**AGENCY**

**Principal-Agent Relationship**

**Agency is the fiduciary relationship that arises when (a) one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and (b) the agent manifests so to act.**

**Liability of Principal for Contracts Entered into by Agents**

**Principal is ONLY liable for authorized contracts entered into by its agents.**

**There are four types of authority:**

**(1) actual express, (2) actual implied, (3) apparent, and (4) ratification.**

 **Actual Express Authority**

 **Actual express authority is created when the principal expressly grants the authority.**

 **If the contract itself must be in writing, the express authority must**

**also be in writing.**

**(a principal may be estopped when a third party has been induced to**

 **make a detrimental change by the reasonable belief.)**

 **Revocation**

**Express authority may be revoked by**

**1) unilateral act of either party, 2) death or incapacity of the principal.**

 **Durable Power of Attorney Exception**

 **Express authority cannot be revoked if the principal gives the**

 **agent a durable power of attorney.**

**Power of attorney is a written expression of authority.**

**Conspicuous language intending survival makes the power durable.**

**Actual Implied Authority**

**short version**

**Actual implied authority is created when the agent reasonably believes the**

**principal has given it based on necessity, custom, or prior acceptance.**

**long version**

**There is actual implied authority to do all tasks;**

**(1) which are necessary to accomplish an expressly authorized task,**

**(2) customarily performed by the person with the agent’s title or position,**

**(3) which the agent reasonably believes to have been authorized based**

**on the prior acceptance of the principal.**

**Apparent Authority**

 **Apparent authority is created when**

**1) a third party reasonably believes the actor has authority, and**

**2) that belief is traceable to the principal's manifestations.**

**Ratification**

**Ratification is the affirmance of a prior act done by another without**

**authority. Ratification creates the effects of actual authority.**

**For a ratification to be valid, the principal must know or has reason to know the material facts relating to the transaction.**

**Ratification is implied when 1) Principal has reason to know all material facts regarding the contract, and 2) Principal accepts its benefits.**

**Ratification is NOT valid if the principal attempts to alter the terms of the contract.**

**Rules of Liability on the Contract**

**General Rule**

**If there is no authority, principal is not liable and agent is liable.**

**If there is authority, principal is liable and agent is not liable.**

 **Undisclosed & Unidentified (= Partially Disclosed) Principal Exception**

**If principal is unidentified or undisclosed, authorized agent may**

**nonetheless be liable at the election of the third party.**

**Liability of Principal for Torts by Agents**

 **The principal will be vicariously liable for torts by its agent if 1) a principal-agent relationship exists, and 2) the tort was committed within the scope of the relationship.**

