CORPORATIONS & LLCS

RULE-STATEMENT CHECKLIST

I. FORMATION OF ORGANIZATIONS

A. ARTICLES OF INCORPORATION

GENERAL RULE A corporation is formed by filing articles of incorporation with the secretary of state; upon filing it becomes a separate legal entity whose shareholders enjoy limited liability, and corporate existence begins when the articles are filed.

- ☐ **Required contents.** The articles must set forth the corporate name (including a corporate indicator such as Inc. or Corp.), the number of authorized shares, the name and address of the registered agent and registered office, and the name and address of each incorporator.
- ☐ **Incorporators.** One or more incorporators execute and file the articles; incorporators need not be shareholders and may be persons or entities, and after filing they hold an organizational meeting to appoint directors and adopt bylaws if directors are not named in the articles.
- ☐ **De jure corporation.** A de jure corporation exists when the incorporators substantially comply with all mandatory statutory requirements for incorporation, insulating shareholders from personal liability for corporate obligations.
- ☐ **De facto corporation.** Where there is a good-faith, colorable attempt to comply with the incorporation statute and actual use of corporate powers, a de facto corporation is treated as a corporation against everyone except the state in a direct quo warranto action, though the MBCA has largely abolished this doctrine.
- ☐ **Corporation by estoppel.** A party who deals with a business as though it were a corporation, or who holds a business out as a corporation, may be estopped from denying its corporate status to impose personal liability; this doctrine applies only in contract, not tort.
- ☐ **Liability for defective incorporation.** Under the MBCA, persons who purport to act as or on behalf of a corporation, knowing there was no incorporation, are jointly and severally liable for obligations created; those who honestly and reasonably believed incorporation had occurred generally escape personal liability.
- ☐ **Ultra vires.** Acts beyond a corporation's stated purpose are ultra vires; because modern articles typically state a general purpose to conduct any lawful business, ultra vires is rarely available, and the MBCA permits challenges only by a shareholder to enjoin the act, by the corporation against a director or officer, or by the state.

B. BYLAWS

- ☐ **Function.** Bylaws are the internal operating rules governing the corporation's management, such as officer duties, meeting procedures, and quorum requirements; they are not filed with the state and need not be public.
- ☐ **Adoption and amendment.** The initial bylaws are adopted by the incorporators or the board at the organizational meeting; thereafter both the board and the shareholders may amend or repeal bylaws, and shareholders may adopt a bylaw that the board cannot later change if they so provide.
- ☐ **Conflict with articles.** If a bylaw conflicts with the articles of incorporation or the governing statute, the articles or statute control.

C. ARTICLES OF ORGANIZATION AND CERTIFICATES OF FORMATION (LLC)

GENERAL RULE An LLC is a hybrid entity offering the limited liability of a corporation and the pass-through tax treatment and management flexibility of a partnership; it is formed by filing articles of organization (or a certificate of formation) with the state.

- ☐ **Formation and filing.** An LLC is created by filing articles of organization with the secretary of state, typically stating the LLC name (with an LLC designator), the registered agent and office, and whether the LLC is member-managed or manager-managed; existence begins upon filing.
- ☐ **Separate legal entity.** Once formed, the LLC is a legal entity distinct from its members, capable of holding property, suing, and being sued in its own name, and its members are generally not personally liable for the LLC's debts.
- ☐ **Members required.** An LLC may be formed with one or more members, and most statutes permit single-member LLCs; members may be individuals, corporations, partnerships, or other LLCs.

D. OPERATING AGREEMENTS (LLC)

- ☐ **Nature and scope.** The operating agreement is the contract among the members governing the LLC's internal affairs, management, allocation of profits and losses, and members' rights and duties; it may be written, oral, or implied and controls over default statutory rules on most matters.
- ☐ **Default rules.** Where the operating agreement is silent, the LLC statute supplies default rules; typically profits and losses and management rights are allocated equally per capita, or in some states by contribution, and management is vested in the members.
- ☐ **Nonwaivable provisions.** An operating agreement generally cannot eliminate the implied covenant of good faith and fair dealing, unreasonably restrict access to records, or eliminate the duty of loyalty, though it may identify specific permitted activities and modify duties if not manifestly unreasonable.

II. PRE-ORGANIZATION TRANSACTIONS

A. PROMOTERS: CONTRACTS AND FIDUCIARY DUTIES

GENERAL RULE A promoter is a person who acts on behalf of a corporation not yet formed, procuring capital, assets, and contracts to bring the corporation into existence.

