED IN CORPORATE FORMATION:*

Preliminary Incorporation Activities

- **Preincorporation**
- **Promoters**
- **Subscriptions**

Legal Process of Incorporation

- **Incorporators**
- **Articles (Certificates) of Incorporation**
- **Office of the Secretary of State**
- **Filing**

Post Incorporation Requirements

- **Organizational Meeting**
- **Issuance of Shares**
- **Election of Board of Directors**
- **Appointment of Corporate Officers**
- **Adoption of Corporate Bylaws**

• Promoters

Definition: As used by the courts, the term "promoter" has been defined as:
"A fiduciary who provides the organizational initiative for the founding of a business enterprise, and who sets in motion all that needs to be done to form the corporation that will conduct the business enterprise"

It is not defined in the business corporation law, and is not a term of art, but rather a term of Business.

Role of Promoters: *The role of a promoter includes:*

- ***Working on a plan to build, organize and bring about a new business enterprise;***
- ***Bringing together persons interested in the new enterprise;***
- ***Preparing the prospectus, advertising and documentation promoting the new company;***
- ***Aiding in the procurement of subscriptions for shares in the future corporation; and***
- ***Ending their role and liabilities upon the functioning of the new corporation.***

Generally: Promoters are persons who provide the organizational initiative for the founding of a business and for the formation of a corporation (or other form) to carry on the business.

What They Do: Promoters sell subscriptions for the purchase of stock in the proposed corporation, court prospective investors, and perform other organizational details that the corporation needs in its pre-incorporation existence.

They Have a Fiduciary Duty: Promoters have certain fiduciary duties aimed at protecting (indirectly) the "outsiders" who invest. Promoters may be, but need not be, the "incorporators."

Corporate Formation Continued

• Promoters Continued

Duties of Promoters: The duties of a promoter flow from their position as fiduciary. Accordingly, they have wide powers to organize the formation of a corporation. Although they are not an agent (since the corporation has yet to come into existence) their legal relationship as a fiduciary with the proposed corporation they promote, and as to those persons whom they induce to become shareholders, is pronounced and serious.

Liability of Promoters: Promoters are personally liable for contracts made on behalf of the corporation before its existence. The corporation is not liable on these contracts unless and until it adopts them through ratification after it comes into existence. They are also liable for any untrue statements on a prospectus, for fraud in promoting the corporation, for misapplication or wrongful retention of corporate property, for misfeasance or breach of trust in representing the corporation to third parties.

• Subscriptions

One of the most important roles of a promoter is the sale of stock subscriptions.

Defined: A pre-incorporation stock subscription is:

"A contract authorizing an investor to purchase a set number of unissued shares from the corporation, at a future date, for a specific price, upon the issuance of such shares, after corporate formation."

Promoters Role: Subscriptions are offered and arranged by promoters with investors.

A promoter is ultimately, individually liable for the subscription contract with the investor, as the pre-incorporation stock subscription is made prior to the existence of the corporation.

Corporations will almost always ratify such stock subscriptions, thereby relieving the promoter of the liability.

As the promoter stands in a fiduciary relationship to the corporation, as well as to the investor purchasing the stock subscription, they are legally prohibited from making any secret profit at either of their expense.

Terms of Subscriptions: Pursuant to the business corporation law:

- ***Irrevocable for Three Months***
- ***Must Be In Writing and Signed by the Subscriber***
- ***Must Be Paid in Full***

Importance of Subscriptions: The sale of stock subscriptions is extremely important to a prospective corporation.

It is through the sale of these subscriptions that the corporation raises its initial capital, and sells its initial authorized shares.

Corporate Formation Continued

• Legal Process of Incorporation

- **Incorporators**
- **Articles (Certificates) of Incorporation**
- **Mechanics of Incorporation**

• Incorporators

Who Are Incorporators: One or more natural persons of the age of 18 or over, who act as the incorporators of a corporation. [BCL §401].

These are the persons who sign and file the incorporation forms, including the certificate (articles) of incorporation, with the New York State Secretary of State.

Role of Incorporators: The role of the incorporators is to sign (with an acknowledgment) the certificate (articles) of incorporation.

They also deliver such certificate (articles) to the New York Department of State, whereupon the department of state files the certificate.

When the corporate existence has begun (after the Secretary of State files the Certificate of Incorporation), the incorporators hold an organization meeting, for the adoption of bylaws and the election of the first board of directors. [BCL §§402, 404]

• Corporate Charters

The Corporate Charter contains three elements:

- **The Articles of Incorporation;**
- **The Pre-Incorporation Documents; and**
- **The State Incorporation Laws.**

• Certificates of Incorporation:

The Certificate, sometimes also referred to as the Articles, of Incorporation is the legal instrument that creates the corporation. Like a constitution for government, it sets out the general framework of what the corporation is, and can later be amended.

Contents: The Certificate of incorporation must set forth the following:

- **Name of the Corporation;**
- **Purposes of the Corporation;**
- **Office of the Corporation;**
- **Authorized Shares and Descriptions;**
- **Duration of the Corporation;**
- **Registered Agent;**
- **Designation of Secretary of State; and**
- **Limitations on Director's Liability (if any).**

Corporate Formation Continued

• Mechanics of Incorporation

Process of Incorporation: One or more natural persons or corporations may act as incorporators of a corporation by signing and filing appropriate forms, including the certificate of incorporation, with the office of the secretary of state.

Steps to Incorporate: Forming a corporation involves three essential steps:

- ***Creating the Certificate***
- ***Signing the Certificate***
- ***Filing the Certificate***

Forming the Corporation:

- ***Certificate Must Be in the English Language;***
- ***Certificate Must Be Signed and Acknowledged;***
- ***Delivery Can Be By Mail, In Person or By Fax;***
- ***Filing Fee of $125 Required;***
- ***Filing Not Discretionary - If Certificate Complies with Law, it Must Be Filed;***
- ***Filing is Conclusive Evidence of Compliance with BCL;***
- ***The Secretary of State Provides A Receipt Upon Filing;***
- ***Corporate Existence Commences Upon Filing;***
- ***Corporation Commencement Date Can Be Delayed if Requested.***

No "Minimum Capital" Requirement: In New York State, the Business Corporation Law does not contain any requirement that any particular minimum amount of capital be paid in before the corporation may commence doing business.

• The Organizational Meeting – Generally

Organizational Meeting Required: After the corporate existence has begun, an organization meeting of the incorporator or incorporators must be held [BCL §403 (a)].

Purpose of the Meeting: The purpose of the meeting is for the adoption of by-laws, the election of directors to hold office until the first annual meeting of shareholders, the issuance of shares, and for the transaction of such other business as may come before the meeting.

Time and Notice for the Meeting: The meeting may be held at the call of any incorporator, who shall give at least five days' notice thereof by mail to each other incorporator, which notice shall set forth the time and place of the meeting. Notice need not be given to any incorporator who attends the meeting or submits a signed waiver.

Quorum and Proxies: A majority of incorporators shall constitute a quorum and the act of the majority present at a meeting at which a quorum is present shall be the act of the incorporators. An incorporator may act in person or by proxy.

Alternative to Meeting: Any action permitted to be taken at the organization meeting may be taken without a meeting if each incorporator agrees.

Corporate Formation Continued

• The Organizational Meeting – Issuance of Shares

Every corporation shall have power to create and issue the number of shares stated in its certificate of incorporation. The Certificate of Incorporation establishes the authorized shares.

Defined: Black's law dictionary defines a ***"Share"*** to be:
"One of the definite number of equal parts into which the capital stock of a corporation is divided, and which represents and equity, ownership interest in the corporation".

- ***Shares Must be Represented by Signed Certificates;***
- ***Certificates Are Only Evidence of Share Ownership;***
- ***Every Share Entitles Owner to One Vote;***
- ***Certificate of Incorporation Controls Stock Issuance (How Many Shares are issued)***
- ***Time and Manner of Issuance:***
  - The initial stock issuance generally takes place at the organizational meeting;
  - Such shares are "issued" by the board of directors, when, by board resolution, actually sell the stock to subscribing shareholders;
  - This sale takes place in accordance with subscriptions, which are made between promoters and prospective shareholders, and such stock purchases are recorded by the secretary so as to confirm the share's voting rights.
- ***Payment for Shares shall consist of money, property, labor or services;***
  - This payment by shareholders for the stock issued is how the corporation raises capital to operate the business for profit.
- ***Treasury Stock is shares which have been authorized but not sold to a shareholder;***
- ***Voting rights: Each share purchased entitles shareholder to cast one vote;***
  - Such vote applies to the election of members of the board of directors, as well as to certain corporate governance matters as set forth in the certificate.

• The Organizational Meeting – Issuance of Shares

Function of the Board: Policy decisions of a corporation are made by a board or directors.

- ***Corporate Governance:*** This corporate "governance" is a "republican" form, whereby shareholders elect members of the board of directors, to represent them;
- ***Size of the Board:*** The size of the board of directors (how many members it contains) is generally contained in the certificate of incorporation, or in the by-laws;
- ***Board Meetings:*** Corporate action of the board of directors shall be taken at a meeting of the board;
- ***Meeting Notice:*** Notice of meetings of the board shall be made in accordance with the bylaws;
- ***Majority Vote Required:*** All decisions of the board, shall be accomplished by a majority vote;
- ***Written Resolutions Recorded:*** All actions of the board shall generally take the form of written resolutions;
- ***Length of Terms:*** The length of the term of the members is contained in the certificate or the bylaws;

Election of the First Board of Directors: The corporation's first board of directors is generally established by an election, overseen by the incorporators, held at the initial organizational meeting. Subsequent elections are held at the corporation's annual meeting.

