

Index

- activist investors, 98
- ad hoc* fiduciaries, 75, 76–77. *See also* functional fiduciaries
 - under ERISA, 75, 77–78
- advice, for investment
 - agency problems, 118–24
 - post-retirement asset management, 123
 - product recommendations, 118–20
 - retirement strategies, 123
 - reverse churning, 121
 - savings accounts, 121–23
 - timing of advice, 120–21
 - compensation models for, 117–18, 126
 - ancillary services, 117
 - through commissions, 117, 118
 - fee-based, 117
 - fee-only, 117, 119
 - flat fee for, 117, 120
 - hourly fee, 120
 - conflicts of interest in, 116–24
 - under fiduciary rule, 125–28
 - regulation of, 124–30
 - under SEC Regulation Best Interest, 113, 128–30
 - theoretical approach to, 113–14
 - for unneeded advice, 123–24
 - for fiduciaries, 87–91
 - fiduciary rules, 113
 - role of trust, 87–89
 - on life-cycle savings problem, 114–16
- advisors, under ERISA, 75–76
- Age Discrimination in Employment Act, U.S., 45–46
- agency costs, 6
- agency doctrine, 26, 27, 37–39
- agency law
 - agents under, 25
 - brokers under, 31–32
 - commodities brokers under, 31–32
 - as consensual, 25
 - principals under, 25
 - securities brokers under, 31–32
 - termination of agency relationships under, 36
 - traits of, 24
- agency relationships. *See also specific relationships*
 - fiduciary duties and, of agents, 27–29
 - applicability of, 28
 - after termination of agency relationship, 33–35
 - in tort theory, 28
 - formation of, 24–27
 - fragility of, 26
 - limited liability companies and, 24
 - long-term implications of, 32
 - separation of ownership and control as influence
 - on, 5–6
 - termination of, 24–27, 32–36
 - corporate officers after, 36
 - fiduciary duties after, 33–35
 - under general agency law, 36
 - preparation for, 35–36
 - principals after, 34–36
 - theoretical implications of, 37–39
 - under tort law, 29
- agent-in-waiting, 29–32
 - brokers, 29–30. *See also* brokers
 - corporate officers, 29–30. *See also* corporate officers
- alternative entity. *See also* limited liability companies; limited partnerships
 - under Delaware corporate law, 2, 4
- anti-contractarians, 337
- asset managers, 26
- Australia, 297–99
- bad faith doctrine, 295–97
- bankruptcy. *See* insolvency
- Bankruptcy Code, 50, 166–67
- Bénabou, Roland, 309
- beneficiaries
 - best interests of, 339–41
 - charitable law and, 247
 - of director duties, 66–67
 - duty of impartiality for, 17–18
 - in employee benefit plans, 193–94
- benefit corporations. *See* public benefit corporations
- benefit plans. *See* employee benefit plans
- Berle, Adolf, 215, 285, 288, 308
- Berle-Dodd debate, 17, 288–89, 308
- Black's Law Dictionary*, 83–84
- Blair, Margaret, 8
- Blass, Dalia, 139
- Board of Directors. *See* directors
- Boissonade, Gustave, 263

- bond issues. *See* secured bond issues; unsecured bond issues
- bondholder protections, 98
 in insolvency, 158
- Bratton, William, 215
- breach of oversight claims, 293–99. *See also In re Caremark International Inc. Derivative Litigation*
- bright line rules, 30
- Brody, Evelyn, 248, 258
- brokers
 under agency law, 31–32
 as agent-in-waiting, 30–32
 commodities, 31–32
 Commodity Futures Trading Commission, 31
 under Dodd-Frank Act, 31
 front-running by, 31–32
 securities, 31–32
- Brudney, Victor, 293
- business judgment rule
 controlling shareholders under, 63–64
 Delaware corporate law and, 207
 directors and, 303
 officers under, 60
 standard of review and, 70–71
- Business Roundtable, 67, 290, 301, 340–41
- business-law scholarship
 on fiduciary duties, 2
 law-and-economics scholarship, 2
- Butler, Henry, 317
- CACs. *See* collective action clauses
- Canada, corporate law in, 306–7
- care. *See* duty of care; standard of care
- Caremark claims. *See In re Caremark International Inc. Derivative Litigation*
- Carnegie, Andrew, 245
- categorical fiduciaries, 76–77
 advantages and disadvantages of, 76–77
 under ERISA, 75, 77–78, 79–80
