Business Transactions: Connecting the Threads IV
Topics

Professor Baker – Clearinghouse Shareholders and "No Creditor Worse Off Than in Liquidation" Claims

The clearinghouse mandates are the centerpiece of the reforms to the over-the-counter derivatives markets responding to the 2007-08 financial crisis. They require that standardized OTC derivatives contracts use "super-systemic" financial market infrastructures known as clearinghouses. However, more than a decade on from the crisis, international policymakers are still wrestling with the question of clearinghouse resolution, that is, how to best handle a distressed or insolvent clearinghouse. In particular, the treatment of clearinghouse equity in resolution has become a particularly thorny issue. This presentation will begin with an overview of clearinghouses, the clearinghouse mandates, and the potential scenario of a clearinghouse resolution. It will then analyze the issue of whether clearinghouse shareholders should have a right to make "no creditor worse off than in liquidation" claims in resolution.

Dean Fershée's topic is "The Benefits and Burdens of Limited Liability." Choosing to form a limited liability entity, and the choice of entity type, comes with rights and obligations. Dean Fershée will discuss the surprising things you can get, and what you might give up, with your choice of entity (or choosing to use an entity at all.)

Professor Heminway and J.D. students Anne G. Crisp and Gray Buchanan Martin will present on "Business Law and Lawyering in the Wake of COVID-19". The public arrival of COVID-19 in the United States in early 2020 brought with it many social, political, and economic dislocations and pressures. These changes and stresses included and fostered adjustments in business law and the work of business lawyers. This presentation draws attention to these business law-related COVID-19 transformations in three ways. First, the session notes and comments on several of the legal issues affecting businesses (drawing from, for example, contract and business associations law) that achieved new or renewed prominence as business firms adjusted to the pandemic. Those attentive to the application of these areas of the law understand that force majeure clauses and emergency bylaws, for instance, garnered renewed and focused attention. Next, the presentation identifies and categorizes ways in which law firms and law practice responded to challenges generated by or in the pandemic. Perhaps most remarkable in this regard is the advent of dedicated COVID-19 web pages on law firm websites and the development of specialized legal technology applications. Finally, the presentation focuses in closely on the ways in which principles of professional responsibility and professional ethics (more broadly) interact with identified disruptions and alterations in law and law practice. Competence remains a critical core professional responsibility that requires our attention, but aspects of lawyering and the lawyer-client relationship in the pandemic offer many additional challenges relating to the business lawyer's professional obligations.

Professor Lipton will discuss limiting shareholder litigation through corporate charters and bylaws. This presentation will address recent developments regarding corporations' ability to use their constitutive documents to limit shareholders' ability to sue under state and federal

law. In its recent decision in Salzberg v. Sciabacucci, the Delaware Supreme Court made clear that corporate charters of Delaware corporations can be used to limit shareholder litigation rights not only for claims concerning the internal affairs of a Delaware corporation, but even for claims under federal law. In so doing, the court opened up a host of new questions regarding the limits of Delaware law, and how far other states - and the federal government - must accept corporate constitutive documents as binding contracts for the purpose of limiting claims within their purview.

Professor Moll will present on "Opting Out of Partnership".

In Energy Transfer Partners, L.P. v. Enterprise Products Partners, L.P., 593 S.W.3d 732 (Tex. 2020), the Supreme Court of Texas held that "parties [as between themselves] can conclusively negate the formation of a partnership . . . through contractual conditions precedent." Perhaps more importantly, the court acknowledged that performance of a condition precedent could be waived, but it concluded that evidence of traditional partnership factors, such as the sharing of profits and control, were not relevant to the waiver inquiry.

Although the Enterprise court focused on the use of conditions precedent to override a partnership conclusion, it is critical to note that the court's logic would seem to extend to absolute disclaimers of partnership. After all, a conditional disclaimer with a condition that is difficult, if not practically impossible, to satisfy ("we are not partners until the year 9999") is no different in effect from an absolute disclaimer of partnership ("we are not partners"). Similarly, a conditional disclaimer with a condition whose satisfaction remains within the control of one or both parties ("we are not partners unless and until our boards approve a definitive written partnership agreement") can be intentionally manipulated to have the same effect as an absolute disclaimer.

The role of freedom of contract in the partnership formation inquiry is a significant issue of national partnership law. Thus, it is important to consider the substantial normative question raised by the Enterprise decision—should disclaimers of partnership be dispositive in inter se disputes?

Professor Murray will present on "The Evolution of Social Enterprise Forms." This essay sketches the history of social enterprise legal forms in the United States and provides suggestions regarding their continued evolution. Social enterprises--companies that blend profit and social purpose--have a long history in the United States, but not until 2008 did states start passing social enterprise specific statutes. In that year, Vermont passed a statute allowing for formation of L3Cs, low-profit limited liability companies. The L3C was aimed primarily at funding issues for social enterprises and attempted to unlock program related investments ("PRIs") to provide for social enterprise capital needs. Following the L3C form were a number of variations on a corporation-based social enterprise: social purpose corporations, benefit corporations, and public benefit corporations. These forms evolved over the past decade to address the issues of corporate purpose and social accountability. Moreover, a small handful of states passed benefit limited liability company ("BLLC") statutes for companies that desired a form similar to the benefit corporation but built on an LLC framework. Since 2008, a few thousand companies have been formed under these social enterprise statutes, and a small number of these companies have

recently gone public. Yet, even at a time when the Business Roundtable has declared an increased focus on social purpose, the forms have not gained significant mainstream adoption. In addition, many commentators doubt the ability of the statutes to ensure production of social good. This essay suggests further amendments to the social enterprise statutes to strengthen the accountability mechanisms. Specifically, the essay suggests establishing stakeholder representatives, streamlining social reporting, and providing significant nonreporting penalties.

Professor Padfield's topic is "An Introduction to Viewpoint Diversity Shareholder Proposals."
He will provide an introduction to viewpoint diversity shareholder proposals. Following an Introduction, the Essay proceeds as follows. Part II provides a brief overview of shareholder proposals, which have been described as having "transformed the corporate landscape in the U.S." over the last 30 years. Part III explains why there might be a need for viewpoint diversity proposals. Part IV provides some examples of viewpoint diversity proposals, including proposals related to (1) protection of employees, (2) selection of board and related members, and (3) viewpoint discrimination in policy-making. Part V provides concluding remarks.

Professor Weldon's topic is "Compliance, Corporate Governance, and COVID-19".
Professor Weldon will address the following questions: What is the role of the corporation in society and how does that change during a crisis? What responsibilities do companies have to their employees and to the society at large? Will and should companies continue the trend toward responsible capitalism during the current financial crisis? How does the push toward racial justice help or complicate corporate recovery during the pandemic? This essay will examine the ethical and fiduciary duties of lawyers, compliance officers, and board members during these unprecedented times.