Corporate Formation Continued

• The Organizational Meeting – Appointment of Officers

Functions of the Board and Officers: Where policy decisions of a corporation are made by a board or directors, such policy decisions are then implemented by appointed officers of the corporation, who act as the managers of the corporation.

- **Officers of the Corporation:** The corporation's officers perform the duties and responsibilities assigned to them by the board of directors for the management of the corporation;
- **Appointed by Board Resolution:** The certificate of incorporate may, but generally does not, provide for election of officers by the shareholders. Accordingly, officers are generally appointed by resolution of the board of directors, and include the following:
  - ***Chief Executive Officer;***
  - ***President;***
  - ***Vice President(s);***
  - ***Chief Financial Officer;***
  - ***Treasurer; and***
  - ***Secretary.***
- ***Term of Office of Officers:*** Unless otherwise provided in the certificate of incorporation or the bylaws, all officers shall be appointed to hold office until the meeting of the board following the next annual meeting of shareholders.

First Appointment and Removal of Officers: The first appointment of the initial officers of the corporation is often done at the organizational meeting, and any officer appointed by the board may be removed by the board with or without cause.

•The Organizational Meeting – Adoption of Bylaws

What are Bylaws:

- Whereas the Certificate of Incorporation is like the Constitution of a Corporation, its Bylaws are like its Statutes.
- Bylaws are the rules and regulations enacted by a corporation to govern its affairs, and that of its shareholders, directors, and officers.
- Bylaws are adopted by the board of directors, when authorized by the certificate of incorporation, and by the shareholders when not so permitted.
- The Bylaws are subordinate to the general law of the state, the business corporation law, and the certificate of incorporation, and any provision of a Bylaw that conflicts with such superior authority invalid.
- Bylaws that are valid are binding on all shareholders, directors, officers and employees of the corporation, regardless of whether they know of the existence of those bylaws or were among the majority that consented to their adoption.

When are Bylaws Adopted: The initial Bylaws of a corporation are adopted by its incorporator or incorporators at the organization meeting.

Thereafter, Bylaws may be adopted, amended or repealed, pursuant to resolution, by a majority vote of the directors (if so permitted by the certificate of incorporation).

What is Contained Within Bylaws: The Bylaws may contain any provision relating to the business of the corporation, the conduct of its affairs, its rights or powers, or the rights or powers of its shareholders, directors, officers, or employees, not inconsistent with the business corporation law or any other statute, or the certificate of incorporation.

Weekly Information Sheet 03

Shareholder Rights

Corporation Defined: Black's Law Dictionary defines a **"Corporation"** as
"An artificial person or legal entity created by or under the authority of the laws of the state or nation, which has an existence distinct from that of its associated individuals, and has a duration that is either perpetual or for a limited term of years, and which acts as a unit in matters relating to the common purpose of the association and within the scope of the powers conferred upon it by law."

Principal Characteristics: In general, corporations have the following characteristics:

- **Limited Liability**
- **Entity Powers (Corporate Personhood)**
- **Centralized Management**
- **Continuity of Existence**
- **Free Transferability of Interests**
- **Statutory Sources of Authority**
- **Constitutional Status**

Corporate Finance

Share Defined: Black's law dictionary defines a ***"Share"*** to be:
"One of the definite number of equal parts into which the capital stock of a corporation is divided, and which represents and equity, ownership interest in the corporation".

Common Stock: "A class of stock entitling the holder to vote on corporate matters, to receive dividends after other claims and dividends have been paid, and to share in assets upon liquidation."

Preferred Stock: "A class of stock giving its holder a preferential claim to receive dividends and to corporate assets upon liquidation, but which carries no voting rights."

Treasury Stock: "Stock either issued by a corporation, but then reacquired or held, or stock authorized but unissued by the corporation."

Shares Are Represented by Signed Certificates; Only Evidence of Share Ownership

Every Share of Common Stock Entitles Owner to One Vote

Bond Defined: Black's law dictionary defines a ***"Corporate Bond"*** to be:
"An interest bearing instrument containing a corporation's promise to pay a fixed sum of money to the holder at a future time."

Debt Securities: The Bonds of a corporation represent its power to borrow, and are debt securities. Bonds are often freely transferable and a more permanent part of the capital structure. The issuance of Bonds is a matter within the board's discretionary power.

Bearer Bonds v. Registered Bonds: Bonds are negotiable securities. Registered Bonds have their owners' names and addresses recorded with the secretary of the corporation, and are payable only to that registered owner. Bearer Bonds do not have such registration, and are payable to anyone who presents them for payment.

Corporate Finance Continued

Capital Structure - Generally

Nature of Stock: Ownership of a corporation is represented by stock. An interest in a corporation is based on ownership of one or more shares of stock of the corporation. Each share represents a fractional interest in the total property of the corporation. The shareholder does not own or have an interest in any specific property of the corporation, because as an artificial person under the law, the corporation is the owner of all of its property [BCL Article 5].

Capital of the Corporation: Capital refers to the net assets of the corporation. Such assets include the monies received from stock issued to shareholders, monies from bonds issued to bondholders, profit from income from the operation of the business of the corporation, and property owned and acquired by the corporation [BCL §506].

Valuation of Stock:

Par Value: The stock of a corporation may have a specified par value. This value is the amount per share, specified on the stock certificate, that a person subscribing to purchase it, must pay the corporation to acquire it.

No Par Value: Shares may be issued with no par value. In such case, no amount is stated on the certificate, and the amount that the subscriber pays the corporation is determined by the board of directors.

Book Value: This is the value found by dividing the value of the net corporate assets, by the total number of shares issued by the corporation.

Market Value: This is the value for which the stock will sell per share on the open, free market**.**

Corporate Bonds: Corporate Bonds are interest bearing instruments containing a corporation's promise to pay a fixed sum of money to the holder at a future time. They are often freely transferable and a permanent part of the corporation's capital structure. The issuance of Bonds is a matter within the board's discretionary power [BCL §518 (a)].

Dividends: A dividend is a pro rata payment by the corporation to equity shareholders based on corporate earnings. Dividends can take many forms, including cash, property, common shares, preferred shares, debt, even property rights. The declaration of dividends is within the discretion of the board of directors, limited by the corporation's financial and legal ability to pay [BCL §510].

Stock is Issued Pursuant to the Certificate of Incorporation

Shares are Acquired: By either direct subscription from the corporation or from other shareholders.

Statute of Frauds: Pursuant to the Statute of Frauds, all contracts for the sale and purchase of shares of stock must be in writing and signed by the party to be charged.

Common Stock and Preferred Stock:

Common Stock: Ownership of Common Stock entitles the owner to voting rights, whereby such owner of can cast a vote per share to elect members of the Board of Directors.

Preferred Stock: This is an investment vehicle, which entitles the owner to be paid dividends first, but which generally confers no voting rights to the owner.

Each share of common stock owned represents a fraction interest in the total property of the corporation

Publicly Traded Corporations:

Free Transferability: Once legally acquired, the owner of shares of stock of a publicly traded corporation, can freely transfer (sell or gift) their shares to any other natural person (over the age of 21), or corporation (including the corporation from which the shares are issued).

Transfers on Exchanges: Stock trades for corporations traded on exchanges (such as the New York Stock Exchange) are regulated by the Federal Securities and Exchange Commission, while stocks not available on such exchanges are regulated solely pursuant to state law (in New York – The Business Corporation Law and the Martin Act - Article 23-A of the NYS General Business Law).

Shareholders

Shareholders - Defined

Shareholder Defined: Black's law dictionary defines a **"Shareholder"** to be:

"One who owns or holds a share in a corporation".

Share Defined: Black's law dictionary defines a **"Share"** to be:

"One of the definite number of equal parts into which the capital stock of a corporation is divided, and which represents and equity, ownership interest in the corporation".

Owners of the Corporation: A shareholder's rights stem from their status as owners of the corporation.

Ownership Rights: Shareholder control over the corporation is indirect. Periodically (ordinarily once a year), the shareholders elect the corporation's board of directors (the policy making body of the corporation), and by this means control the corporation. Corporate governance is a representative, republican form of governance. The shareholders have no direct right or power to control or manage corporate activity.

Shareholder Rights: Shareholders of common stock have the following rights in the corporation:
- **Ownership**: The right to have a properly executed stock certificate representing their ownership interest;
- **Transferability:** The right to freely transfer their shares;
- **Voting Rights:** The right to vote their shares in the election of the Board of Directors;
- **Dividend Rights:** The right to received dividends as declared by the corporation;
- **Limited Liability:** The right to have their exposure limited to the amount paid for their stock shares; and
- **Disclosure Rights:** The right to inspect the books, records and proceeding minutes of the corporation.

Shareholder Ownership Rights:

Indirect Control

Vote for Representative Governance

Shareholder Limitations on Corporate Control: Because of this representative system of corporate governance by the board of directors, **Shareholders cannot:**
- **Act on the ordinary business and affairs of the corporation;**
- **Represent or bind the corporation contractually;**
- **Select and remove officers (even for cause);**
- **Fix employees' compensation;**
- **Compel or overturn individual Board decisions or**
- **Have the corporation pay dividends.**

Shareholder's rights do include the right to have a properly executed stock certificate

Free Transferability: Unless limited by a valid restriction, such as a limitation in the certificate of incorporation, a shareholder has the right to transfer their shares. This share transferability also allows shareholders to transfer their shares (and attached voting rights) to an acquirer, by means of sale, gift or by means of a post death, estate transaction.

Voting Rights: Shareholders of common stock have the right to vote at shareholders' meetings for the election of members of the board of directors and on certain other special matters that shareholders must vote on (according to the certificate of incorporation).

Who May Vote: Ordinarily, only shareholders of record those common stock shareholders in whose name the stock appears on the books of the corporation (who are registered with the secretary of the corporation as the owner of the common stock shares) are entitled to vote.