- CFTC. *See* Commodity Futures Trading Commission
- charitable law, 241–42. *See also* non-profit law; non-profit organizations
 beneficiaries and, 247
 contract paradigm and. *See* contract paradigm
 Hansmann on, 246–48
 public ownership and, 258
 theoretical approach to, 241–43
- charitable trusts, 247
 and contracts, 249
 cy près doctrine and, 249–50
- charity as contract, 248–51
 donor-advised funds, 259
- CITs. *See* collective investment trusts
- civil law, in Japan, 262–65
- Clark, Robert, 6
- clawbacks, 14
 definition of, 154
 insolvency and, 162, 163–69
 in bankruptcy, 163–64
 corporate rescue and, 167–69
- duty of loyalty, 163–64
 fiduciary duty and, 164–69
 fraudulent conveyances and, 163
 in U.K., 164
 in U.S., 164
- collective action clauses (CACs), 106–7
- collective investment trusts (CITs), 147
- commissions, for investment advice, 117, 118
- commodities brokers, 31–32
 Commodity Futures Trading Commission, 31
 under Dodd-Frank Act, 31
- Commodity Futures Trading Commission (CFTC), 31
- common law, of agency
 definition of, 24
 theoretical approach to, 23–24
- common law doctrine, Eisenberg on, 72
- common law fiduciaries
 advisors as, 87–89
 discretionary authority of, 82–84, 87
 ERISA advisors, 82, 89–91
- common law trust, in Japan, 262
- Commonwealth Bank v. Barker*, 34–35
- Commonwealth jurisdictions, oppression doctrine in, 179–80, 181
- Companies Act, U.K. (1940), 179
- Companies Act, U.K. (2006), 302
- compensation
 for investment advice. *See* advice
 under Revised Uniform Partnership Act, 49–50
- conflict of interest
 under German Corporate Governance Code, 232–34
 permanent conflict of interest, 232–33
 potential conflict of interest, 233–34
 substantial conflict of interest, 233
 for investment advice, 113, 116–24
 under fiduciary rule, 125–28
 regulation of, 124–30
 under SEC Regulation Best Interest, 113, 128–30
 theoretical approach to, 113–14
 for unneeded advice, 123–24
 prohibition of, 345–47
- conflict of interest transactions, by controlling shareholders, 62
- consolidations, of MLPs, 53
- contract law, fiduciary law as subsidiary to, 3
- contract metaphor, 10
- contract paradigm
 charitable law and, 242, 243, 251–59
 Attorneys General role in, 255–56
 donor intent, 252–53, 254–55
 donor protections as part of, 255–56
 donor rights, 252–54
 donor standing, 252–54
 duty of obedience, 256–58
 under UMIFA, 253
 under UPMIFA, 253
 non-profit law and, 258–59
 non-profit organizations and, 251–59

- “Contractarian Basis of the Law of Trust” (Langbein), 248–49
- contractarianism. *See also* Easterbrook, Frank; Fischel, Daniel
 under ERISA, 6, 9
 fiduciary model and, 337
 fiduciary theory and, 1–2
 during financial crisis of 2008–2009, 1
 increased scholarship on, 1–4
 proto-contractarian positions, 3–4
 challenges to, 4–10
 within corporate law, 7
 fiduciary traditionalist path, 9–10
 market realist critique, 5–7
 stakeholder/pluralist critique, 7–9
 Sarbanes-Oxley Act, 1
- contracts. *See also* nexus of contracts
 charitable trusts and, 249
 controlling shareholders, 61–64
 under business judgment rule, 63–64
 conflict of interest transactions by, 62
 duty of care for, 61–62
 duty of loyalty for, 62, 64
 self-dealing, 62
- corporate charters, fiduciary duties narrowed through, 3
- corporate culture, 286, 290–92
 corporate governance and, 290–91
 scandals from, 291–92
- corporate governance, 6, 72–73
 German Corporate Governance Code, 222–23
 interventions in, indecisions about, 176–77
 in large corporations, 338–45
 long-term wealth maximization, 338
 making rules in
 majority rule, 173–74
 tyranny of majority, 174–76
 responsibilities of officers, 59–61
 by shareholders, 172, 173, 176
- corporate law
 economic analysis of, 3–4
 fairness in, 62–63
 goals and purpose of, 3
 history of, 287–88
 monistic/pluralistic divide in, 17, 302, 303–10
 primary principal in, 8
 proto-contractarian positions within, 7
- corporate officers
