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Incorporating Litigation Perspectives to Enhance the Business Associations Course

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The recent financial crisis and corporate scandals have dramatically changed the business environment and created new legal norms for businesses.[1] Attorneys must adapt to this new environment while advising businesses. They must do more than simply advise businesses on the current legal standards. Attorneys must also consider a wide variety of potential legal risks involved with a business decision, including the potential litigation risks. Even if a business would ultimately prevail in litigation, the business loses to some degree whenever it becomes entangled in litigation. Litigation is expensive, time consuming, and burdensome for businesses, and it may often generate negative publicity. Investigation and enforcement actions by the Securities and Exchange Commission, the Department of Justice, or state attorneys general can have even more negative consequences for businesses.

To help students learn the new legal norms for businesses and understand the process for advising businesses, I teach students in my Business Associations class to think about the potential risks of a business decision, including consideration of the multiple perspectives that might produce litigation. In the future, a business's actions will be viewed from multiple perspectives, such as those of regulators,

* Professor of Law, Saint Louis University. For their helpful comments on early versions of this paper, I want to thank the participants in a workshop at Saint Louis University School of Law and the participants in the Discussion Group on Teaching Business Law in a New Economic Environment at the Southeastern Association of Law Schools Annual Meeting on August 3, 2012. Most importantly, I have had the pleasure of teaching many students in my Business Associations course, and I want to thank all of them for their patience and feedback as I have tried new teaching methods.

1. *See generally* Stop Trading on Congressional Knowledge Act (STOCK Act), Pub. L. No. 112–105, 126 Stat. 291 (2012) (codified as amended in scattered sections of the U.S.C.); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S.C.); Jumpstart Our Business Startups Act (JOBS Act), Pub. L. No. 112–106, 126 Stat. 306 (2012) (codified as amended in scattered sections of the U.S.C.). *See also* Anita K. Krug, *Institutionalization, Investment Adviser Regulation, and the Hedge Fund Problem*, 63 Hastings L.J. 1, 12–17 (2011) (discussing the new environment for hedge funds and other private funds after the Dodd-Frank Act and the regulations required by the Act); Michael E. Sykuta, *The Nature of the Deal in the Post-Crisis Financial Market*, 7 Ohio St. Entrepreneurial Bus. L.J. 27, 27–28 (2012) (discussing how the contracting environment for small business financing has changed as a result of the recent financial crisis and new regulations).

shareholders, and juries. An attorney must consider those numerous perspectives in advising a business about the potential risks of its decision both in the near term and in the future.

I have been teaching students to consider multiple viewpoints within practical litigation problems in my Civil Procedure class for many years. Teaching such skills in a Civil Procedure class seems natural and easy. In class, the professor can have students consider the perspective of the plaintiff's counsel, the plaintiff, the defendant's counsel, the defendant, the judge, and the jury on a variety of issues presented by practical hypothetical legal cases. Alternatively, the professor can accomplish the same outside of class by assigning students to draft documents such as a motion to dismiss for failure to state a claim on behalf of the defendant, the opposition brief on behalf of the plaintiff, or the judge's ruling.

Using litigation perspectives to teach Business Associations, however, appears to be less typical, or at least less emphasized, by professors. Most Business Associations professors are likely former corporate attorneys, so an emphasis other than litigation is understandable. Yet, the case method utilized by most Business Associations textbooks[2] makes a litigation approach fairly easy to incorporate into class discussions. A litigation approach can be used not only to understand "what went wrong" to cause litigation, but also to understand how businesses can proactively seek to avoid such liability and, thus, to comprehend attorneys' roles in advising their business clients.