Number of Votes:

Straight Voting: Unless there is a provision to the contrary, for each share owned, each shareholder is entitled to one vote on each matter to be voted.

Cumulative Voting: To elect directors only however, *cumulative voting* is allowed [BCL §618)]. Under a cumulative voting plan, each shareholder has as many votes as the number of shares owned multiplied by the number of directors to be elected.

Proxy Voting: Voting Shareholders need not be present to vote but can vote by means a of a written proxy sheet. With proxy voting they can also assign their right to vote to another person.

Shareholders Continued

Shareholder Rights Continued:

Dividend Rights: A shareholder has the right to receive a dividend as they are declared, subject to the relative rights of other shareholders to preferences, accumulation of dividends, and participation.

Payment of Declared Dividend: There is no absolute right that dividends be declared**.**

Funds Must Be Available for Declaration of Dividends

Discretion of Directors: It is then a matter primarily within the discretion of the board of directors whether a dividend shall be declared.

Form of Dividends: Customarily, a dividend is paid in money. However, it may be paid in property, such as a product manufactured by the corporation, in shares of other corporations held by the corporation, or in shares of the corporation itself.

Limited Liability: Shareholders generally have the right to have their investment exposure limited to the amount paid for their stock shares. This is known as limited liability.

Meaning of Limited Liability: Limited Liability means that the shareholder is not personally liable for the debts and liabilities of the corporation. As a result no personal liability will be placed on the shareholders.

The Effect of Limited Liability: The concept of limited liability has become one of the essential elements of the modern business corporation. Being able to limit the exposure from one's investment has served as a magnet for the raising of capital, and has resulted in the extreme popularity of the corporation.

Beyond the Limits of Limited Liability:

Piercing the Corporate Veil: Under certain limited circumstances a shareholder can be held liable for the actions of a corporation, under the legal doctrine known as ***"piercing the corporate veil"*** The factors under which liability applies pursuant to this doctrine include:

- ***Failure to maintain adequate corporate records.***
- ***Commingling of assets.***
- ***Grossly inadequate capitalization.***
- ***Diversion by shareholders of corporate funds or assets.***
- ***Formation of the corporation to avoid existing obligations or commit fraud.***
- ***Injustice would result if the corporate entity were recognized.***

Special Circumstances: Under very special circumstances, the top 10 shareholders of common stock of a corporation can also be held personally liable for wage claims, unpaid subscriptions, and unauthorized dividends. Additionally, a Professional Corporation cannot be created to avoid liability for malpractice.

Disclosure Rights: In accordance with the Business Corporation Law, Shareholders of Common Stock of a corporation have the right to inspect the books, records and proceeding minutes of the corporation.

What May Be Inspected: Each corporation must keep correct and complete books and records of account and shall keep minutes of the proceedings of its shareholders, board and executive committee, a record containing the names and addresses of all shareholders, the number and class of shares held by each, and the dates when they respectively became the owners of record thereof.

Reason for Inspections/Disclosure**:** A shareholder is entitled to inspect the records to determine the financial condition of the corporation, the quality of its management, and any matters relating to rights or interests in the corporate business, such as the value of stock.

Financial Statements: The Business Corporation requires a corporation to produce and furnish annual financial statements. These statements include a balance sheet at the end of the fiscal year, an annual income statement, and a statement of changes in shareholders' equity for that year.

CORPORATIONS

Securities Regulation

1. State Regulation

- ### State Regulation Generally:

Corporate regulation under state law is as follows:

- **State Blue Sky Laws:**

  These laws apply only to intrastate transactions, and protect the public from the sale of fraudulent securities.

  The National Securities Markets Improvement Act of 1996 allocated responsibilities between federal and state authorities.

- **The Martin Act:**

  In 1921 the NYS Legislature enacted one of the nation's first blue sky laws, known as the Martin Act (Article 23-A of the NYS General Business Law).

  The law provides extraordinary powers to the State Attorney General to combat financial fraud.

- ### State Regulators

- **Office of the Attorney General**

  Under the Martin Act the Office of the NYS Attorney General has the legal authority to monitor and bring lawsuits for securities fraud and violations of the NYS General Business Law.

- ***Department of Financial Services***

  This new state entity, created in 2011, has jurisdiction to regulate all insurance companies and banks doing business in New York. They further have some limited power to regulate certain securities transactions where such regulation is not pre-empted under Federal law.

2. Anti Fraud Provisions

- ### Anti Fraud Provisions Generally

Both the Martin Act and the Federal Securities Laws provide for measures to combat fraud and misrepresentation with respect to the sale, purchase and transfer of securities.

These provisions permit enforcement by both federal and state authorities to combat fraud and misrepresentation and authorize the imposition of both civil and criminal sanctions upon the proof of such misconduct.

3. Federal Regulation

• Federal Regulation Generally

Corporate regulation under federal law began after the 1929 stock market crash.

There are four principal federal laws which provide the framework for federal regulation of the sale of securities in interstate commerce.

These include:

**** The Securities Act of 1933;***

**** The Securities Exchange Act of 1934;***

**** The Sarbanes-Oxley of 2002; and***

**** The Dodd-Frank Act of 2010***

- **Definition of Security:**

  The term "security" has defined as "stocks and bonds issued by a corporation". Other definitions may also include other financial products interests that seek to provide unearned income.

- **Definition of Investment Contract:**

  An investment contract for purposes of the Securities Act, on the other hand, means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise.

• The Business Judgment Rule:

The business judgment rule is a case law-derived concept in corporations law whereby the "directors of a corporation . . . are clothed with [the] presumption, which the law accords to them, of being [motivated] in their conduct by a bona fide regard for the interests of the corporation whose affairs the stockholders have committed to their charge" (See Gimbel v. Signal Cos., 316 A.2d 599, 608 (Del. Ch. 1974)

The Business Judgment Rule has at its core, a responsibility of directors to weigh risk against reward. This is an art, not a science.

4. Insider Trading

• Insider Trading (Rule 10b)

- Trading of securities based upon "inside information" is unlawful and subjects those involved to both criminal sanctions and civil penalties of three times the profit made.

- Directors and corporate employees are liable for insider trading, as can be temporary insiders (consultant, attorney, CPA, etc).

- A person will only be liable if the insider providing the information breaches a fiduciary duty.

5. Industry Self Regulation

• Arbitration

- Many securities investment firms have adopted a code of arbitration, giving customers a contractual right to settle disputes through arbitration.

- Courts rarely overturn the decisions of an arbitrator in these cases, as due process and an opportunity to be heard for both sides is afforded.

- Arbitrators are selected jointly or pursuant to a contract

Weekly Information Sheet 05

CORPORATIONS

Governance, Board of Directors, Personhood

1. Original Corporate Organization

• The Final Steps in Organizing the Corporation:

Once the articles of incorporation have been filed, there are some additional steps that must be followed to complete proper organization of the newly formed corporation. They include:

- **Initial organizational meeting**
- ***Creation and adoption of corporate bylaws***
- **Election of corporate officers**
- **Approval of shareholders agreements**
- ***Election of directors (if not named in the articles of incorporation)***
- **Banking resolution and fiscal year provisions**
- **Issuance of shares**
- **Annual reports**

• Organizational Meeting Generally:

The organizational meeting, or initial meeting, is the first official business of the newly formed corporation. The purpose of this meeting is to bring together the various members of the corporation, vote on officers, adopt by-laws, and take care of the other clerical work that must be done to officially launch the corporation.

• Election of Directors:

Members of the corporation who have shares entitling them to vote decide among themselves who they would like to elect to the board of directors. These directors will set the policies for the corporation and handle many other important decisions, including the payment of taxes, franchise fees, and changes in corporate procedures.

1. Original Corporate Organization Continued

• Appointment of Officers:

One of the first tasks the board of directors must accomplish is to vote on officers that will lead the corporation on a day to day basis. These officers include: Chief Executive Officer, President, Vice President(s), Chief Financial Officer, Treasurer and Secretary.

• Adoption of Corporate By Laws:

Whereas the Articles of Incorporation are similar to a Corporation's Constitution, the Corporation will also adopt By-Laws, which are similar to statutes. These By-Laws contain guidelines for how the business will be run and should make provisions for the following:

- ***The Date and Location of the annual shareholder meeting***
- ***The number of Directors***
- ***The authority, duties, and titles of corporate officers***

The By-Laws must be consistent with the articles of incorporation, and many courts have defined By-Laws as the essential contract between shareholders and the corporation.

• Shareholder Agreements and Banking Resolutions:

One of the first acts of the board of directors will also be the approval of shareholder agreements. Such approval will be made pursuant to any guidance that exists in the Articles of Incorporation.

Another of the first acts of the board of directors will be the approval of Banking Resolutions. Banking resolutions authorize the creation and maintenance of corporate bank accounts.

These resolutions will further limit who has access to corporate accounts, who is permitted to sign corporate checks, who is allowed to oversee the accounts, and how account reports will be made to the shareholders.

• Annual Report:

Corporations are required to file an annual report with the secretary of state's office listing the names and addresses of the officers and directors.

Such report details the operations and finances of the corporation, as well as its past substantive accomplishments and future aspirations.

Pursuant to the Sarbanes Oxley Act, the Chief Executive Officer and the Chief Financial Officer are required to certify the authenticity of the information contained in the annual report.

2. Corporate Governance

- ## General Issues:

Defined: Blacks law dictionary defined Board of Directors to mean:

"The governing body of a corporation, elected by the shareholders to establish corporate policy, appoint executive officers, and make major business and financial decisions."