- ☐ **Promoter liability on contracts.** A promoter who contracts on behalf of a corporation not yet in existence is personally liable on that contract, and remains liable even after the corporation forms and adopts the contract, unless there is a novation.

- ☐ **Corporate liability and adoption.** A corporation is not automatically bound by a promoter's pre-incorporation contracts; it becomes liable only if, after formation, it adopts the contract expressly or impliedly by knowingly accepting its benefits.
- ☐ **Novation.** A promoter is released from personal liability only by a novation, an agreement among the promoter, the corporation, and the third party to substitute the corporation for the promoter as the party bound.
- ☐ **Fiduciary duties.** Promoters owe fiduciary duties of good faith and fair disclosure to the corporation, its subscribers, and other promoters; a promoter who sells property to the corporation must disclose all material facts and any profit, and secret profits may be recovered by the corporation.

B. SUBSCRIPTIONS FOR SHARES

- ☐ **Nature of subscription.** A share subscription is a written offer or agreement to purchase a specified number of the corporation's shares, which may be entered into before or after incorporation.
- ☐ **Irrevocability of pre-incorporation subscriptions.** Under the MBCA, a pre-incorporation subscription is irrevocable for six months unless the subscription agreement provides otherwise or all subscribers consent to revocation.
- ☐ **Payment and default.** Subscribers must pay the consideration set by the board when called; if a subscriber defaults, the corporation may collect the amount owed by ordinary collection or, after notice, may rescind and sell the shares to another.

III. PIERCING THE VEIL

A. GROUNDS FOR PIERCING

> **GENERAL RULE** Courts will pierce the corporate veil and hold shareholders personally liable for corporate obligations only when the corporate form is abused to work a fraud or injustice; piercing is applied reluctantly and generally only against close corporations, and to shareholders who are active in the abuse.

- ☐ **Alter ego / disregard of formalities.** The veil may be pierced where a shareholder so dominates and disregards the corporation's separate existence, by commingling funds, ignoring corporate formalities, or treating corporate assets as personal, that the corporation is merely the shareholder's alter ego and injustice would result from respecting the form.
- ☐ **Undercapitalization.** A court may pierce where shareholders failed to provide adequate capitalization at formation to meet the reasonably anticipated liabilities of the business, especially in tort cases where the creditor did not choose to deal with the corporation.
- ☐ **Fraud or injustice.** The veil may be pierced where shareholders used the corporate form to perpetrate fraud, evade existing obligations, or otherwise avoid a duty owed to the plaintiff.
- ☐ **Tort vs contract creditors.** Courts pierce more readily for involuntary tort creditors than for voluntary contract creditors, who are presumed to have assessed the corporation's creditworthiness before dealing with it.
- ☐ **Enterprise liability and parent-subsidiary.** Under enterprise liability, a court may combine the assets of affiliated corporations under common ownership treated as a single business, and a parent may be liable for a subsidiary's obligations where the subsidiary is a mere instrumentality of the parent.

IV. FINANCING THE ORGANIZATION

A. SOURCES OF FINANCE

> **GENERAL RULE** A corporation raises capital through equity (issuing shares) and debt (borrowing, often by issuing bonds or debentures); equity holders own the corporation while debt holders are creditors.

- ☐ **Equity vs debt.** Equity securities represent ownership interests that share in profits and residual assets, whereas debt securities represent a creditor relationship entitling the holder to repayment of principal with interest and priority over shareholders on dissolution.
- ☐ **Common vs preferred shares.** Common shares carry voting rights and a residual claim on earnings and assets, while preferred shares carry a stated preference in dividends or liquidation and may be cumulative, participating, or convertible as provided in the articles.

B. SECURITIES ISSUANCE AND CHARACTERISTICS

- ☐ **Authorized, issued, and outstanding shares.** Authorized shares are the maximum number the articles permit the corporation to issue; issued shares are those actually sold to shareholders; and outstanding shares are issued shares still held by shareholders and not reacquired by the corporation.
- ☐ **Consideration for shares.** Under the MBCA, shares may be issued for any tangible or intangible property or benefit to the corporation, including cash, promissory notes, services performed, and contracts for future services; the board's good-faith determination of adequacy is conclusive.
- ☐ **Par value and watered stock.** Par value is the minimum consideration for which a share may be issued; the MBCA has eliminated par value, but where it applies, shares issued for less than par are watered stock and the shareholder is liable to the corporation for the deficiency.
- ☐ **Preemptive rights.** Preemptive rights allow existing shareholders to purchase newly issued shares in proportion to their holdings to preserve their percentage ownership; under the MBCA these rights do not exist unless the articles expressly provide for them.