**An employee is an agent whose principal controls the manner and means**

**of the agent’s performance of work.**

**Principal-agent relationship**

 **A principal-agent relationship arises when…**

**Scope of Agency relationship**

**An agent’s act is within the scope when**

**1) the act is within the job description,**

**2) it occurs in a course of conducts subject to the principal’s control, or**

**3) the agent intended to serve the principal.**

**Inten**t**ional torts**

**Intentional torts are generally outside the scope of agency but within the scope if the conduct was**

**1) done with the intent of serving the principal (and foreseeable),**

**2) specifically authorized by the principal, or**

**3) natural from the nature of employment.**

**Independent contractor (Non-employee agent)**

**Independent contractor is an agent whose principal does not control the manner and means of their work.**

**In general, there is no liability for independent contractor’s tort;**

**except when**

**1) independent contractor commits tort while engaging abnormally**

**dangerous activity,**

**2) the hiring party delegated no-delegable duties or**

**3) the third party reasonably believes the independent contractor is an**

 **agent and the reliance is traceable to the hiring party’s manifestations.**

**Direct liability**

 **Principals may be directly liable if they were negligent in selecting or**

**supervising agent including an independent contractor.**

**Fiduciary Duties of Agents**

 **Agents owe 1) duty of care, 2) duty to obey reasonable instructions,**

**and 3) duty of loyalty.**

**Duty of Loyalty**

 **Self-dealing**

**Duty not to deal with the principal as or on behalf of an adverse party in a transaction connected with the agency.**

**Usurping a principal’s opportunity**

**Duty not to take for oneself any business opportunity that could benefit the principal.**

**Secret profits**

**Duty not to acquire material benefits through the use of the agent’s**

**position**. (usually in connection with transaction conducted on the principal’s behalf)

**Remedy**

**Principal may**

 **1) recover losses caused by the breach, and**

 **2) disgorge profits made by the breaching agent.**

**Duties of principal to Agents**

**Principals owe duties imposed by the contract**

**Compensation**

**If the agreement is silent, the agent is entitled to reasonable compensation.**

**Cooperation**

 **The principal should not interfere with the agent’s performance.**

**Reimbursement**

**The principal must reimburse the agent for expenses.**

**PARTNERSHIP**

 **General Partnership is an association of two or more persons**

 **who are carrying on as co-owners a business for profit.**

 **No formalities and intent to form a partnership are not required.**

 **The contribution of money or services in return for a share of profits creates a presumption that a general partnership exists.**

 **Liabilities of Partnership and Partners**

 **Partners are agents of the partnership for the purpose of its business.**

 **Partnership is bound by contracts entered into by partners with**

**authority.**

**A partner has**

**1) actual express authority by the partnership agreement or vote;**

**and 2) actual implied authority to carry out ordinary business.**

**※ Apparent authorityはordinary businessであれば基本成立。そうでなけれ**

**ば基本不成立。**

**※ An act outside the ordinary course of business (& an amendment to**

**the partnership agreement) may be undertaken only with the**

**consent of all. Another act is determined by majority vote.**

**Tort Liability**

**Partnership is liable for each partner’s torts acting 1) in the ordinary**

**course of business or 2) with authority of the partnership.**

 **Liabilities of Partners**

**Each individual general partner is personally liable for all debts of the partnership. They owe joint and several liability.**

 **※ A judgment creditor must first seek satisfaction from the partnerships,**

 **then from the partner to the extent not covered by partnership asset.**

**Incoming Partner's liability for Pre-existing Debts**

 **In general, an incoming partner is NOT personally liable for**

 **prior debts.**

 **However, any money paid in by the incoming partner to the**

 **partnership can be used to satisfy those prior debts.**

**Dissociating (withdrawing) Partner's Liability for Subsequent Debts**

 **A dissociating partner remains liable for all future debt incurred**

 **until actual or constructive notice of dissociation is given to**

 **creditors.**

**Constructive Notice is given 90 days after filing notice of**

**dissociation with the state.**

**General Partnership Liability by Estoppel**

**One, who represents to a third-party that a general partnership exists, will be liable as if a general partnership exists.**

**(It requires actual and reasonable reliance.)**

**Rights and Liabilities between Partners**

**Fiduciary Duties – General partners are fiduciaries of each other and the**

 **partnership.**

**Duty of Loyalty 1) No Self-dealing**

**2) No Usurping partnership opportunities**

**3) No Secret profits at the partnership expense**

**Remedy – 1) Recover losses caused by the breach,**

**2) Disgorge profits made by the breach.**

**Partners Rights in Partnership Property**

**Specific Partnership Assets**

**Individual partner may not transfer these assets without partnership authority.**

**Share in Management**

 **Individual partner may not transfer their share to a third party.**

**Share Profits and Surplus**

**Individual partner may freely transfer their share of profits and**

**surplus to a third party.**

 **Conflict between Specific Partnership Assets and Personal Property**

**1. Property is partnership property if acquired in the name of the**

**partnership.**

 **2. If property is acquired not in the name of the partnership, the**

**property is presumed to belong to the person whose money**

**was used to purchase the property.**

**Management**

**Control**

**Absent an agreement, each partner is entitled to equal control.**

**An act outside the ordinary course of business (& an amendment to the partnership agreement) may be undertaken only with the consent of all.**

**Another act is determined by majority vote.**

Salary

Absent an agreement, partners get **NO SALARY**.

Share of Profits and Losses

Absent an agreement, **PROFITS & LOSSES are SHARED EQUALLY.**

Indemnity

A partner has a right to be indemnified by the other partners for expenses

incurred on behalf of the partnership.