Role: The role of the Board of Directors of a Corporation is as follows:

- ***Meet Regularly to Govern the Corporation:*** The Members of a Corporation's Board of Directors are the elected representatives of the shareholders, that meet regularly to govern the corporation.
- ***Provide Oversight for, and Make Policy of, the Corporation:*** The Members of a Corporation's Board of Directors provide general oversight and make policy of the corporation (similar to that of political system's republican, representative government) so as to serve as the governance power of the corporation. All policy decisions are thus under the dominion and control of the board of directors.
- ***Size of the Board of Directors:*** The number of Directors is fixed in the certificate of incorporation or when it is silent, the corporate Bylaws.
- ***Chair of the Board:*** Typically, the Board of Directors chooses one of its members to be the Chair of the Board, by majority vote. The Chair is the person responsible for presiding over the meetings of the Board. Such person provides leadership of the Board, often speaks for its actions, appoints the committees of the board, and exercises the additional duties and powers as provided in the Certificate of Incorporation, the Bylaws or by vote of the board.

- ## Manner of Corporate Governance / Management:

Corporation Governance and Management is a form of republican rule where shareholders elect directors to represent them.

Corporations must act through their employees, agents, officers and directors.

Shareholders are not authorized to sell corporate property, negotiate contracts on behalf of the corporation, or take individual action to hire and fire employees.

PART ONE: CORPORATE ELECTIONS:

Generally: Shareholders have the power to elect directors at the initial shareholders' meeting and then at every annual meeting thereafter. Control over the composition of the board is at the heart of the shareholders' governance role.

Procedures: Director elections occur pursuant to procedures outlined in either the certificate of incorporation, or the bylaws, or both, complying with procedural guidelines including notice, quorum and ballot requirements. Most election procedures allow for proxy voting.

Time of Election: The initial election is held at the organizational meeting, and then at the annual meeting of the corporation.

Nominations: Generally, the directors which run for election, are nominated either by the board of directors as a whole, or a nominating committee, or by the shareholders themselves.

Means of Voting: Depending upon the procedures in the Certificate of Incorporation and/or the Bylaws, the means of elections can be by either straight voting or cumulative voting.

Straight Voting: In straight voting, each share may be voted for as many candidates as there are slots on the board, but no share may be voted more than once for any given candidate. Directors are thereby elected by a plurality (not necessarily majority) of the votes cast, with each share casting only one vote per candidate running.

Cumulative Voting: To ensure board representation for larger minority shareholders, some corporations allow cumulative voting. In cumulative voting, minority shareholders can accumulate all of their votes, and allocate them among a few or even one candidate. This increases the chances of board representation for minority shareholders. It should be noted, however, that cumulative voting, however, only applies to electing directors, not to any other type of shareholder vote.

2. Corporate Governance Continued

• Manner of Corporate Governance / Management Continued:

PART TWO: THE SPECIAL ROLE OF DIRECTORS:

The members of a corporation's Board of Directors are the elected representatives of the shareholders. They meet regularly to govern the corporation.

The Board of Directors provide general oversight to serve as the governance power of the corporation.

Policy decisions are thus under their dominion and control. These decisions include:

- ***Hiring Officers;***
- ***Development / Approval of Strategic Plans;***
- ***Approving Policy Initiatives;***
- ***Approving SEC Filings and Annual Reports;***
- ***Acting on Mergers, Acquisitions and Dissolutions;***
- ***Approving Annual Budgets and Ensuring the Availability of Financial Resources; and***
- ***Establishing Compensation and Benefits for Officers and Employees.***

Courts will not interfere with the board's judgment in the absence of unusual conduct such as fraud, and a director has a duty of loyalty and is disqualified from taking part in corporate action when they have a conflict of interest.

PART THREE: OBLIGATIONS, DUTIES AND RESPONSIBILITIES

Obligations and Duties: A Corporation's Board of Directors have the following obligations and duties:

- ***Establish Ongoing Goals, Missions and Policies of the Corporation;***
- ***Hire and Oversee the Corporate Officers;***
- ***Delegate Duties to Officers, so as to Advance Corporate Policy and Goals;***
- ***Perform Corporate Planning and Strategy Development for Corporate Advancement;***
- ***Provide General Management of the Corporate Business, Policy, and Resources;***
- ***Determine and Monitor the Organization's Products, Services and Programs;***
- ***Enhance the Corporation's Public Image (so as to improve share value);***
- ***Assess the Performance of the Corporation and the Board Itself;***
- ***Avoid Conflicts of Interests and Keep Their Fiduciary Duty to Shareholders;***
- ***Provide Continuity of the Corporation; and***
- ***Account to Shareholders for the operation and Conduct of Corporate Business.***

PART THREE: OBLIGATIONS, DUTIES AND RESPONSIBILITIES (Continued)

Board of Directors' Responsibilities to Shareholders:

Fiduciary Duty: The primary responsibilities of board directors to shareholders relate to their fiduciary duties, including the duty of care, duty of loyalty and duty of obedience. These duties require board directors to place the best interests of the company ahead of their own. They must make decisions for the company and act in a manner that an ordinary, prudent person would. The duty of obedience requires boards to ensure that the company remains in compliance with all laws and regulations.

Quality Board Members Who Make Quality Decisions: Another responsibility that board directors have to shareholders is to compose and maintain a diverse, independent and highly competent board. Sound decision-making only comes from a wide variety of perspectives. Shareholders are entitled to know that the board overseeing the company's operations is well-qualified and up to the task.

Transparent Communication: Boards are required to take minutes of their meetings to detail the issues that they're working on. Shareholders may request copies of board meeting minutes if they're looking for assurance that the board is actively fulfilling their duties of oversight and strategic planning. This doesn't mean that shareholders have any say in directing the issues the board chooses to tackle or the way they prioritize issues.

Oversee a Financially Sound Corporation: Shareholders look for assurance that companies are financially strong currently and will continue to grow and prosper. The board of directors has an explicit responsibility to form a short-term plan of one to two years to ensure sustainability. In addition, shareholders are interested in long-term growth for continued security and prosperity.

Assure that Corporation Operates Consistently With Policy Goals: Board directors also have a responsibility to oversee all departments and aspects of the corporation. The responsibility includes making sure operations are running efficiently, company operations are in alignment with the organization's purpose, there are no incidences of fraud, they communicate the corporate culture throughout the organization, and they conduct oversight over all departments and operations of the company.

PART FOUR: DIRECTOR DUTIES AND LIABILITIES

Duties and Liabilities of Directors:

Liability: Directors have a unique relationship to the corporation, arising from their broad authority to manage and supervise the corporation's business and affairs, subject to the rights of shareholders. The liability and responsibility of Directors includes:

Fiduciary Duty: Corporate directors are said to owe fiduciary duties to the corporation itself as a separate and distinct artificial person under the law, and not to the particular shareholders who elected them. These fiduciary rules thus proceed from a theory of maximizing corporate financial well-being by focusing on shareholder wealth maximization.

Corporate Social Responsibility: Over the past decade, many companies have begun to assert that their responsibilities extend beyond the legal duties toward shareholders and others with whom the company does business, and have voluntarily taken responsibility for their impact on customers, workers, communities, and other stakeholders, as well as the environment. This attitude, however, can directly conflict with the true fiduciary duties of Directors to the Corporation itself and its shareholder owners.

PART FOUR: DIRECTOR DUTIES AND LIABILITIES (Continued)

Duties and Liabilities of Directors (Continued):

Duties of Care and Loyalty: According to traditional fiduciary analysis, corporate Directors owe two duties to the corporation: care and loyalty. Each duty describes standards for judicial review of corporate decision-making and fiduciary activities.

> ***Duty of Care:*** The duty of care addresses the attentiveness and prudence of Directors in performing their decision-making and oversight functions. The famous ***"business judgment rule"*** presumes that directors carry out their functions in good faith, after sufficient investigation, and for acceptable reasons. Unless this presumption is overcome, courts abstain from second guessing well-meaning business decisions even when they are flops. This is a risk that shareholders take when they make a corporate investment. Thus, to encourage directors to take business risks without fear of personal liability, corporate law protects well-meaning Directors, through exculpation provisions in the corporation's articles and Bylaws, as well as through directors' and officers' insurance.
>
> ***Duty of Loyalty:*** The duty of loyalty addresses fiduciaries' conflicts of interest. This duty requires fiduciaries to put the corporation's interests ahead of their own. This means that fiduciaries cannot serve two masters. Corporate fiduciaries breach their duty of loyalty when they divert corporate assets, business opportunities, or proprietary information for personal gain. Accordingly, courts will not interfere with the board's judgment in the absence of unusual conduct such as fraud, and a Director has a duty of loyalty, and is disqualified from taking part in corporate action, when they have a conflict of interest.

PART FIVE: CORPORATE PERSONHOOD

Corporate Personhood: As declared since the famous case of Dartmouth College v. Woodward, is the legal principle that a corporation is an Artificial Person under the law, with many of the same rights and privileges as a natural person.

Corporations Have Their Own Separate Legal Status: Pursuant to the concept of corporate personhood, corporations are deemed as legally separate from their associated human beings (shareholders, directors, officers and employees), and have their own constitutionally protected rights.

Rights of the Corporation: As separate legal persons, corporations have a right to enter into contracts with other parties, to sue or be sued in court in the same way as natural persons, and enjoy most constitutional rights traditionally associated with natural persons. The constitutional rights they **DO NOT** have include:

- **Corporations cannot vote in political elections;**
- **Corporations are not citizens under the Fourteenth Amendment;**
- **Corporations lack Fifth Amendment self-incrimination rights;**
- **Corporations are not given Privileges and Immunities under Article IV;**
- **Corporations are not afforded Due Process Clause Liberty Rights; and**
- **Corporations obviously due not have the human rights to serve on juries, run for political office, marry, procreate, or travel.**

More on Corporate Personhood: Since the time of their establishment under Roman Law, Corporations have been held to be, and have been viewed as, an Artificial Person Under the Law. This Corporate "Personhood" means that the corporation is viewed as a separate entity, distinct from its shareholder owners, and managing board of directors and officers.