For instance, Business Associations textbooks present cases in which principals are sued for contracts made by their agents or torts committed by their agents.[3] These cases can be used not only to explain when a principal is liable, but also how principals can seek to avoid liability, such as by ensuring proper training of agents or notifying third parties of any limitations on the authority of agents. As another example, I discuss the various forms of business entities by evolving a business from a sole proprietorship with employees, to a general partnership, to a limited liability company, to a closely held corporation, and finally to a publicly held corporation. As we discuss each form of business entity, I pose similar litigation scenarios: a lawsuit by a third-party tort plaintiff, a lawsuit by a third-party contract plaintiff, and a lawsuit between the owners of the entity (other than the sole proprietorship). Through these scenarios, students learn the essential characteristics of the various

2. *See., e.g.*, William A. Klein et al., Business Associations: Cases and Materials on Agency, Partnership, and Corporations (8th ed. 2012) (using cases almost exclusively, with little explanatory text, to convey the course material); Robert W. Hamilton et al., Cases and Materials on Corporations Including Partnerships and Limited Liability Companies (11th ed. 2010) (using cases and some explanatory material); Charles R.T. O'Kelley & Robert B. Thompson, Corporations and Other Business Associations (6th ed. 2010) (using cases and some explanatory material).

3. *See* Klein et al., *supra* note 2, at 16–19 (excerpting Three–Seventy Leasing Corp. v. Ampex Corp., 528 F.2d 993 (5th Cir. 1976), in which defendant was sued for sales contract allegedly made by its agent); *id.* at 59–64 (excerpting Arguello v. Conoco, Inc., 207 F.3d 803 (5th Cir. 2000), in which defendant was sued for torts allegedly committed by agents during sales transactions).

business entities, the factors that impact the choice of business entity form (such as limited liability), and other means for limiting the potential financial liability of litigation (such as insurance). In other words, considering "what could go wrong" can help an attorney advise the client in choosing the form of business entity and in making other decisions about establishing a business. As another means of teaching students about the choice of business entity, a professor could assign different groups of students to draft employment contracts, partnership agreements, operating agreements, and bylaws based on a given set of facts. Students can then see the consequences of their drafting choices in those organizational documents when the professor presents various legal disputes that might arise in the future.

Similarly, litigation perspectives can be easily incorporated into discussions about shareholder litigation, as well as shareholder inspection rights. The viewpoints of the board of directors, the shareholders, and the judge or jury can be explored in hypothetical problems on these topics. I have sometimes even asked students to draft a demand on the board of directors for an alleged breach of fiduciary duty, the substantive portions of the shareholder derivative complaint, and the company's responses to each. Through such problems, students also learn that attorneys play an important role in advising directors and officers about potential litigation risks when they make their business decisions, which is the key to preventing litigation rather than simply advising how a judge or jury may ultimately decide an alleged breach of fiduciary duty.

In addition, I teach students to consider the possible litigation issues in routine business matters. Borrowing a hypothetical from my Civil Procedure course, I have students play the role of a company's general counsel advising their company on a potential contract. From a litigation perspective, the general counsel needs to think about the possibility of contracting to avoid future litigation through alternative dispute resolution clauses and the desirability of including a clause specifying the applicable law to govern any dispute arising from the contract. If no alternative dispute resolution provision is included, the attorney should consider specifying the judicial forum for any litigation arising from the contract. In my experience, these sometimes are the only litigation issues considered by corporate attorneys. However, if the contract is ever the subject of litigation, the general counsel must consider the evidence that will be needed to establish the company's claim or defense, such as documentation of the contract negotiations. The general counsel also must preserve the attorney-client privilege and work product where appropriate, and ensure that the company has an adequate document retention plan and a policy to preserve relevant documents when litigation is likely.[4]

The practical skill of considering multiple perspectives of potential litigation can also aid students in understanding the new legal norms. The enactment of the Stop

4. The retention and preservation of documents also includes electronically stored information. *See, e.g.*, FED. R. CIV. P. 26(a)(1)(ii), 34(a)(1)(A).