 as agents-in-waiting, 30–32
 bright line rules for, 30
 de facto, 29–30
 de jure, 29–30
 after termination of agency relationships, 36
- corporate opportunity claims, under Delaware corporate law, 2
- corporate rescue, during insolvency, 164–65
 clawbacks and, 167–69
 situational leverage, 165
- corporations, 320–23. *See also* corporate culture; directors; managers; officers
 under Delaware law. *See* Delaware corporate law
- dissolution of, 212
 double taxation of, 55–56
 expiration of, 212
 governance in, 6, 72–73
 history of, 287–88
 law and economics approach to, 291. *See also* nexus of contracts
 in business law scholarship, 2
 fiduciary duties ignored in, 3
 monistic/pluralistic divide in, 17, 302, 303–10
 as nexus of contracts, 3, 242, 285–86
 public/private divide in, 17, 288–89
 social enterprise movement, 322–23
- creditors. *See also* debtor-creditor relationship
 protections for, 218–19
- Criddle, Evan, 83, 340
- culture. *See* corporate culture
- cy près doctrine, 249–50
- Daughtrey, Martha Craig, 46
- de facto* corporate officers, 29–30
- de facto* fiduciaries, 75
- de jure* corporate officers, 29–30
- de jure* fiduciaries, 75
- debt, equity and, 8
- debt governance, 93
- debtor-creditor relationship, 25
- deepening insolvency doctrine, 216–17, 218
- defined benefit plans, 191
 fiduciary relationships in, 194–95
 for retirement, 14
- defined contribution plans, 191–92
 Employee Stock Ownership Plans, 191, 194–95, 197–99
 fiduciary relationships in, 194–95
 for retirement, 14
 settlor doctrine and, 197–98
- Delaware corporate law
 alternative entity under, 2, 4
 business judgment rule and, 207
 corporate opportunity claims under, 2
 deepening insolvency doctrine, 216–17, 218
 Delaware Revised Uniform Limited Partnership Act, 51
 duty of care under, 57–59
 duty of loyalty under, 57–59
 Eisenberg on, 58
 elimination of direct claims against officers and directors, 218–20
 duty-shifting, 218
 fiduciary duties under, 2, 67–72
 fiduciary law under, 8
 German corporate law and, structural differences with, 228–29
 implementation of, 237–38
 two-tier board structure, 228–29
 Gheewalla doctrine, 218–20
 good faith principle in, 4, 295–97
 independent directors under. *See* independent directors
 insolvency under, 159
 LLC statutes under, 4
 MLPs under, 51

- role of officers under, 59–61
- standard of conduct under, 67–72
 - anomalies to, 69–70
 - divergence of standards theory, 68–69
 - Eisenberg on, 68–69
 - under Model Business Corporation Act, 71–72
 - use of standard construct, 68–69
- standard of review under, 68–72
 - anomalies to, 69–70
 - business judgment rule and, 70–71
 - divergence of standards theory, 68–69
 - Eisenberg on, 68–69
 - use of review construct, 68–69
- transferable shares under, in PTPs, 51
- trust fund doctrine under, 15, 207, 208–14
 - applicability of, 213
 - limitations of, 213
 - origins of, 208–9
 - rise of, in equity jurisprudence, 209–11
 - slow decline of, 211–14
- Uniform Limited Liability Company Act, 4
- zone of insolvency, 207, 214–17
 - origins of, 215–16
- Delaware General Corporation Law, 62–63
- Delaware Revised Uniform Limited Partnership Act (DRULPA), U.S. (1976), 51
- DeMott, Deborah, 10, 83, 89
- Depository Trust Company (DTC), 103
- DeScioli, Peter, 251
- directed trustee, 80
- directors, 65–67. *See also* independent directors
 - beneficiaries of, 66–67
 - business judgment rule and, 303
 - duties of, 65–66
 - Berle-Dodd debate over, 17, 288–89
 - duty of care for, 65–66
 - duty of loyalty for, 65
 - duty of oversight for, breach of, 293–99
 - in Australian case law, 297–99
 - fiduciary law for, 71–72
 - good faith determinations of, 141–42
 - officer duties compared to, 61, 67
 - vicinity of insolvency, 158–60
- Dirks v. S.E.C.*, 33
- disclosure regimes, 136
 - integrated, 149–50
 - requirements in, 147–48
 - SEC rules for, 149
- discretion, ERISA and, 75
 - advice as distinct from, 85–86