Powers of a Corporation: Because of its status as an artificial person under the law, corporations have many, distinct entity powers. This means a corporation can contract in its own name, sue or be sued, own or convey property, and be held criminally liable for crimes that it commits. (BCL §202).

Certificate of Incorporation: Unless the certificate of incorporation expressly limits the corporation's powers, it will be deemed to have the power to engage in any lawful business activity.

Meaning of Corporate Rights: Corporate personhood refers to the ability of corporations to be recognized as an artificial person under the law, with certain constitutionally protected rights. One of these critical rights is the power to act as a person under the law, and thereby enter into contractual agreements and to bring and defend litigation in its own name. Corporate personhood is also linked to the concept of limited liability, as it is the corporation that enters into contracts and take on debt and risk, not the individuals who work for the corporation or the shareholders who own its stock.

Weekly Information Sheet 06

CORPORATE GOVERNANCE

Corporate Governance

• General Issues:

A Corporation must act through its employees, agents, officers and directors. These individuals are important members of a corporation, but the corporation exists separately from them. A Corporation Consists of:

- ***Shareholders***: A shareholder is a person who owns shares in a corporation. A "share" is literally the physical representation of a predetermined amount of the business. As owners, these stockholders have the right to control the corporation through the election of directors and through other proposals brought to a vote. Ordinarily, stockholder action is taken at a regular or special meeting of the stockholders. Shareholders cannot have their percentage of ownership diluted.
- ***Officers:*** An individual hired or selected by a board of directors who has specific authority, such as the ability to bind the corporation to contracts and other agreements, and who carries out the day-to-day activities of the business.
- ***Directors:*** Individuals who set policy and long-term goals for corporations. These Directors are elected by Shareholders and set the policies for the corporation and handle many other important decisions, including the payment of taxes, franchise fees, and changes in corporate procedures. Directors also select, appoint and hire the Officers of the corporation.

• Manner of Corporate Governance / Management:

- Corporation Governance and Management is a form of republican rule where shareholders elect directors to represent them.
- Corporations must act through their employees, agents, officers and directors.
- Shareholders are not authorized to sell corporate property, negotiate contracts on behalf of the corporation, or take individual action to hire and fire employees.

THE SPECIAL ROLE OF DIRECTORS:

The members of a corporation's Board of Directors are the elected representatives of the shareholders. They meet regularly to govern the corporation.

The Board of Directors provide general oversight to serve as the governance power of the corporation. Policy decisions are thus under their dominion and control. These decisions include:

- ***Hiring Officers;***
- ***Development / Approval of Strategic Plans;***
- ***Management of the business policy of the corporation***
- ***Control of the policy of the business; and***
- ***Delegation of duties to officers to put policy into practice***
- ***Approving Policy Initiatives;***
- ***Approving SEC Filings and Annual Reports; and***
- ***Acting on Mergers, Acquisitions and Dissolutions.***

The number of Directors is fixed in the corporate bylaws or the articles of incorporation.

Courts will generally not interfere with the board's judgment in the absence of unusual conduct such as fraud, and a director has a duty of loyalty and is disqualified from taking part in corporate action when they have a conflict of interest.

Directors have authority to manage the corporation.

They may enter into any contract or transaction necessary to carry out business.
They may appoint officers and other agents to act for the company, and may appoint several of its own members as an executive committee to act for the board between meetings.

1. Corporate Governance Continued

• Manner of Corporate Governance / Management Continued:

DIRECTOR DUTIES AND LIABILITIES CONTINUED:

Liabilities of Directors:

Directors also have **Liabilities**. They must act in a fiduciary capacity in dealing with the corporation.

The Business Judgment Rule provides a defense for Directors who act in good faith and who have exercised reasonable care.

Directors and Officers are generally not liable for corporate obligations and debts.

Directors also owe a **fiduciary duty** to their shareholders and to the corporation as a legal entity under the law.

A fiduciary is someone who has ethical, moral, and financial duties to act in the best interests of another (in this case the corporation).

Directors must avoid **Conflicts of Interest.**

The fiduciary duty imposed on directors is straightforward. Directors owe the corporation an undivided loyalty that prohibits them from self-dealing and conflicts of interest.

Accordingly, Directors further have a **duty to refrain from** doing anything in their capacity as director of a corporation that would:

- **Injure the corporation's interests,**
- **Deprive the corporation of profit, or**
- **That would allow the director to take personal advantage of corporate information.**

Directors work for, and are elected by, the Shareholders. Since shareholders elect the directors, they also have the power to remove them as specified in the ByLaws or Articles of Incorporation.

Shareholders most often have the right to remove a director for "good cause," such as a proven allegation of fraud or embezzlement.

• Corporate Officers:

The Officers of a corporation, are selected and removed by the board of directors. Officers are agents of the corporation with specific, actual authority, and with powers governed by the law of agency.

Their relations with the corporation are fiduciary in nature, and they are liable for any secret profits and for diverting corporate opportunities to their own advantage.

Officers of a Corporation Include:

- **Chief Executive Officer**
- **President;**
- **Vice – President;**
- **Chief Financial Officer;**
- **Treasurer; and**
- **Secretary.**

Officers vs. Agents:

Officers are employees of the corporation who have general duties.

An Agent, on the other hand is a broad term encompassing any individual who works, even temporarily, for another's interest. As a result, all officers are agents, but not all agents are officers.

Corporate Officers – What they do

1. Chief Executive Officer:

This is the highest ranking officer in the corporation – responsible as the corporation's lead agent, and performs the following duties:

- **Decides whom to hire and fire as agent or employee;**
- **Responsible for the day to day management of the business;**
- **Oversees the other employees (and to limited extent other officers as they are appointed and overseen by directors);**
- **Signs contracts on behalf of the corporation;**
- **Negotiates on behalf of the corporation (pursuant to the parameters set by the board of directors);**
- **Delegates his authority to other officers or employees (as allowed by the board of directors); and**
- **Is Responsible under the Sarbanes Oxley Act for the signing and verification of corporate reports (such as annual reports)**

1. Corporate Governance Continued

• Corporate Officers Continued:

Corporate Officers – What they do

2. President:

If there is no separate Chief Executive Officer, the president is the highest ranking officer in the corporation – and is responsible as the corporation's lead agent, and performs the duties as set forth previously for the CEO, or as assigned by the corporate bylaws or the Board of Directors.

3. Vice President:

Corporate vice-presidents generally have very little to do with the day-to-day function of a corporation.
Usually, they are only authorized to take action in specific situations, such as when the corporate president is unavailable.
Sometimes they are the head of a division the corporation or set in charge of a function (such as Head of Light Bulb Manufacturing Division or Consumer Affairs/Relations)

4. Chief Financial Officer:

The Chief Financial Officer or CFO is the officer responsible for the finances, and accounting of the finances, of the corporation.
Together with the Chief Executive Officer, the CFO must also verify the accuracy of reports under the Sarbanes Oxley Act.

5. Treasurer:

If the corporation does not have a separate, Chief Financial Officer, the treasurer serves as the officer responsible for the finances, and accounting of the finances, of the corporation.
They are the officer responsible for maintaining records of the corporation's finances and ensuring that all corporate checking accounts, revenues, and accounts receivable are accurate and up-to-date.

6. Secretary:

The Secretary is the officer responsible for the maintaining nonmonetary records for the corporation.
The corporate secretary is responsible for sending out/transmitting all notices and documents from the corporation. They are also the officer that keeps the corporate seal, and who keep all records of the shareholder and directors' meetings.
The secretary must also ensure that proper documentation is filed with the state secretary of state's office, or any other required corporate filing.

• Corporate Employees:

Generally:

Generally, directors and officers are not liable for corporate obligations or debts.
A corporation itself, however, is civilly liable to a third party if one of its agents causes injury.

Corporate Employees:

Employment Defined: Black's Law Dictionary defines "Employment" as:

1. Act of employing or state of being employed; or
2. That which engages or occupies; or
3. That which consumes time or attention; or
4. An occupation, profession, trade, post or business.

A Simple definition of "Employment" is:
"An act to engage or hire one's service, in return for payment for such service."

The Labor Law's Definition of "Employment" is:
A relationship where someone is "permitted or suffered to work"

Corporation Employees: Has been held to include all individuals who are employees of Corporation, including unionized (collectively bargained), non-unionized (non collectively bargained), part-time, full-time employees, or individuals engaged on contract to provide employment services or sales to Corporation.

1. Corporate Governance Continued

Corporate Employees Continued:

- Employees are the persons who actually perform the day to day work of the corporation, under the oversight of the Corporate Officers.
- Employees of a corporation, are selected and removed by the Corporate Officers.
- Employees of the corporation are vested with specific, actual authority, and with powers governed by the law of agency.
- Employees, like Officers, are personally responsible for any torts or crimes they commit even if they act on behalf of the corporation.
- Employees, like Officers, may be liable for taking advantage of a corporate opportunity.
- The primary difference between an employee and an officer of the corporation is that employee is an individual who merely provides professional or manual work to a corporation while an officer has a position of authority in the corporation's hierarchical organization.
- Employees of the corporation are agents hired and paid by the corporation, to perform its functions, as directed by the corporation's officers.
- Their employer is the corporation itself.
- The corporation is generally liable for their actions.
- Employees are hired, and may be discharged, by the corporation's officers.

Corporate Agents vs. Corporate Employees:

- Employees of the corporation have a permanent status, and are paid regular wages or salaries by the corporation for their work and duties.
- Agents, on the other hand, is a broad term encompassing any individual who works, even temporarily, for another's interest.
- As a result, all employees are agents, but not all agents are employees.

