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UNINCORPORATED BUSINESS ENTITIES

Fifth Edition

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MATTHEW  BENDER

Preface

Shortly before he passed away all too early, Larry Ribstein and Jeff Lipshaw had an e-mail exchange about this Fifth Edition of *Unincorporated Business Entities*. The previous editions, particularly the most recent, addressed the need to stop thinking of unincorporated business associations, and particularly the limited liability company, merely as a quickie add-on to what is essentially a “corporations” course. Unincorporated business associations are a distinct and increasingly important area of modern business law practice. Indeed, many lawyers are more likely to be working with unincorporated business entities than with corporations. Moreover, what most law students learn in the basic business associations course about standardized publicly held corporations, even with a two or three-week introduction to partnerships and LLCs, is inadequate to help them deal with the vast array of contracting issues that arise in unincorporated firms.

Nevertheless, even the Fourth Edition, like most business associations casebooks, proceeded from standard form to standard form, beginning with agency (even though agency is not a standard form of business entity) and progressing through partnerships, limited partnerships, and LLCs. That is the logical sequence given the traditional litigation focus of the law school case method. Once the parties reach the stage of fighting over an issue, it is fair to classify it within the business form. For example, if you are dealing with a dispute over management rights in a partnership, there is really no need to compare management rights in a limited partnership or an LLC.

Larry and Jeff came to agree that there were enough casebooks taking that approach. Even if in substance it was still to be about the doctrine of the various forms, the book should be organized, we thought, on a comparative basis. That is how practitioners confront it from a business planning and transactional standpoint. One of the benefits of this approach would be to remedy a long-standing problem in teaching about LLCs. The law surrounding this relatively new form of organization is still developing rapidly, particularly regarding the fiduciary duties of members and managers. The form-centered approach tended to mean that LLCs, despite now being the predominant form of business organization in the United States, were the last subject covered in the typical semester-long course, and got short shrift as teachers and students scrambled to cover the remaining materials in the last few sessions.

Larry passed away suddenly and tragically, and never had a chance to execute the shared vision. Thankfully, Beth Miller and Josh Fershee were willing to sign on to the vision, and this Fifth Edition is the product. We cover largely the same materials as before, but now organized topically over the life (and death) of the enterprise. Hence, we get to the law of LLCs early and often, with a chance for teachers and students to compare the form to partnerships and limited partnerships along the way.

This edition carries on the goals of its predecessors: (1) to provide the basis for a course that teaches the kind of business law the overwhelming majority of lawyers are likely to practice; (2) to teach issues in current legal doctrine and not to be overly concerned with historical and arcane rules; and (3) to teach the law in a business planning context, demonstrating the interaction between default rules and the art of business lawyering. Although the organization of the material has changed, most of the problems have not. Chapter 1 introduces five stories that carry on in realistic problems distributed throughout the overview of the basic forms and the subsequent in-depth comparative

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review of legal issues of management, financial rights, limited and vicarious liability, transfer of interests, fiduciary obligations, and endgames: a fledgling start-up company, two enterprising neighborhood gourmet shop entrepreneurs, young lawyers starting a new law firm, a hedge fund, and two large corporations contemplating a joint venture. The many problems focus on planning and drafting as well as legal doctrine. They also draw on other areas of the law, including tax, bankruptcy, securities, and employment discrimination. The problems highlight the lawyer's role as counselor in the business planning and dispute resolution process.

The “Chameleon Agreement” in the Appendix provides the basics of a partnership or operating agreement. (It is a chameleon because it refers to the parties as “Memners,” i.e., either partners in a partnership or members in a limited liability company.) The agreement is a skeleton of provisions normally found in a partnership or operating agreement. You should refer to it as a starting point when considering the planning and drafting problems, which are intended to add flesh to the skeleton.

The Appendix also contains the partnership, limited partnership, and limited liability company statutes you will need for purposes of the book. We have tried to reduce the cost burden by relieving you of the obligation to purchase a statutory supplement. This approach also helps ensure that you see these statutes as an important and integral part of the material.

It is inadvisable and almost impossible to teach a general business law course, and particularly one with a planning emphasis, without reference to other areas of the law. We discuss enough tax to indicate where some of the tax issues lie, but we leave most of the discussion to our tax colleagues. We also highlight some of the other areas in which unincorporated business association law intersects with other areas of the law, particularly securities and employment discrimination.

This book is suitable for a variety of different course plans, depending on professors' preferences and the other courses in the curriculum. The book is designed for an upper-class, three-semester-hour survey course. It can also be used for a two-semester-hour course with selective coverage or for a comprehensive four-semester-hour-course with detailed coverage of the problems. The authors have used the book in both three- and four-semester hour courses.

We want to acknowledge the work of Jeff's research assistant, Hannah Hastings, and the Suffolk University Law School students who were willing to be guinea pigs in the spring 2013 offering of LLCs and Partnerships, using a preliminary draft of this book. In particular, thanks to Sarah Baldwin, Matthew Smith, Sardiaa Leney, and John Ferrantino for their comments. We also thank Ann Ribstein for her continued support and assistance under these difficult circumstances.

Jeff Lipshaw
Beth Miller
Josh Fershee
August 2013

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