 - definition of discretion, 84–85
- discretionary authority
 - under ERISA, 84–87
 - of functional judiciaries, 84
 - under securities law, 86
 - of fiduciaries, 82–87
 - in common law, 82–84, 87
- dissolution of corporations, 212
- distribution, under Revised Uniform Partnership Act, 49–50
- divergence of standards theory, 68–69
- Dodd, E. Merrick, 308
- Dodd-Frank Act, U.S. (2010), 31, 72
- donor intent, 252–53, 254–55
- donor protections, 255–56
- donor rights, 252–54
- donor standing, 252–54
- donor-advised funds, 259
- DRULPA. *See* Delaware Revised Uniform Limited Partnership Act
- DTC. *See* Depository Trust Company
- duty of care
 - for controlling shareholders, 61–62
 - under Delaware corporate law, 57–59
 - for directors, 65–66
 - in fiduciary theory, 2
 - theoretical approach to, 57–59
- duty of impartiality
 - for beneficiaries, 17–18
 - evolution of, 302–3
 - purpose of, 312
 - for stakeholders, 303, 310–17
 - classical doctrine, 310–13
 - theoretical approach to, 313–17
 - trust law and, 302–3
 - for trustees, 17–18
- duty of loyalty, 38–39. *See also* standard of conduct
 - for controlling shareholders, 62, 64
 - under Delaware corporate law, 57–59, 70
 - for directors, 65
 - insolvency and, 155, 163–64
 - for shareholders, 183
 - theoretical approach to, 57–59
- duty of obedience, 256–58
- duty of oversight, breach of. *See also* *In re Caremark International Inc. Derivative Litigation*
 - for directors, 293–99
 - in Australian case law, 297–99
 - for officers, 293–99
- Easterbrook, Frank, 2
 - on fiduciary law, 3
- economics. *See* law and economics approach
- Eiichi Hoshino, 264
- Eisaku Sato, 267
- Eisenberg, Melvin, 12, 293
 - on common law doctrine, 72
 - on Delaware corporate law, 58
 - divergence of standards theory, 68–69
- Ellias, Jared, 7, 169
- employee benefit plans
 - defined benefit plans, 191
 - fiduciary relationships in, 194–95
 - defined contribution plans, 191–92
 - Employee Stock Ownership Plans, 191, 194–95, 197–99
 - fiduciary relationships in, 194–95
 - settlor doctrine and, 197–98
 - under ERISA, 190–91, 192–93
 - under fiduciary law, 189

- employee benefit plans (cont.)
 fiduciary relationships among key parties in, 193–96
 for beneficiaries, 193–94
 for defined benefit plans, 194–95
 for defined contribution plans, 194–95
 in health care plans, 195–96
 for settlors, 193–94. *See also* settlor doctrine
 for trustees, 193–94
 implementation of rules, 196–203. *See also specific rules*
 participants in, 189
 plan assets, 189
 regulation of, 190–93
 regulatory arbitrage and, 191–92
 retirement plans and, 190
 settlor doctrine, 196–200
 defined contribution plans and, 197–98
 exceptions from, 198–200
 operation of, 196–97
 plan sponsors, 199, 200
 standard of review doctrine for claim denials, 200–3
 challenges to, 201–3
 development of, 200–1
 implications of, 201–3
 operation of, 200–1
 rationale of, 201
 under trust law, 189–90
 typology of, 190–93
 welfare benefit plans, 192–93
- Employee Retirement Income Security Act (ERISA)
ad hoc fiduciaries, 75, 77–78
 advisors under, 75–76
 categorical fiduciaries, 75, 77–78, 79–80
 common law fiduciaries and, 82, 89–91
 contractarianism under, 6, 9
 definition and scope of, 74–75
 discretion and, 75
 advice as distinct from, 85–86
 definition of, 84–85
 discretionary authority under, 84–87
 of functional judiciaries, 84
 under securities law, 86
 employee benefit plans under, 190–91, 192–93
 fiduciaries under, 12. *See also specific fiduciaries*
 fiduciary law and, 74–75
 fiduciary theory under, 2
 functional fiduciaries, 78–79
 discretionary authority under, 84
 investment managers, 80
 named fiduciaries, 79–80
 pension plans, 147–48
- Employee Stock Ownership Plans (ESOP), 191, 194–95, 197–99
- employment, LLPs created for, 44–46
 categorization of employees, 45
- entitlement, insolvency and, 155–60
- equitable duty, 155
- equitable realization
 from insolvency, 153–54, 167