Roles, Duties and Liability of Corporate Employees:

- ***Corporate Employees*** **–** Although Corporate Employees are employees of the corporation, they are hired by the corporate officers, and perform the roles and duties assigned to them by the corporate officers.
- ***Only Provide Delegated Management Role:*** They play no role in the management or decision making of the corporation, other than to manage other employees or to make decisions delegated to them by the corporate officer to whom the employee reports.
- ***Agency Principles Govern:*** The authority, rights, and liabilities of an agent or employee of a corporation are governed by the same rules as those applicable when the principal or employer is a natural person. As a result, the authority of corporate employees is also governed by general agency principles.
- ***No Shielded Protection:*** The fact that a person is acting on behalf of a corporation does not serve as a shield from the liability that would be imposed for acts done on behalf of a natural person.
- ***Indemnification:*** Corporations are empowered to indemnify these persons if they acted in good faith and in a manner reasonably believed to be in, or not opposed to, the interests of the corporation and had no reason to believe that their conduct was ultra vires or unlawful.

Corporate Agents:

- ***Corporate Agents*** **–** As an artificial person under the law, corporations must act through agents. The conduct of agents is governed by the law of agency.
- ***Agency Defined:*** Black's Law Dictionary defines the term "Agency" as follows:
  "A fiduciary relationship created by express or implied contract or by law, in which one party (the agent) may act on behalf of another party (the principal) and bind that other party by words or actions."
- ***Agency Principles Govern***: The authority, rights, and liabilities of an agent of a corporation are governed by the same rules as those applicable when the principal or employer is a natural person. As a result, the authority of corporate agents is also governed by general agency principles.
- ***Temporary Role:*** Unlike an employee, who holds a permanent status by means of regular paid salary or wages by the corporation, an agent relationship tends to be more of a task related relationship, whereby payment and authority exist only for the performance of the task assigned.
- ***Indemnification:*** Corporations are empowered to indemnify these persons if they acted in good faith and in a manner reasonably believed to be in, or not opposed to, the interests of the corporation and had no reason to believe that their conduct was ultra vires or unlawful.

1. Corporate Governance Continued

• Running the Corporation:

- ***Board of Directors:*** The New York Business Corporation Law, as well as the articles of incorporation and the by laws of the corporation, provide broad powers to the board of directors to manage and run the corporation. They are the policy making entity for the corporation and hire the corporate officers who provide the day to day management of corporate affairs.
- **Meetings of the Boards of Directors:** The Board of Directors operates by means of meetings of the board. Agendas for such meetings are prepared by the Chair of the Board. Business of the board, and policy decisions made by the board, is accomplished by resolutions adopted by the board at their meetings.
- **Size of the Board of Directors:** The size of the board of directors is established in the articles of incorporation or the by-laws. Such size is a balancing test between the need for broad talent and diverse opinions and the need to have a manageable size so as to not make meetings unwieldy. Corporate Governance Expert **Ira Milstein, has declared that seven persons is the perfect balance for board size.** But due to regulatory requirements, corporate committee needs, and modern board duties, most boards are far larger than seven, so as to accommodate and more fairly such workloads and duties.
- ***Officers:*** The board of directors appoints officers and other agents to act for the company, to do the day to day work of the corporation, in accordance with board directives and policies. To accomplish the work of the corporation, the board grants broad powers to its officers to do the work they are assigned. The **Chief Executive Officer,** is the primary corporate manager, and pursuant to board policy and directive, is the person responsible for carrying out the day to day responsibilities of the company, and assuring that the purposes and goals of the corporation are achieved.

• Enforcement of Board Policies:

- ***Board Policies:*** The Corporate Officers are the persons most generally responsible for the implementation and enforcement of policies adopted by the Corporation's Board of Directors. As the day to day managers of the Corporation, the Officers are responsible for the board policies under their area of responsibility, and are overseen and held accountable by the board of directors for their performance
- ***Execution of Board Action:*** If the Board of Directors decides to expand into a new product line or area, or discontinue a previously authorized corporate activity or mission, it is the officers of the corporation that must act to make this decision a reality, including the purchase or sale of materials and expansion or reduction of employees incumbent with such a directive. Officers are generally given broad discretion as to how to accomplish these board directives and policies.

• Employee Management:

- ***Oversight of Corporate Employees***: The Corporate Officers are the persons responsible for the oversight and management of all the corporate employees. The officers hire, fire and manage the corporation's employees so as to carry out the corporation's purposes and accomplish the directive and policies of the board of directors.
- ***Employee Administration:*** Corporate Officers, especially the Chief Executive Officer, provide employee administration, including tasking employees, defining employee roles, establishing and administering employee salaries, wages and benefits, granting employee raises, levying employee discipline, determining workforce strength, directing employee missions, and examining and reporting on employee productivity.

• Shareholder Derivative Law Suits:

- A shareholder derivative suit is a lawsuit brought by a shareholder on behalf of a corporation against a third party. Often, the third party is an insider of the corporation, such as an executive officer or director. Shareholder derivative suits are unique because under traditional corporate law, management is responsible for bringing and defending the corporation against suit. Shareholder derivative suits permit a shareholder to initiate a suit when management has failed to do so. It should be noted, that if the shareholder wins the action, it is the corporation, and not the shareholder who is awarded the recovery.

Weekly Information Sheet 07

CORPORATE LIABILITY

Piercing the Corporate Veil:

Definitions:

Piercing the Corporate Veil Defined: Black's law dictionary defines the term piercing the corporate veil as:

"The judicial act of imposing personal liability on otherwise immune corporate directors, officers and shareholders for a corporation's wrongful acts.

Meaning: The meaning of removing the limited liability of a corporation is as follows:

Causes: Limited liability can tempt insiders to exploit the corporation's creditors. Insiders can use their control to create a false appearance of corporate solvency, engage in self-dealing transactions, distribute corporate funds to themselves, or gamble on high-return corporate projects. In each case, insiders pass (externalize) risks to outsiders, with the gains accruing to the insiders and—because of limited liability—any losses falling on outside creditors.

Prevents Insider Abuse: As a protection against insider abuse, courts sometimes disregard the rule of limited liability and "pierce the corporate veil" to hold shareholders, directors, and officers personally liable for corporate obligations. Piercing is different from other protections afforded corporate creditors. In a piercing case: the business has been properly incorporated, the corporation is obligated to the creditor, and any distributions to shareholders have been statutorily proper.

Accountability:

Holding a Corporation Accountable by Removing Limited Liability:

An Extreme Remedy Not Readily Given: Ordinarily a corporation is regarded and treated as a separate legal entity, and the law does not look behind a corporation to see who owns or controls it.

The fact that two corporations have identical shareholders does not justify a court's regarding the two corporations as one.

Similarly, the fact that there is a close working relationship between two corporations does not in itself constitute any basis for ignoring their separate corporate entities when they in fact are separately run enterprises.

Piercing the Corporate Veil:

Accountability Continued:

Piercing the Corporate Veil:

When A Corporation Should be Held Accountable: A court may disregard the corporate entity, or figuratively "pierce the corporate veil," when exceptional circumstances warrant.
The decision whether to disregard the corporate entity is made on a case-by-case basis, weighing all factors before the court.

Factors that may lead to piercing the corporate veil and imposing liability on its owners (the shareholders) are:

- ***The failure to maintain adequate corporate records and the commingling of corporate and other funds;***
- ***Grossly inadequate capitalization;***
- ***The diversion by shareholders of corporate funds or asset;***
- ***The formation of the corporation to evade an existing obligation;***
- ***The formation of the corporation to perpetrate a fraud or conceal illegality, and***
- ***A determination that injustice and inequitable consequences would result if the corporate entity were recognized.***

Other Exceptions to Limited Liability:

Improper or Incomplete Corporate Formation: Liability may also be imposed on a shareholder as though there were no corporation when the court ignores the corporate entity either because of the particular circumstances of the case or because the corporation is so defectively organized that it is deemed not to exist.

Wage Claims: New York State law also provides that the shareholders shall have unlimited liability for the wage claims of corporate employees. This exception is limited to the ten largest shareholders, pursuant to section 630 of the New York State Business Corporation Law.

Unpaid Subscriptions: Most states prohibit the issuance of par value shares for less than par or except for "money, labor done, or property actually received." Whenever shares issued by a corporation are not fully paid for, the original subscriber receiving the shares, or any transferee who does not give value or who knows that the shares were not fully paid for, is liable for the unpaid balance if the corporation is insolvent and the money is required to pay its creditors.

Liable Parties – Directed Responsibility and Scope of Liability:

General Issues:

- Because a corporation is an artificial person, it can be both civilly and criminally liable for actions carried out on its behalf.
- Directors are personally liable for breaches of their duties and any economic injuries to the corporation that result from their negligence.
- Shareholders who seek losses for business deals that never materialized must prove that the failure to consummate the deal rests squarely with the negligent officer before the court will entertain any action for indemnification for possible lost profits.
- The core responsibility of directors (under the Business Judgment Rule) is to weigh risk against reward. This is an art, not a science.