C. DIVIDENDS AND DISTRIBUTIONS

- ☐ **Board discretion.** The declaration of dividends is within the board's discretion, protected by the business judgment rule, and shareholders cannot compel a dividend absent a showing of bad faith or abuse of discretion.
- ☐ **Insolvency limits on distributions.** Under the MBCA, a corporation may not make a distribution if, after giving effect to it, the corporation could not pay its debts as they become due in the usual course of business (equity insolvency test) or its total assets would be less than its total liabilities plus liquidation preferences (balance-sheet test).

- ☐ **Director and shareholder liability for unlawful distributions.** Directors who vote for or assent to an unlawful distribution are personally liable to the corporation for the excess unless they relied in good faith on financial data or a legal opinion, and shareholders who received a distribution knowing it was unlawful are liable to return it.
- ☐ **Priority among shares.** Preferred shareholders are paid dividends before common shareholders; cumulative preferred dividends that are undeclared in a given year accrue as arrearages that must be paid before any common dividend.

D. REDEMPTIONS AND REPURCHASES

- ☐ **Redemption and repurchase.** A corporation may redeem or repurchase its own shares if authorized, converting them into treasury or authorized-but-unissued shares; such reacquisitions are distributions subject to the same insolvency limits as dividends.
- ☐ **Good faith requirement.** Selective repurchases must be made in good faith and cannot be used to unfairly benefit controlling shareholders or entrench management at the corporation's or minority's expense.

V. MANAGEMENT AND CONTROL

A. SHAREHOLDERS (MEETINGS AND VOTING)

> **GENERAL RULE** Shareholders own the corporation and elect the directors; directors manage the business and set policy; and officers execute the board's decisions and run day-to-day operations. Shareholders ordinarily do not manage but vote on directors and fundamental changes.

- ☐ **Annual and special meetings.** Shareholders must hold an annual meeting to elect directors; special meetings may be called by the board, holders of at least ten percent of voting shares, or others authorized in the articles or bylaws, and the corporation must give timely notice stating the date, time, place, and, for special meetings, the purpose.
- ☐ **Quorum and voting.** A quorum for a shareholder meeting requires a majority of the shares entitled to vote unless the articles set a higher number; once a quorum is present, an action other than election of directors is approved if the votes cast in favor exceed the votes cast against, and directors are elected by a plurality.
- ☐ **Record date and eligibility.** Only shareholders of record on the record date fixed by the board (not more than seventy days before the meeting) are entitled to notice and to vote.
- ☐ **Action by written consent.** Shareholders may act without a meeting by unanimous written consent, or, if the articles permit, by written consent of the holders of the minimum number of votes that would be required at a meeting.
- ☐ **Cumulative voting.** Cumulative voting, available only in director elections and only if the articles so provide, lets each shareholder multiply the shares owned by the number of directors being elected and cast all those votes for one or more candidates, enhancing minority representation.
- ☐ **Proxies.** A shareholder may vote by proxy through a signed writing or electronic transmission authorizing another to vote the shares; a proxy is valid for eleven months unless it states otherwise and is revocable unless it is coupled with an interest and expressly stated to be irrevocable.
- ☐ **Voting trusts.** In a voting trust, shareholders transfer legal title of their shares to a trustee who votes them under a written trust agreement, valid for up to ten years (renewable), with the agreement and beneficiaries disclosed to the corporation.
- ☐ **Voting (pooling) agreements.** Shareholders may enter written agreements to vote their shares in a specified manner; such pooling agreements are valid, need not be filed, and under the MBCA are specifically enforceable.
- ☐ **Class voting.** When a proposed action would affect a class of shares in specified ways, that class is entitled to vote as a separate group and must approve the action by its own majority regardless of the overall vote.