Inspect

Partner has the right to inspect and copy partnership books.

**Dissolution**

**Absent an agreement, dissolution occurs automatically upon notice of**

**express will of any one general partner to dissociate.**

 **Termination**; is real end of the partnership

**Winding Up** ; is period between **dissolution** and **termination** in which the

**remaining partners** **liquidate** the partnerships **assets** to **satisfy**

**the partnerships creditors.**

**Compensation and Liability for Winding Up**

**Compensation – Partners receive a salary for winding up.**

**Liability**

**Old business**

 **Partnership and therefore its individual general partners remain**

 **liable on ALL transactions entered into prior to dissolution AND**

 **during wind up.**

 **New business**

 **Partnership and therefore its individual general partners remain**

**liable on ANY new transactions entered into until actual or**

**constructive notice of dissolution is given to creditors.**

**Distribution**

**When partnership assets are distributed, 1) outside and inside**

**creditors are paid first, 2) then capital contributions are paid, 3) finally**

**partners share profits and losses.**

**Limited Partnership**

 Partnership where there is at least one general partner and one limited partner

 To form limited partnership, a Limited Partnership Certificate must be filed with the

 State.

**General partners** are personally liable for all limited partnership obligations, and has right to manage (control) the partnership.

**Limited partners** areonly liable to the extent of their investment and may NOT manage the partnership without giving up their right to limited liability.

**Limited Liability Partnerships**

Formation – file a Statement of Qualification plus Annual Reports.

Liabilities – Partner is not liable for the obligations of the partnership itself.