Trading on Congressional Knowledge Act (STOCK Act)[5] provides an excellent example. For many years, I posed a hypothetical problem in which a Senate Committee learns that the Securities and Exchange Commission is about to announce an investigation into a public company for violation of the Foreign Corrupt Practices Act.[6] A Senator and one of his staffers trade on that non-public information and earn a sizable profit from doing so.[7] This scenario requires students to apply the misappropriation theory, which states that a person violates the securities laws "when he misappropriates confidential information for securities trading purposes, in breach of a duty owed to the source of the information."[8] I assign different groups of students to represent the Senator, the staffer, the Securities and Exchange Commission, the shareholders of the company, and the judge and jurors. The students typically disagree on whether liability can be imposed on the Senator or the staffer, because reasonable arguments can be made both ways on whether they have breached a duty owed to the source of the information.[9] After this debate, the class reads the STOCK Act, which states that Congressional members and employees are not exempt from the insider trading laws and affirms that they owe a duty of trust and confidence to the Congress, the United States Government, and the citizens of the United States.[10] Having argued both sides of the litigation hypothetical, rather than simply reading the Act, students understand why Congress thought the STOCK Act was needed and how it was intended to function.

Litigation perspectives can also be helpful in teaching an aspect of the Sarbanes-Oxley Act of 2002[11] and the Dodd-Frank Wall Street Reform and Consumer Protection Act,[12] which require that companies have an effective communication system for employees to report potential legal compliance issues to the company. In class, I have students discuss how to draft such a system by considering the perspectives of the board of directors, the employees, the shareholders, and the Securities and Exchange Commission, all of whom may potentially play a role in litigation regarding the effectiveness of the company's reporting system.

5. Pub. L. No. 112–105, 126 Stat. 291, §§ 3–4 (2012).

6. Pub. L. No. 95–213, 91 Stat. 1494 (1977) (codified at 15 U.S.C. §§ 78dd-1–3).

7. By adding that the staffer or the Senator told a friend about this non-public information and the friend also profitably traded on the information, a tipping question can also be presented by the problem. Dirks v. SEC, 463 U.S. 646, 660 (1983) (discussing the liability of a tippee).

8. United States v. O'Hagan, 521 U.S. 642, 652 (1997); *see id.* at 655–56 (recognizing the misappropriation theory in a case in which a law firm partner took confidential information belonging to his law firm and its client, and then traded in securities on the basis of that information).

9. In addition, students can disagree on whether the Senator and staffer could disclose their plans to trade on the nonpublic information to foreclose liability under the misappropriation theory. *O'Hagan*, 521 U.S. at 655.

10. Pub. L. No. 112–105, 126 Stat. 291, §§ 4(a), (b)(1–2) (2012).

11. Pub. L. No. 107–204, 116 Stat. 745, § 404 (2002) (15 U.S.C. § 7262(a) (2006)).

12. Pub. L. No. 111–203, 124 Stat. 1376 (2010).

Alternatively, students can be asked to make the arguments of a shareholder with a claim against directors for losses stemming from the board's failure to implement or maintain an effective legal compliance program, as well as to anticipate how the company would seek to defend itself.

By incorporating litigation scenarios with multiple perspectives, I have found that student interest and engagement in Business Associations is greatly increased. Most of my students enroll in Business Associations because it is a bar course, and they tend to be more interested in litigation than corporate law courses. Indeed, many students are nervous about taking Business Associations because they lack business knowledge or experience. By focusing on litigation, which these students are already familiar with from their first year law courses, students are better able to learn and understand the business context and perspectives. Through these scenarios students are coached to consider the perspectives of all the parties who may be involved in such litigation, including the business's perspective. As the semester progresses, this process helps future corporate attorneys learn how to advise businesses, because they develop an understanding of how businesses conduct their affairs and the wide-ranging legal implications of business decisions. For students who plan on becoming litigators, this understanding will help them when they defend or sue businesses or when they become employees or owners of businesses themselves. The practical skills gained by considering multiple perspectives of potential litigation are useful to law students regardless of whether they become corporate attorneys or litigators.