 vicinity of insolvency and, 165–66
 vicinity of insolvency, 165–66
- equity
 debt and, 8
ex ante fiduciary regulation, 178–79
ex post judicial review for oppression, 179–81
 as fairness, 172
 fiduciary constraints and, as source of, 10
 insolvency and. *See* insolvency
 intervention modes, 177–81
 corrective, 179–81
 supplemental, 178–79
 in modern law, 171–72, 187–88
 oppression remedy, 185–87
 as system, 185
 in trust fund doctrine, 209–11
- ERISA. *See* Employee Retirement Income Security Act
- ESOP. *See* Employee Stock Ownership Plans
- EU Directive on Preventive Restructuring Frameworks, 156, 164
- Events of Default, 105–6
- ex ante* fiduciary regulation, 178–79
- ex post* judicial review, for oppression, 179–81
- exemptive relief from statutory restrictions, 138–39
- expiration of corporations, 212
- external independence, 223, 224
- extra large partnerships, 7. *See also* limited liability partnerships; master limited partnerships; publicly traded partnerships
 future of, 55–56
 under partnership law, 41
 theoretical approach to, 40–41
- fairness. *See also* equity
 in corporate law, 62–63
- Farnworth, Allan, 38
- federal securities laws, fiduciary theory influenced by, 2
- fiduciaries, 59–67
ad hoc, 75, 76–77
 under ERISA, 75, 77–78
 advice and, 87–91
 fiduciary rules, 113
 role of trust, 87–89
 categorical, 76–77
 advantages and disadvantages of, 76–77
 under ERISA, 75, 77–78
 common law
 advisors as, 87–89
 discretionary authority of, 82–84, 87
 ERISA advisors and, 89–91
 controlling shareholders, 61–64
 under business judgment rule, 63–64
 conflict of interest transactions by, 62
 duty of care for, 61–62
 duty of loyalty for, 62, 64
 self-dealing, 62
 controversies in jurisprudence, 80–82
de facto, 75
de jure, 75
 definition of, 81–82
 directors, 65–67
 beneficiaries of, 66–67

- duties of, 65–66
- duty of care for, 65–66
- duty of loyalty for, 65
- officer duties compared to, 61, 67
- discretionary authority of, 82–87
 - of common law fiduciaries, 82–84, 87
 - under ERISA. *See* Employee Retirement Income Security Act
- functional, 78–79
 - definition of, 78
 - discretionary authority under, 84
- identification of, 10–12
- named, 79–80
- non-profit organizations as, 246–47
- officers, 59–61
 - under business judgment rule, 60
 - under Delaware corporate law, governance responsibilities of, 59–61
 - director duties compared to, 61, 67
 - standard of care for, 60–61
 - standard of review for, 61
 - vulnerability to, 343–45
- Fiduciaries of Humanity* (Criddle and Fox-Decent), 83
- fiduciary doctrine, expressive function of, 347–48
- fiduciary duties
 - agency doctrine and, 26
 - agency relationships and, 27–29
 - applicability of duties, 28
 - after termination of relationship, 33–35
 - in tort theory, 28
 - alternatives to, 13–15
 - application of, limitations on, 2
 - comparative perspectives on, 15–17
 - corporate charters and, 3
 - under Delaware corporate law, 2, 67–72
 - duty of care. *See* duty of care
 - duty of loyalty. *See* duty of loyalty
 - Easterbrook on, 2
 - enforceability of, limitations on, 2
 - Fischel on, 2
 - historical perspectives on, 15–17
 - identification of, 10–12
 - in LLCs, 3, 53–54
 - in LPs, 53–54
 - in MLPs, 53–54
 - in PTPs, 53–54
 - scholarship on, 2
 - in U.K., 153
 - in U.S., 153
- fiduciary governance, in Japan, 275–76, 278–79
- fiduciary law. *See also* fiduciary duties
 - alternatives to, 13–15
 - contract law and, as subsidiary to, 3
 - under Delaware corporate law, 8
 - for directors, 71–72
 - Easterbrook on, 3
 - employee benefit plans under, 189
 - ERISA and, 74–75
 - Fischel on, 3
 - proto-contractarian positions in, 3–4
 - challenges to, 4–10
 - within corporate law, 7
 - fiduciary traditionalist path, 9–10
 - market realist critique, 5–7
 - stakeholder/pluralist critique, 7–9
 - standard of review as distinct from standard of conduct under, 12
- fiduciary model, 334, 336–37
 - anti-contractarians on, 337