**CORPORATION**

**Promoters**

**PROMOTERS**

**are persons acting on behalf of a corporation NOT yet formed.**

**Liability**

**Corporation becomes liable on a promoter's pre-incorporation contract when the corporation adopts the contract by**

**1) express resolution of the board of directors in writing, or**

**2) implied adoption through knowledge of the contract and acceptance**

**of its benefits.**

**Promoter remains liable until there has been a novation.**

**Fiduciaries – Promoters owe a duty of loyalty to each other and the corporation.**

**Loyalty　 The promoter cannot engage in self-dealing, usurping**

**corporate opportunities, nor making secret profits.**

**Remedy The corporation may recover loss and disgorge profits.**

**Sale of Property**

**1. If there is sale to corporation of property acquired by promoter**

**BEFORE becoming promoter, his profit is recoverable by corporation**

**ONLY if sold for more than fair market value.**

**2. If acquired AFTER becoming a promoter,**

**ANY profit is recoverable by the corporation.**

**Formation**

**Articles of Incorporation ~ De Jure Corporation**

 **Articles of Incorporation must be filed with the Secretary of State.**

 **It must include the following: 1) Authorized Shares 2) Purpose (&**

 **duration) 3) Agent 4) Incorporator 5) Name of the corporation.**

**Ultra Vires**

 **Ultra vires acts, which are acts beyond the business purpose, is valid.**

 **However, the State or a shareholder can sue to enjoin the ultra vires**

 **activity and the corporation may sue its own directors and officers for**

 **losses caused by the Ultra Vires activity. (i.e. failed to obey articles)**

**By-Laws**

 **The board has the power to adopt and amend the by-laws, unless the**

 **Articles give the power to the Shareholders.**

**De Facto Corporation Doctrine**

 **A business failing to achieve de jure corporate status nonetheless is**

 **treated as a corporation,**

 **if:1) organizers have made a good faith, colorable attempt to comply**

 **with corporate formalities, AND**

**2) have no knowledge of the lack of corporate status.**

 **Corporation by Estoppel**

 **To Creditor**

**If the third party treats an organization as though it were a corporation,**

 **he may be estopped from denying its corporate status to avoid unjust harm.**

 **To Corporation**

 **If an organization holds itself as a corporation, it may be estopped**

 **from denying its corporate status to avoid unjust harm.**

 **Piercing the Corporate Veil**

 **In general, a shareholder is NOT liable for the debts or obligations of a**

 **corporation.**

 **Exception**

 **However, courts will disregard the corporate entity and hold individuals**

 **liable for corporate obligations in the following reason:**

 **Alter-Ego**

 **Where shareholders treat the corporation as the Alter-ego by**

 **treating corporate assets as their own or ignoring the formalities,**

 **Undercapitalization**

 **Where shareholders fails to maintain sufficient funds to cover**

 **foreseeable liabilities.** Dangerous business without insurance or capitalization

 **Prevention of Fraud**

 **Where the disregard is necessary to prevent fraud such as using**

 **the corporation merely as shield against their existing liability.**

 **※ Courts are generally more willing to pierce the corporate veil for a**

 **tort victim rather than a contract.**

**Issuance of Stock**

 **Preemptive Rights**

 Right of an **existing shareholder** to **maintain her percentage** of ownership by

 **buying stock** whenever there is a new issuance of stock.

 **Par value** – **Minimum** issuance price.

 Issuance of par value stock for less than par value is valid; however, directors are

 liable personally and shareholder are liable for paying full consideration.

**DIRECTORS and OFFICERS**

**Statutory Requirements for Directors**

**Shareholders elect directors and can remove a director before her term expires with or without cause.**

**※ A shareholder has the right to petition the court for the removal of a corporation’s director if that director is acting in bad faith and not in the best interests of the corporation and its shareholders.**

**Boards can only take an act by 1) the majority vote at a meeting or 2)**

**unanimous agreement in writing.**

**Valid Meeting – To execute action, the board must call a meeting and pass**

**a resolution.**

**Meeting Required**

**Unless ALL directors consent in writing to act without a meeting, a**

**meeting is required.**

**Quorum – To take action, a majority of ALL directors must be present**

 **unless a different percentage is required in bylaws.**

**Vote – To pass a resolution, a majority vote of those directors**

 **present is required.**

**※ Directors Must Personal Vote**

 **Proxies are not allowed. Also, no voting agreements are allowed.**

 **But, conference calls are now generally valid.**

**※ Concurrence**

 **Each director is presumed to have concurred in Board action,**

 **unless her dissent or abstention is recorded in writing.**

**Liabilities of Directors**

**Directors are fiduciaries of their corporation.**

**As such, they owe duty of care and loyalty to their company and**

**shareholders.**

**Duty of Care**

**Duty of care is duty to act with care that ordinary prudent person would use in similar circumstances.**

**Business Judgment Rule (BJR)**

**If the director**

**1) acted in good faith (is not self-interested)**

**2) informed himself about material relevant information, and**

**3) did not act completely irrationally,**

**there is no breach of duty of care.**

**Reliance on expert**

**BJR also attaches if the directors rely on statements made by other**

**directors, officers or outside experts, so long as the statement is**

**within their competence.**

**Duty of Loyalty**

 **Duty of loyalty is duty to act in the corporation’s best interest.**

 **A conflict of interest exists when he or a person related to him has**

 **beneficial interests in the situation.**

**An interested-director transaction constitutes a breach of loyalty,**

**unless the director**

**1) fully discloses the relevant information and received approval by a**

**majority vote of disinterested directors** (or a committee of at least

two disinterested directors) **or shareholders, or**

**2) shows the transaction is intrinsic fair.**

**Self-dealing (interested director transaction)**

**arises when a director deals with the corporation as or on behalf of**

**an adverse party. (such as entity in which he or his family member**

**has substantial interest.)**

**Usurping corporate opportunities**

 **arises when a director (competes with his corporation and) takes for oneself business opportunity that is within line of business of the corporation.**

