

**Association of American Law Schools Mid-Year Meeting
Conference on Business Associations: Taking Stock of the Field and
Corporate Social Accountability**

**Outline for presentation for panel - Role of Basic Course: What It Is and
Where It Is Going?**

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I. The importance of basing doctrinal and theoretical discussions on issues and problems derived from current events

A. The economic downturn makes it more important than ever to make the basic Business Associations class relevant to the world into which our students will graduate.

1. For students who are interested in practicing business law: Discussion of events in the news provides them with issues and topics to discuss when they interview for jobs.

2. For students not interested in practicing business law: Discussion of events in the news inspires a level of interest that extends beyond copious note taking in order to get a decent grade.

B. Discussion of issues and news events was important before the economic crisis, and will continue in importance after the economy is restored.

1. 9/11 and Business Organizations.

2. Enron, WorldCom, etc.

II. Organizing the Business Associations course around a particular news event:

A. Last semester, the news was replete with discussions about subprime mortgages. I used this discussion and context throughout the semester.

1. Were fiduciary duties breached when financial institutions purchased complex mortgage-backed securities that managers did not fully understand?

a. The duty of care/the board's monitoring function under *Caremark*. Because of exculpatory charter provisions, the duty of care is largely irrelevant in the litigation context. Yet, cases such as *Caremark* are essential for students to understand because they contain judicial pronouncements of the goals to which directors and managers should aspire. It is clear that care breaches will not result in directorial liability, but business leaders must be concerned with issues beyond their potential liability to shareholders. While boards and managers at companies such as Citibank and Merrill Lynch (before its merger with Bank of America) may not be liable to their shareholders for care/monitoring breaches, they may have avoided some of their companies' financial difficulties with the exercise of greater care and adequate monitoring. I also discussed with students the fact that courts are more willing to review the monitoring processes of

directors of financial institutions.

b. The Business Judgment Rule. I explored the justifications courts give for deferring to directors under the business judgment rule in the context of the predatory lending debacle. One justification for the rule is that it encourages managerial risk taking that will make shareholders money. I explored with students the nature of the risks taken by managers at companies such as Merrill Lynch. We also discussed the idea that after the fact litigation is inappropriate for directors.

c. Derivative litigation. I asked students what shareholders would have to do procedurally if they wanted to try to hold directors and managers at Merrill and Citibank liable: security for expenses in some states, demand, special litigation committees.

2. Limited liability. We discussed the fact that no one is personally liable for shareholder losses in the subprime context.

3. Proxies. When Richard Parsons became Chairman of Citigroup he reshaped the board. I discussed the new board nominees in Citigroup's proxy statement. This also allowed for a discussion about basic corporate governance issues regarding board membership. All of Parsons' Citigroup nominees were independent. Parsons suggested that some of Citigroup's losses were attributable to the fact that there were too many non-independent directors at the time the decisions were made to purchase mortgage-backed securities.

4. Some of the financial institutions that purchased mortgage-backed securities purchased them from small businesses. This allowed for a discussion of close business arrangements, including other types of business organizations such as LLCs. Limited liability comes up again when discussing the predatory lending practices of some nonbank mortgage brokers. No individual is responsible for predatory practices unless the corporate veil is pierced.

5. The subprime context provided examples of complex derivatives and allowed for a discussion of *Howey* and what a security is.

6. Mergers and Acquisitions. We discussed the Merrill Lynch/Bank of America merger.

7. Business ethics.

III. Other news events.

A. The problems of the auto industry allowed for a discussion about markets versus stakeholder theory. Taxpayers, labor and bondholders made concessions in an attempt to keep Chrysler and GM viable. According to the political discourse, this was done not for the benefit of shareholders, but for the economic benefit of local communities and the entire nation. This discussion highlighted several points about stakeholder theory as it relates to employees and the communities in which the auto companies do business - including the national community. I also asked students whether a free market, with no governmental intervention, would have rectified the mistakes that businesses made over

the past decade. And, if the mistakes could not be rectified, why not allow the companies to file for bankruptcy?

B. The bonuses paid to executives at AIG and Merrill provided context for a discussion of executive compensation and the duty of loyalty.

IV. Corporate Social Responsibility and Accountability. Many of the news events that unfolded when I have taught Business Associations allowed for a discussion of corporate social responsibility throughout the semester. Last semester, I emphasized the interrelatedness of the health of big business and the health of the national, and even global economies.