B. DIRECTORS (MEETINGS, QUORUM, AND ACTION)

- ☐ **Board authority and election.** The board of directors manages or directs the management of the corporation's business and affairs; directors are elected by shareholders, generally serve one-year terms unless staggered, and may be removed by shareholders with or without cause unless the articles limit removal to for cause.
- ☐ **Meetings, notice, and quorum.** Regular board meetings require no notice, while special meetings require at least two days' notice of date, time, and place but not purpose; a quorum is a majority of the directors then in office unless the articles or bylaws provide otherwise, and approval requires a majority of directors present.
- ☐ **Action by written consent.** The board may act without a meeting only by the unanimous written consent of all directors.
- ☐ **Action by committee.** The board may create committees of one or more directors and delegate board authority to them, but a committee may not take certain fundamental actions such as declaring distributions in some cases, filling board vacancies, or amending the bylaws or articles.
- ☐ **Director objection and dissent.** A director present at a meeting is presumed to assent to action taken unless the director objects at the outset to holding the meeting, votes against or abstains and has the dissent noted in the minutes, or delivers written dissent to the corporation promptly after adjournment; a director who votes for an action may not later dissent.
- ☐ **Participation and vacancies.** Directors may participate by any means permitting simultaneous communication such as conference call, and a vacancy on the board may be filled by the shareholders or by a majority of the remaining directors even if less than a quorum.

C. OFFICERS (AUTHORITY AND LIABILITY)

- ☐ **Appointment and role.** Officers are appointed by the board and serve at its pleasure, carrying out the board's directives and managing day-to-day operations; officers are agents of the corporation and their authority is governed by agency principles.

- ☐ **Actual and apparent authority.** An officer binds the corporation when acting with actual authority (express grant in the bylaws or by board resolution, or implied authority to do what is reasonably necessary to the office) or with apparent authority arising from the corporation's holding the officer out as authorized.
- ☐ **Officer liability on corporate obligations.** An officer acting within authority on behalf of a disclosed corporate principal is not personally liable on the resulting contracts; personal liability arises only where the officer exceeds authority, personally guarantees the obligation, or commits a tort.

D. MEMBERS AND MANAGERS OF AN LLC (AUTHORITY, LIABILITY, POWERS)

- ☐ **Member-managed vs manager-managed.** In a member-managed LLC, all members share management authority and each member is an agent of the LLC; in a manager-managed LLC, only the designated managers manage and bind the LLC, and non-managing members lack agency authority by virtue of membership alone.
- ☐ **Voting and decision-making.** Absent contrary agreement, ordinary business decisions are made by a majority of members (per capita in many statutes), while extraordinary matters such as amending the operating agreement or admitting new members require unanimous consent.
- ☐ **Liability shield.** Members and managers are not personally liable for the debts, obligations, or liabilities of the LLC solely by reason of being a member or manager; they remain liable for their own torts and for personal guarantees.
- ☐ **Distributions and financial rights.** Absent contrary agreement, distributions are shared equally per capita in many states or by contribution in others, and members are not entitled to remuneration for services except for winding up the LLC.

VI. FIDUCIARY DUTIES

A. DIRECTORS, OFFICERS, AND CONTROLLING SHAREHOLDERS

> **GENERAL RULE** Directors and officers owe the corporation and its shareholders fiduciary duties of care and loyalty; the business judgment rule presumes that in making a decision directors acted on an informed basis, in good faith, and in the honest belief that the action was in the corporation's best interest, shielding informed disinterested decisions from liability.

- ☐ **Duty of care.** A director must discharge duties in good faith and with the care an ordinarily prudent person would exercise in like circumstances, staying reasonably informed; a director may rely in good faith on competent officers, employees, experts, and board committees.
- ☐ **Business judgment rule.** The business judgment rule protects directors from liability for honest, informed, good-faith decisions even if they turn out badly; the rule is rebutted by fraud, illegality, conflict of interest, waste, or gross negligence in failing to become informed.
- ☐ **Duty of loyalty and self-dealing.** A director must act in the corporation's best interest and not in the director's own; a conflicting-interest (self-dealing) transaction is voidable unless the director shows it was fair to the corporation or it was approved, after full disclosure, by a majority of disinterested directors or disinterested shareholders.
- ☐ **Corporate opportunity.** A director or officer may not usurp for personal benefit a business opportunity in the corporation's line of business or in which the corporation has an interest or expectancy without first disclosing it and giving the corporation the chance to act; a wrongful taker may be forced to disgorge the opportunity or its profits.
- ☐ **Duty of good faith and disclosure.** Directors must act in good faith, which is breached by intentional dereliction of duty or conscious disregard of responsibilities, and must disclose material information to the board and shareholders when seeking action.
- ☐ **Controlling shareholder duties.** A controlling shareholder owes fiduciary duties of good faith and fair dealing to minority shareholders and may not use control to benefit itself at the minority's expense, as in oppressive freeze-outs, unfair self-dealing, or sales of control to known looters.