 **Defense 1) incapacity 2) different source**

 **3) offering = 利益相反取引一般例外と同じ (i.e.,開示&承認)**

**Ratification**

 **The corporation may ratify if given a material disclosure through:**

**1) majority vote of independent directors,**

**2) majority vote of shares held by independent shareholders, or**

**3) majority vote of a committee of at least 2 independent directors.**

**Remedy**

 **The corporation may**

**1) recover profits (D must disgorge profits) or**

**2) compel transfer of opportunity to corporation under constructive**

**trust theory.**

**Duty to Manage – Directors have a duty to manage the corporation.**

**Delegation**

 **Directors may delegate management functions to a committee of one or**

 **more directors that recommends action to the Board.**

**OFFICERS – Owe same duties of care and loyalty.**

**Agents**

 **Officers are agents of the corporation and bind the corporation by their**

**authorized activities.**

**An officer has actual express authority by a) the Article, by) by-laws, or c)**

**resolution by valid directors’ meeting.**

**An officer has actual implied authority in the ordinary course of business.**

**Necessary Officers**

**Corporations must have a President, Secretary, & Treasurer.**

**Select and Remove**

**Directors have virtually unlimited power to select officers, and may**

**remove officers from office at any time.**

**Indemnification of directors and officers**

**Director or Officers that have incurred costs,** attorney’s fees, fines, **a judgment or settlement in the course of corporate business, may seek indemnity from the corporation.**