Liable Parties – Directed Responsibility and Scope of Liability:

The Business Judgment Rule:

- ***What The Business Judgment Rule Is:*** The business judgment rule is a case law-derived concept in corporations law whereby the "directors of a corporation . . . are clothed with [the] presumption, which the law accords to them, of being [motivated] in their conduct by a bona fide regard for the interests of the corporation whose affairs the stockholders have committed to their charge" (See Gimbel v. Signal Cos., 316 A.2d 599, 608 (Del. Ch. 1974);
- ***Burden of Proof:*** To challenge the actions of a corporation's board of directors, a plaintiff assumes "the burden of providing evidence that directors, in reaching their challenged decision, breached any one of the triads of their fiduciary duty good faith, loyalty, or due care".
- ***Must Constitute Waste:*** Failing to do so, a plaintiff "is not entitled to any remedy unless the transaction constitutes waste . . . [that is,] the exchange was so one-sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration".
- ***Risk vs. Reward:*** The Business Judgment Rule has at its core, a responsibility of directors to weigh risk against reward. This is an art, not a science.
- ***Protects Officers and Directors:*** The business judgment rule protects corporate officers and directors from being sued when their business judgments turn out to be incorrect.
- ***Keeps Courts From Interceding in Corporation's Business:*** The business judgment rule not only insulates officers and directors from lawsuits from shareholders, but it also keeps courts out of the business of monitoring business decisions.
- ***Doesn't Protect When Authority Exceeded:*** When corporate officers or directors exceed their authority, the business judgment rule no longer protects them. Such acts are deemed to be ultra vires (a Latin phrase meaning "beyond the powers" – meaning the board of directors has exceeded or gone beyond their legal authority).
- ***Ultra Vires:*** Only shareholders or others who have a direct interest in the corporation can raise a claim of ultra vires.

Liability of Directors:

- ***Fiduciary Role:*** Directors act in a fiduciary capacity in dealing with the corporation.
- ***Good Faith and Reasonable Care:*** Pursuant to the Business Judgment Rule, Directors who act in good faith and have exercised reasonable care.
- ***Fraud:*** Courts will not interfere with the board's judgment in the absence of unusual conduct such as fraud.
- ***Conflicts of Interest:*** A director is disqualified from taking part in corporate action when the director has a conflict of interest.
- ***Sarbanes Restrictions:*** Pursuant to the Sarbanes Oxley Act, all direct and indirect loans to directors are prohibited.
- ***Suits against Directors:*** Action against directors can be brought by the corporation, while Shareholders can bring a derivative suit.

Liable Parties – Directed Responsibility and Scope of Liability Continued:

Liability of Officers:

- ***Officers and Agents:*** Officers, as agents generally of the corporation, are personally responsible for any torts or crimes they commit, even if they act on behalf of the corporation. If they act on behalf of the corporation, then the corporation may be liable as well.
- ***Corporate Opportunity:*** Officers may also be liable for taking advantage of a corporate opportunity.
- ***Conflicts of Interest:*** An officer is also disqualified from taking part in corporate action when the officer has a conflict of interest.
- ***Sarbanes Restrictions:*** Pursuant to the Sarbanes Oxley Act, all direct and indirect loans to officers are prohibited.
- ***Question of Liability:*** In determining liability, the threshold question is: was there a breach of fiduciary duty?

Liability to Third Parties:

Generally:

- Shareholders enjoy limited liability.
- Generally, directors and officers are not liable for corporate obligations or debts.
- A corporation is civilly liable to a third party if one of its agents causes injury.

Liability of Management to Third Persons:

- Generally not liable for economic consequences if decision made in good faith.
- Generally not liable to third parties for poor decisions (but there may be a derivative suit).

Criminal Liability:

- Criminal Liability is pursuant to the Responsible Corporate Officer Doctrine: Control and Knowledge of the Violations.

Insider Trading

Definitions:

Insider Trading Defined: Black's law dictionary defines the term insider trading as:

"The use of material, non public information in trading the shares of a company by a corporate insider or other person who owes a fiduciary duty to the company."

Insider Trading Continued:

Meaning:

State vs. Federal Law: State corporate law mostly accepts the principle of unfettered share liquidity and only narrowly regulates the trading of company stock by insiders. The real law of insider trading is federal—an offshoot of Rule 10b-5 under the Securities Exchange Act of 1934.

What Constitutes Insider Trading: The paradigm case of insider trading arises when a corporate insider trades (buys or sells) shares of his corporation using material, nonpublic information obtained through the insider's corporate position.

Exploitation of Insider Information: The insider exploits their informational advantage (a corporate asset) at the expense of the corporation's shareholders or others who deal in the corporation's stock. The insider can exploit his advantage whether undisclosed information is good or bad.

Good News Trades: If *good news,* the insider can profit by buying stock from shareholders before the price rises on the favorable public disclosure. (An insider can thus garner an even greater profit on a smaller investment by purchasing "call options" on an options market that give him a right to buy the shares at a fixed price in the future.)

Bad News Trades: If *bad news,* the insider can profit by selling to unknowing investors before the price falls on unfavorable disclosure. (An insider who does not own shares can also profit by borrowing shares and selling them for delivery in a few days when the price falls, known as "selling short," or by purchasing "put options," which give him the right to sell the shares at a fixed price in the future.)

Liability:

Trading on Insider Information:

When Liability Occurs: Illegal insider trading occurs when a person who owes a fiduciary duty to a company buys or sells a security while in possession of material, nonpublic information.

Enforcement: Enforcing insider trading laws is a high priority for the SEC. In recent years, the SEC has pursued insider trading cases against financial professionals, hedge fund managers, corporate insiders, and attorneys.

Penalties and Sanctions: Section 10(b) and Rule 10b-5 form a basis for imposing penalties and sanctions for trading on **insider information.**

Those accused of insider trading may face both criminal and civil actions.

The Insider Trading and Securities Fraud Enforcement Act of 1988, which amended the 1934 act, gave the SEC authority to bring an action against an individual purchasing or selling a security while in possession of material inside information.

Persons who "aid or abet" in the violation may also be held liable under the act.

Individuals convicted of criminal insider trading may be sentenced up to 20 years in prison per violation and can face fines of up to $5 million or twice the gain from the offense.

In a civil action by the SEC, an individual may have to **disgorge any profits** from the offense and may have to pay **fines not to exceed the greater of $1 million or three times the amount of the profit gained or loss avoided.**

Individuals can also be barred from serving as an officer or a director of a public company, or from acting as a securities broker or an investment advisor.

Attorneys and accountants may be barred from serving before the SEC.

Bob Farley

Business Law 500 – The Law of Corporations

Weekly Information Sheet 08

LIMITED LIABILITY COMPANIES

1. Limited Liability Companies – Attributes / Process

- ### Generally:

NYS History:

LLCs are a relatively new form of business organization. They seek to combine the limited liability of a corporation, with the ease of management of a partnership.

New York first authorized these entities under a chapter of laws of 1994. They have since become a very popular vehicle for small business

Defined:

A Limited Liability Company is an unincorporated business organization of one or more persons or entities who have limited liability regarding contractual obligations and other liabilities of the business.

Attributes:

An LLC is an unincorporated business organization of one or more persons who have limited liability for the contractual obligations and other liabilities of the business.

The Limited Liability Company Law governs the formation and operation of an LLC. An LLC may organize for any lawful business purpose or purposes.

The owners of an LLC are "members" rather than shareholders or partners. A member may be an individual, a corporation, a partnership, another limited liability company or any other legal entity.

Organizers form an LLC by filing the Articles of Organization, pursuant to Section 203 of the Limited Liability Company Law, with the Department of State.

Organizers are like incorporators for a corporation, and the Articles of Organization are like the Articles of Incorporation of a Corporation. Any person or business entity may be an organizer, and need not be, a member of the LLC formed.

Process:

To form an LLC the organizers must select a name for the business and verify its availability. They must further determine other requirements, if any, and file the Articles of Organization with the Department of State together with a $200 fee.

Organizers must additionally apply for a Federal ID Number and fulfill publication requirements (the formation must be published in the legal notices of a local newspaper).

Finally, just like an organizational meeting with a corporation, the organizers must adopt a written operating agreement (like a partnership agreement).

When selecting the business name, the organizers must include the words "Limited Liability Company", "L.L.C.", or "LLC". Such name must be distinguishable from all other business names on file with the NY Dept of State.

Bob Farley

Business Law 500 – The Law of Corporations

Weekly Information Sheet 09

PUBLIC AUTHORITIES

Public Benefit Corporations

- Public benefit corporations are entities that chartered by an act of the state legislature and are closely associated with governmental operations and public functions (such as public authorities).
- Public benefit corporations are designed to carry out a public purpose and therefore receive some benefit for this function.
- Public benefit corporations are usually not bound by the same set of rules and statutes as private corporations. They are formed for limited purposes, which are principally to build, finance and operate something for the public benefit.
- Public benefit corporations are often given special tax treatment and other benefits that private corporations do not receive.

Public Authorities

- Public Authorities are Public benefit corporations chartered by an act of the state legislature.
- The first Public Authority was the Port of London Authority.
- The First Public Authority in New York (and in the United States) was the Port Authority of New York, which was chartered by Congress, and then codified in State Law. It is a bi-state authority, now known as the Port Authority of New York and New Jersey.
- Today there are hundreds of Public Authorities in New York. Some of the more famous include the Thruway Authority, the Dormitory Authority, the Metropolitan Transportation Authority, the Power Authority, and the Empire State Development Corporation (legally known as the Urban Development Corporation).
- The purpose of Public Authorities is to finance, build and operate things (principally infrastructure) for the benefit of the state and its citizens (i.e. the public).

DISSOLUTION

1. Dissolution and Termination

Generally:

Most Corporations are formed for perpetual existence. As a result, most corporations need never cease to exist. A corporation can however, have its existence terminated either voluntarily or involuntarily. Such process is known as corporate dissolution, whereby the company is dissolved and its assets are distributed.

Definitions:

Dissolution Defined: Black's law dictionary defines the term dissolution as:

"The termination of a corporation's legal existence by expiration of its charter, by legislative act, by bankruptcy or by other means, which brings about the liquidation or winding up process"

Corporate Dissolutions:

Voluntary Dissolution: A corporation's desired termination by the board of directors and approved by the shareholders.

Involuntary Dissolution: The termination of a corporation administratively (for failure to file required reports or pay taxes), judicially (for abuse of corporate authority, management deadlock or failure to pay creditors), or through involuntary bankruptcy.