B. MANAGERS AND MEMBERS OF AN LLC

- ☐ **Scope of duties.** In a member-managed LLC, members owe the LLC and each other duties of care and loyalty; in a manager-managed LLC, these duties are owed by the managers, and non-managing members generally owe no fiduciary duties by reason of membership alone.
- ☐ **Duty of loyalty.** The LLC duty of loyalty requires accounting for profits and benefits derived from the LLC's business, refraining from dealing with the LLC as an adverse party, and refraining from competing with the LLC, subject to modification by the operating agreement if not manifestly unreasonable.
- ☐ **Duty of care and good faith.** Managing members and managers must act with the care of a person in a like position and discharge their duties consistent with the implied contractual covenant of good faith and fair dealing, which the operating agreement cannot eliminate.

VII. CLOSE CORPORATIONS AND SPECIAL CONTROL DEVICES

A. SHARE TRANSFER RESTRICTIONS

> **GENERAL RULE** A close corporation has few shareholders, no public market for its shares, and often shareholders active in management; special control devices are permitted to allocate control and protect minority owners.

- ☐ **Validity of restrictions.** Restrictions on the transfer of shares are valid if reasonable in purpose (such as maintaining an S corporation election or preserving control) and are enforceable against a transferee only if conspicuously noted on the share certificate or the transferee has actual knowledge.
- ☐ **Types of restrictions.** Common transfer restrictions include rights of first refusal, first-option provisions, consent requirements, and buy-sell agreements; outright prohibitions on transfer are generally unreasonable and unenforceable.

B. SPECIAL AGREEMENTS ALLOCATING AUTHORITY

- ☐ **Shareholder management agreements.** Shareholders of a close corporation may enter agreements that restrict board discretion or vest management in the shareholders themselves, even eliminating the board; under the MBCA such agreements are valid if set forth in the articles, bylaws, or a written agreement approved by all shareholders.
- ☐ **Effect on liability.** A valid shareholder management agreement that shifts management from the board to the shareholders correspondingly shifts to those shareholders the liability for managerial acts imposed on directors.

C. RESOLUTION OF DISPUTES AND DEADLOCKS

- ☐ **Shareholder oppression.** Minority shareholders in a close corporation may seek relief for oppressive conduct, such as being frozen out of employment, dividends, or a meaningful role, and courts may order remedies including a buyout, a dividend, or dissolution.
- ☐ **Judicial dissolution for deadlock.** A court may order dissolution or an alternative remedy where the directors are deadlocked in management and irreparable injury is threatened, the shareholders are deadlocked and have failed to elect directors, those in control act in an illegal, oppressive, or fraudulent manner, or corporate assets are being wasted.
- ☐ **Election to purchase in lieu of dissolution.** When a shareholder petitions for dissolution, the corporation or the other shareholders may elect to purchase the petitioner's shares at fair value, avoiding dissolution.

D. OPTION OR BUY/SELL AGREEMENTS

- ☐ **Buy-sell agreements.** A buy-sell agreement obligates a shareholder or the shareholder's estate to sell, and the corporation or other shareholders to buy, shares upon a triggering event such as death, disability, or departure, providing liquidity and preserving control.
- ☐ **Valuation and funding.** Buy-sell and option agreements commonly fix a price or valuation formula and may be funded by corporate-owned life insurance; a reasonable agreed price is enforceable even if it differs from later market value.

VIII. ORGANIZATIONAL STRUCTURE INCLUDING PARENTS AND SUBSIDIARIES

A. AMENDMENTS

> **GENERAL RULE** Fundamental corporate changes generally require board approval of a resolution followed by shareholder approval, notice to shareholders, and often trigger appraisal (dissenters') rights for shareholders who object.

- ☐ **Amending the articles.** An amendment to the articles of incorporation requires the board to adopt the amendment and recommend it to the shareholders, who must approve it, generally by a majority of votes cast under the MBCA, with class voting where the amendment affects a class of shares.
- ☐ **Minor amendments.** The board may adopt certain ministerial amendments without shareholder approval, such as changing the registered agent or making housekeeping changes that do not affect shareholder rights.