**1. The corporation may NEVER indemnify a director who lose a lawsuit with**

 **the corporation.**

**2. The corporation MUST ALWAYS indemnify a director if a director or officer**

**wins a lawsuit against any party, including their corporation.**

**3. 3.The corporation MAY indemnify directors or officers if**

 **1) Director or officer shows that she acted in good faith (reasonable belief**

 **that they acted in the corporation's best interest) and**

 **2) the permissive indemnity is determined by**

 **a) Majority vote of disinterested directors (or committee of at least two**

**independent directors) or shareholders, or**

 **b) independent legal counsel.**

**Rights of Shareholders**

 **Shareholder Direct Suits**

**Shareholders may bring a suit for a wrong that was done directly to them.**

**例：1) compel the payments of dividends**

**2) enjoin an ultra vires activities**

**3) protect certain shareholders right (e.g. preemptive right)**

**4) enjoin dilution of shareholder voting power**

 **Shareholder Derivative Suits**

 **Shareholders may bring a derivative suit on behalf of the corporation for**

 **a wrong that was done to the corporation.**

 **Requirements**

 **For bringing a derivative suit, shareholders must;**

 **1) own stock when a) the claim arose, and b) throughout the litigation, and**

**2) a) make demand on directors to bring suit or redress injury and**

**b) the demand is rejected by the Board (or at least 90 days pass**

**since demand was made).**

 **Voting**

 **Proxies**

 **Proxies must be a signed writing authorizing another to cast a vote, (and**

 **must be sent to secretary of corporation. It is valid for only 11 months.)**

 **Revocable – Proxies are freely revocable unless: a) It states that the**

 **proxy is irrevocable, and b) It is coupled with an interest.**

**Meetings / Notice**

 **Annual Meeting – Corporation must have a properly noticed annual meeting.**

 **Notice – Notified of the meeting not less than 10 or more than 60**

 **days before the meeting.**

 **Notice must contain the time and place of the meeting.**

 **Special Meeting**

 **– Called by the Board, the President, or 10% of the voting shares.**

 **Vote only on a proposal or fundamental corporate change.**

**Notice – must also contain the meetings special purpose.**

 **Quorum – A quorum requires a majority of outstanding SHARES to be**

 **present when the meeting begins, unless otherwise provided in**

 **Article.**

 **Vote**

 **If quorum is present, action is approved if the votes cast in favor for the**

 **proposal exceed the votes cast against the proposal.**

 **Cumulative Voting for Directors**

 **Generally**

 **if multiple directorships are open, multiple separate elections**

 **are held and can only vote once in each election.**

**→Cumulative Voting**

 **The number of shares is multiplied by the number of directors to**

 **be elected, and shareholder can cast all of his votes for one**

 **candidate.**

 **Pooled or Block Voting Methods**

 **a Voting Trust**

 **Formal delegation of voting power to a voting trustee.**

 **It is valid for 10 years.**

 **It occurs when shareholder agree in writing to transfer share to voting**

 **trustee who vote and distribute dividends.**

 **It must be filed with corporation.**

 **a Voting Agreement**

 **is a written agreement to vote shares as required in the agreement.**

 **Shareholders may agree to exercise control to determine who will be**

 **directors, but not to determine how those directors will vote.**

 **∵ Directors must act in the best interest of ALL the shareholders.**

 **Shareholders have freedom of contract and can make a voting**

 **agreement but it becomes in valid if it violates protection of the**

 **minority by evading the corporate law’s policy.**

 **The unanimous agreement is generally valid.**

 **The restriction of transfer is generally valid but cannot assert ot**

 **the bona fide purchaser.**

 **Right to Examine the Books and Records of the Corporation**

 **Any shareholder shall have access to books and records upon notice at**

 **proper times.**

 **Dividends**

 **Shareholders have NO right to dividends.**

 **Dividends are declared at the Board's Discretion unless the corporation**

 **is insolvent or would be rendered insolvent by the dividends.**

 **\*repurchasing of stock is a type of distribution**

 **(特定の株主を有利に扱えばduty of loyalty違反になる)**

 **Personal Liability**

 **Board members are liable personally for unlawful distributions, but**

 **have a defense of good faith reliance on financial officer's**

 **representations regarding solvency.**

 **Priority of Distribution**

 **Common stock gets paid Last and paid Equally.**

 **Preferred stock gets paid First.**

 **Participating – Get paid twice. Get paid first as preferred stock and**

 **also participate in the common stock distribution.**

 **Cumulative　 　 　　　– If one payment is missed, two are due next period.**

**Shareholder Liabilities**

**General Rule – Shareholders are not liable for corporate obligations.**

**Exceptions**

**1. Piercing the Corporate Veil render shareholders liable.**

**2. Controlling Shareholders**

**Owe a fiduciary duty to minority shareholders,**

1. **cannot receive benefits at the expense of the minority shareholders,**
2. **cannot sell the corporation to a party who loots the corporation,**