Dissolution Generally: Dissolution is the ultimate fundamental change. Although dissolution results in the death of the corporation, it does not necessarily mean the death of the business. Because of its going-concern value, the business (its assets) usually will be sold intact. Dissolution simply redistributes the assets to an outside party (or shareholder faction). The shareholders then share pro rata in the proceeds of the sale.

Dissolution Terminology:

Dissolution is the formal extinguishment of the corporation's legal life. *Liquidation* is the process of reducing the corporation's assets to cash or liquid assets, after which the corporation becomes a holding shell. *Winding up* is the whole process of liquidating the assets, paying off creditors, and distributing what remains to shareholders.

Process:

Accomplished First By the Board of Directors: Typically, voluntary dissolution must be initiated by the board of directors and followed by shareholder approval, though in some states all shareholders can consent to dissolve the corporation without board action. Dissolution, like a charter amendment, is subject to majority rule.

DISSOLUTION CONTINUED

1. Dissolution and Termination Continued

Process Continued:

Shareholders Get A Vote After the Board: Absent oppression or deadlock, minority shareholders generally cannot dissolve the corporation. Likewise, minority shareholders cannot force the corporation's continuance.

Two Step Dance: Voluntary dissolution is subject to only two levels of protection: (1) initial approval by the board of directors, and (2) subsequent approval by shareholders.

New York Business Corporation Law: Article 10 of the Business Corporation Law governs voluntary dissolutions. Article 11 governs involuntary dissolutions by means of a petition to the state supreme court. Once a dissolution is approved, the corporation may conduct no other business than to wind up its affairs.

Process of Winding Up:

Creditors Protected: Corporate law protects creditors in a dissolution. In the winding-up process, the corporation must pay all known claims. The corporation must send notice to known claimants for them to submit their claims. Under the Business Corporation Law, unknown claims (such as contingent tort claims) may be brought against the dissolved corporation.

Wage Claims: If the corporation does not retain sufficient assets after the distribution, the Business Corporation Law (section 630) permits employees and labors to get priority in payment, and thereafter, to seek satisfaction from the ten largest former shareholders.

Successor Liability: If creditors cannot satisfy their claims against the dissolved corporation or its former shareholders, they may be afforded the opportunity to assert their claims against the entity that acquired the business's assets under the successor liability doctrine. Further, if the board approves the distribution of assets to shareholders without the corporation first satisfying known claimants, the directors can be liable to the creditors, with contribution (recoupment) available from shareholders who knew the distribution was illegal.

Judicial Oversight: To shield directors from liability, the corporation can apply to have the supreme court to oversee the dissolution and determine how much security the corporation should set aside to satisfy anticipated claims.

Process of Liquidation:

Purpose: The purpose of liquidating a corporation is to distribute all of the company's assets to those individuals and businesses that have claims against the corporation.

Priority: Priority is an important issue when it comes to liquidating corporate assets. Priority, means the order in which a person at he or she has the right to receive payment before others.

Shareholders: Shareholders are entitled to whatever corporate assets are left over after corporate creditors have been paid.

After Liquidation: Upon liquidation, the corporation no longer has any assets.

Definitions: Liquidation and winding up are two terms closely intertwined. Liquidation refers to the process of divesting all corporate assets, while winding up refers to the process of concluding all corporate business.

DISSOLUTION CONTINUED

2. Corporate Property

Definitions:

Corporate Property Defined:

"Corporations are separate legal entities from the persons (which may include individuals or other corporations) that own them. Although the corporation will be owned by other persons (shareholders), such persons do not actually own the property of the corporation, as it belongs to the corporation itself, which has the characteristic of being able to legally own property, as an artificial person under the law."

Corporate Property During Dissolutions:

Winding Up: In accordance with section 1005 of the Business Corporation Law, a corporation that is dissolving shall proceed to wind up its affairs, with power to:

- ***Fulfill or discharge its contracts;***
- ***Collect its assets;***
- ***Sell its assets for cash at public or private sale;***
- ***Discharge or pay its liabilities, and***
- ***Do all other acts appropriate to liquidate its business.***

Liquidation and Shareholder Distribution of Corporate Property:

Liquidation of Assets:

When a corporation is dissolved, it must liquidate its assets. Liquidation refers to the process of sale or auction of the company's non-cash assets. Only those assets your company owns can be liquidated. Thus, a corporation cannot liquidate assets that are used as collateral for loans. Assets used as security for loans must be given to the bank or creditor that extended the loan, or it must pay off the loan before selling such assets.

Shareholder Distribution:

The final step of dissolution involves distributing the company's remaining assets among its shareholders. Such assets may include the money kept in bank accounts or obtained from selling or otherwise disposing of the company's non-cash assets. The payment to company shareholders is done on a pro-rata basis, i.e., in the ratio of their share ownership percentages. This distribution is only done after all other liabilities of the corporation have been satisfied. If the corporation is solvent (meaning it has more assets than liabilities), it will have cash and assets after repaying its taxes and liabilities to distribute to shareholders. In such cases, the leftover amount is totaled and divided between shareholders on the basis of their ownership stake. In exchange for getting back their investment (in full or part), the shareholders return their shares to the company, which are then canceled.

3. Issues in Dissolution

Generally:

Perpetual Existence: Most Corporations are formed for perpetual existence. As a result, most corporations need never cease to exist. In these situations, corporations do not exist for a set time period, and instead, can exist for centuries, long outliving the individuals who created them.

Decision to Dissolve: A corporation can however, have its existence terminated either voluntarily or involuntarily. Such process is known as corporate dissolution, whereby the company is dissolved and its assets are distributed.

Why Dissolution: Businesses terminate for a wide variety of reasons, but when a corporation seeks to end its legal existence, there are special rules with which it must comply.

DISSOLUTION CONTINUED

3. Issues in Dissolution Continued

Generally Continued:

Effect of Dissolution: Dissolution terminates the Corporation's existence. When the corporation does cease to exist, the corporate charter, the articles of incorporation, and any other document related to the corporation's existence cease to have any legal significance.

Dissolution Can Take Time: Dissolving a corporation can take months or even years. During this time, all of the corporation's business will be concluded (wound up) and its assets will be distributed to creditors and shareholders.

Shareholders must Agree to Dissolution: In a voluntary dissolution, shareholders must agree, usually by simple majority vote, to dissolve the corporation.

Notification of Creditors: When a corporation is considering dissolution, it must notify its creditors of its intention.

Priority of Creditors: The Business Corporation Law requires that creditors receive higher priority than corporate shareholders when it comes to distributing assets. In fact, only after all corporate creditors are paid will shareholders be entitled to receive any remaining corporate assets.

Where Dissolution Takes Place: When a corporation functions in several different states, the state which has authority to dissolve the corporate structure is the state in which the corporation is domiciled (i.e. where they filed their Articles of Incorporation).

BANKRUPTCY

1. Bankruptcy

The Nature of Bankruptcy:

Bankruptcy is an action brought under Federal Law (the United States Bankruptcy Code – Title 11 of the United States Code).

Federal Jurisdiction for Bankruptcy is conferred by the Constitution (Article 1, Section 8, Clause 4) which authorizes Congress to enact "uniform Laws on the subject of Bankruptcies throughout the United States.

The first federal bankruptcy law was enacted in 1801. Prior to that insolvency and debtors were dealt with pursuant to Common Law.

Fundamentals:

There are two parties involved in bankruptcy.

Each party can be a natural person or a corporation. Such parties are debtors and creditors.

There is also the trustee and the federal government who will administer the bankruptcy proceeding.

The term "Bankruptcy" is defined by Black's Law dictionary to mean:

"A statutory procedure by which a (usually insolvent) debtor obtains financial relief and undergoes a judicially supervised reorganization or liquidation of the debtor's assets for the benefit of creditors".

BANKRUPTCY CONTINUED

1. Bankruptcy Continued

History:

The word bankrupt is actually of ancient origin, and traces its roots to medieval Italy.

There, as a symbol of your financial failure, and your inability to pay your debts, creditors were legally empowered to break the bench from which the merchant operated their business.

From the Italian “banka” – meaning “bench” and “rotta” – meaning ”break” derives the word “bankrupt”.

How Bankruptcy is Declared and Processed:

Jurisdiction over bankruptcy cases is in U.S. district courts, which may refer all cases and related proceedings to adjunct bankruptcy courts. These are federal cases pursuant to federal statute (Title 11 of the US Code – The Bankruptcy Code).

An action is commenced by the filing of a petition.

This can be ***voluntary*** (filed by the debtor – natural person or the corporation that owes the money); or

Involuntary (by not less than 3 creditors – the corporations or people to whom the money is owed).

The debtor(s) and the creditor(s) are the parties in Bankruptcy.

Five bankruptcy proceedings are available:

- **Chapter 7 (Liquidation);**
- **Chapter 9 (Municipalities)**
- **Chapter 11 (Business reorganization);**
- **Chapter 12 (Family Farms and Fishermen); and**
- **Chapter 13 (Individual Consumer Debt Adjustment).**

What the Parties Want:

In a bankruptcy case the Debtor wants a discharge of his debts and to preserve his assets.

What the Creditor(s) and Trustee want is to maximize the distribution to creditors, to keep the Debtor “honest”, to discharge only dischargeable debts, and to keep no non-exempt assets.

What the Bankruptcy Court wants is a “fresh start” for honest debtors, a return to productivity free from unmanageable debt, to promote best interests of Creditors, and an equitable distribution of estate, from debtor’s non-exempt assets.

Debtors Prison:

Prior to the enactment of modern Bankruptcy laws, a merchant who did not pay their debt through no fault of their own, could be imprisoned in Debtors Prison.