B. MERGERS AND CONSOLIDATIONS

- ☐ **Approval process.** A merger requires the board of each corporation to approve a plan of merger and the shareholders of each to approve it, generally by a majority of votes entitled to be cast; the surviving entity succeeds to all assets and liabilities of the constituent corporations by operation of law.
- ☐ **Short-form merger.** A parent owning at least ninety percent of a subsidiary's shares may merge the subsidiary into itself without approval of the subsidiary's shareholders or board, though minority shareholders receive appraisal rights.
- ☐ **Appraisal rights.** Shareholders entitled to vote on a merger who dissent may demand appraisal, requiring the corporation to buy their shares at fair value, provided they file written notice before the vote, do not vote in favor, and make timely written demand.

C. SALES OF SUBSTANTIALLY ALL ASSETS

- ☐ **Selling corporation approval.** A sale, lease, or exchange of all or substantially all of a corporation's assets outside the ordinary course of business requires board approval and shareholder approval, and triggers appraisal rights for dissenting shareholders of the selling corporation.
- ☐ **Buying corporation and successor liability.** The purchasing corporation's shareholders generally need not approve the acquisition; the buyer ordinarily does not assume the seller's liabilities unless it expressly agrees, the transaction is a de facto merger, the buyer is a mere continuation of the seller, or the sale is fraudulent to creditors.

D. RECAPITALIZATIONS

- ☐ **Recapitalization.** A recapitalization restructures the corporation's capital by altering the rights, preferences, or amounts of outstanding securities through an amendment to the articles, and requires shareholder approval with class voting where a class of shares is affected.

E. EXCHANGES OF SECURITIES

- ☐ **Share exchange.** In a statutory share exchange, one corporation acquires all outstanding shares of one or more classes of another by a compulsory exchange approved by the board and shareholders of the corporation whose shares are acquired; the acquired corporation survives as a subsidiary, and dissenting shareholders receive appraisal rights.

F. DISSOLUTION

- ☐ **Voluntary dissolution.** A corporation may dissolve voluntarily by board resolution followed by shareholder approval, after which it files articles of dissolution and winds up by liquidating assets, paying creditors first, and distributing any remainder to shareholders according to their liquidation preferences.
- ☐ **Administrative dissolution.** The state may administratively dissolve a corporation for failing to pay fees, file annual reports, or maintain a registered agent, subject to reinstatement upon curing the default.

- ☐ **Judicial dissolution.** A court may judicially dissolve a corporation in an action by the state for abuse of authority, by a shareholder for director or shareholder deadlock, oppression, waste, or fraud, or by a creditor of an insolvent corporation with an unsatisfied judgment.
- ☐ **Winding up and claims.** During winding up the corporation may dispose of claims by notifying known creditors, who are barred if they do not timely respond, and by publishing notice to unknown creditors, who are barred after a statutory period.

IX. SHAREHOLDER AND MEMBER LITIGATION

A. DIRECT, DERIVATIVE, AND CLASS LITIGATION

> **GENERAL RULE** A shareholder or member may sue directly to enforce personal rights, or derivatively on behalf of the entity to enforce a right belonging to the entity; the distinction turns on who suffered the harm and who receives the recovery.

- ☐ **Direct vs derivative.** A suit is direct when the shareholder alleges an injury to the shareholder personally and any recovery runs to the shareholder, and derivative when the injury is to the corporation, in which case recovery generally goes to the corporation.
- ☐ **Standing.** To bring a derivative action, a plaintiff must have been a shareholder at the time of the wrongful act (the contemporaneous ownership rule), remain a shareholder throughout the litigation, and fairly and adequately represent the corporation's interests.
- ☐ **Demand requirement.** Under the MBCA, a shareholder must make a written demand on the board to take action and then wait ninety days before filing, unless irreparable injury would result; demand is universally required and is not excused as futile under the MBCA approach.
- ☐ **Dismissal on independent recommendation.** A derivative suit may be dismissed if a majority of qualified (disinterested) directors, or a court-appointed panel or special litigation committee, determines in good faith after reasonable inquiry that the suit is not in the corporation's best interest.
- ☐ **Corporation as necessary party and recovery.** The corporation must be joined as a party, ordinarily as a defendant; any judgment or settlement recovery belongs to the corporation, and the plaintiff may recover reasonable litigation expenses including attorney's fees if the action produced a substantial benefit.
- ☐ **Settlement and dismissal approval.** A derivative action may not be settled or dismissed without court approval, and the court may require notice to affected shareholders.
- ☐ **LLC derivative actions.** A member of an LLC may bring a derivative action to enforce a right of the LLC after making demand on the members or managers, or showing demand would be futile, subject to standing and adequacy requirements analogous to the corporate rule.