**unless reasonable measures were taken to investigate the buyer’s reputation and plans.**

 **Controlling shareholders can sell that controlling interest at a**

 **“Control premium”, but one cannot generally sell a Board seat.**

**Closely-Held Corporation**

 **– Shareholder Agreements to Eliminate Corporate Formalities**

 **Shareholders in a close corporation are generally held to owe each**

 **other the same duty of loyalty and utmost good faith that is owed by**

 **partners to each other.**

 **Requirements:**

 **1) Unanimous Shareholder Election in the Articles, By-laws, or in a**

**Filed Written Agreement**

 **2) Reasonable Share Transfer Restriction**

 **Benefits:**

 **・NO piercing of the corporate veil even if you fail to maintain formalities.**

 **・Possible Sub-chapter S corporation status.**

 **Benefit of S Corp– Treated as a partnership for tax purposes**

 **Requirements to become an S Corp**

 **・No more than 100 Shareholders, who are individuals and**

 **American residents.**

 **・No more than ONE class of stock.**

**※Professional Corporations**

**– Licensed Professionals (lawyers, accountants, medical) may**

 **incorporate as Professional Corporation (PC).**

**Requirements**

**1) Organizers file Articles with name designated as "PC".**

**2) Shareholders must be licensed professionals.**

**3) Corporation may practice only ONE designated profession.**

 **※ Professionals are liable personally for their OWN malpractice.**

 **Professionals are NOT liable for each other's malpractice or the**

 **obligations of the corporation itself.**

**FUNDAMENTAL CORPORATE CHANGES**

**Recognized Fundamental Corporate Changes**

1. **Merger, Consolidation**

**2) Amendment of the Articles in a fundamental way**

**3) Sale of Substantially all of the Corporation's Assets**

**4) Dissolution**

**Procedural Steps (5 steps)**

**① Resolution – Resolution by Board at a Valid meeting**

**② Notice – Notice of a Special Meeting**

**③ Approval – Approval by:**

 **1) Majority of ALL shares entitled to vote, AND**

 **2) Majority of any voting group adversely affected by the change separately**

**④ Dissenters Appraisal Remedy**

 **– Shareholder who does not vote for a fundamental change has the**

**right to force the corporation to buy their shares back at FMV.**

**Actions to Perfect the Right**

 **1) Written Notice 2) Adverse Vote 3) Written Demand**

**⑤ File Notice with the State (i.e., Articles of Merger)**

**Involuntary (court ordered) Dissolution and Liquidation**

**・Shareholders can petition court to dissolve if:**

**1) Director abuse, waste of assets, misconduct, illegal or oppressive acts,**

**2) Shareholder deadlock and failure to fill a vacancy for 2 annual meetings,**

**3) Director deadlock causing irreparable harm to the corporation**

**・Court may order a buy-out of Shareholders instead.**

**・Creditor can petition because the corporation is insolvent.**

**Winding up – after dissolution, corporation stays in business to wind up.**

**(Gather assets, convert to cash, pay creditors, and distribute**

**remainder to Shareholders pro rata by share)**

 **※Deep Rock Doctrine**

**Third party creditors may be paid off before shareholders creditors.**

**FEDERAL SECURITIES LAWS**

**Rule 10b-5 Action**

 **SEC rule 10b-5 prohibits**

 **1) untrue statement or omission of 2) material fact**

 **3) in connection with the actual purchase or sale of any security**

 **4) by the use of any means or instrumentality of interstate commerce,**

 **5) with Scienter.**

 **material fact**

 **Material fact is fact that a reasonable investor would consider important**

 **in making investment decision.**

 **the purchase or sale of any security**

 **Actual purchase or sale is required. The possibility is not enough.**

 **Scienter**

 **which must be at least reckless (intent to deceive or defraud)**

 **Private action**

 **Purchasers or sellers of securities may recover damages under Rule 10b-5**

 **through a private action if he can show the following:**

 **Reliance (transaction causation) and Loss Causation**

 **a) Investor actually relied on fraud (or invested at a market price infected by fraud)**

 **b) Fraud caused actual loss**

 **Damages**

**Insider trading**

 **SEC rule 10b-5 prohibits insider trading by the use of any means or**

 **instrumentality of interstate commerce with scienter.**

**In general, insider trading is trading securities on the basis of nonpublic**

**material information in breach of fiducial duty by a person who owes the**

 **duty to the corporation.**

**(such as a director, officer, controlling shareholders, attorney or accountant.)**

 **Tipping, Tippee, Misappropriation**

 **Insider trading violations may also include**

 **a) "tipping": disclosing material nonpublic information for improper**

 **purpose**

 **i) that disclosure is made in breach of a fiduciary duty of loyalty**

 **ii) knowing someone trades on it),**

 **b) securities trading by "tippee" who receives material nonpublic**

 **information and trades on it with knowledge that the information was**

 **disclosed in breach of the tipper’s fiduciary duty,**

 **c) securities trading by those who misappropriate material nonpublic**

**information in breach of the duty owed to the source of the information.**

 **Section 16(b) - Short-Swing Trading Profits**

 **Section 16(b) prohibits short-swing trading profits. It requires the following;**

 **1) Corporation must be Reporting Corporations which**

**a) are Listed on a national exchange, or**

**b) have at least 500 shareholders and $10 million assets,**

 **2) Defendant must be officer, director, or shareholder with more than 10%,**

 **at the time of both purchase and selling,**

 **3) Defendant sell and purchase the company’s stock within 6 months.**

 **All "profits" from such "short-swing trading" are recoverable by the**

 **corporation.**

 **Profits may either be**

 **a) a gain within 6 months after a purchase or**

 **b) an avoided loss within 6 months after a sale.**

 **Sarbanes-Oxley Act**

 **False reports**

 **CEO & CFO of reporting corporations must certify that the reports filed with**

 **SEC are not false.**

 **If not, the Corporation (directly or derivatively) may recover:**

 **a) Officers' profits made from trading the company's securities within 12**

 **months after the false reports were filed, AND**

 **b) Officers’ incentive-based compensation received during that period.**

 **Black-Out**

 **The Corporation (directly or derivatively) may also recover: ANY profits**

 **made by Officers from trading corporation's stock during "black out"**

 **periods of at least 3 days.**