 - contractarians on, 337
- fiduciary protection systems, 137–38
- fiduciary relationships
 - in defined benefit plans, 194–95
 - in defined contribution plans, 194–95
 - in employee benefit plans, 193–96
 - for beneficiaries, 193–94
 - for defined benefit plans, 194–95
 - for defined contribution plans, 194–95
 - in health care plans, 195–96
 - for settlors, 193–94. *See also* settlor doctrine
 - for trustees, 193–94
- fiduciary rule
 - conflict of interest under, 125–28
 - for investment advice, 113
- fiduciary theory. *See also* fiduciary law
 - academic debates over, 9
 - contractarianism and, 1–2
 - duty of care in, 2
 - under Employee Retirement Income Security Act, 2
 - federal securities laws as influence on, 2
 - prudent person rule in, 2
- Fifth Third Bancorp v. Dudenhoeffer*, 197–98
- financial crisis (2008)
 - contractarianism during, 1
 - indenture trustees during, 96–97
- Financial Industry Regulatory Authority (FINRA), 122, 136, 144–45
- Fink, Larry, 290
- FINRA. *See* Financial Industry Regulatory Authority
- firms. *See* alternative entity; corporations; limited liability companies
- Fischel, Daniel, 2, 336–37
 - on fiduciary law, 3
- formalism, 101
- Fox-Decent, Evan, 83, 340
- Frankel, Tamar, 83
- fraudulent conveyances, 163
- Freeman, Edward, 315
- Friedman, Milton, 289
 - wealth maximization and, 319
- front-running, 31–32
- functional fiduciaries, 78–79
 - definition of, 78
 - discretionary authority under, 84
- fundamental investment policies, 140–41
- Galoob, Stephen, 38
- German Corporate Governance Code (GCCC), 222–23, 229–32, 233–36
 - conflicts of interest under, 232–34

- German Corporate Governance Code (GCCC) (cont.)
 permanent, 232–33
 potential, 233–34
 substantial, 233
 independence requirement
 for company members, 231
 for controlling shareholders, 231–32, 237
 determination of, 236–37
 for management board, 231
 objectives of, 230
 indicators for lack of independence, 234–36
 business relationships, 235
 family members, 235
 for past members of management board,
 234–35
 personal relationships, 235–36
 supervisory board membership, 236
- German corporate law, 221–22
 independent directors in, 228–38
 purpose of, 229
 recommendations for, 229–37
 structural differences with Delaware corporate law,
 228–29
 implementation of, 237–38
 two-tier board structure, 228–29
- Gheewalla* doctrine, 218–20
- Global Investment Performance Standards (GIPS), 146
- going concern value, 156
- good faith
 under Delaware corporate law, 4, 295–97
 directors and, 141–42
- governance. *See also* corporate governance
 fiduciary, in Japan, 275–76, 278–79
 of indenture trustees
 bondholders as beneficiaries of, 93–95
 debt governance compared to, 93
 in Japan, of nonprofit organizations, 266–69
 fiduciary, 275–76, 278–79
hyogi-kai (supervisory council), 267
 through limited liability partnerships, 43
- Hall, Mark, 67–68
- Hand, Learned, 212
- Hansmann, Henry, 7, 246, 304
 on charitable law, 246–48
 on donor standing, 254
- Hart, Oliver, 309
- Harvard College v. Amory*, 2
- health care plans, 195–96
- Hill, Jennifer, 8
- Hinchman, Edward S., 88
- Holland, Randy, 65
- Hunt, Edwin S., 210
- Hurt, Christine, 7, 32
- hyogi-kai* (supervisory council), in Japan, 267
- immunity. *See* partner immunity
 impartiality. *See* duty of impartiality
- In re Caremark International Inc. Derivative Litigation*
 (Caremark claims), 4, 69, 294–97
- indenture trustees. *See also* pre-default duties and
 governance
 definition of, 93
 governance of
 bondholders as beneficiaries of, 93–95
 debt governance compared to, 93
 historical development of, 95–97
 during financial crisis of 2007–2008, 96–97
 Trust Indenture Act of 1939, 95
 post-default governance, 94
 qualified institutional buyers, 99
 secured bond issues, 96
 unsecured bond issues, 96
- indentures, collective action clauses and, 106–7
- independence
 case-by-case determination of, 222–23
 as concept, 223–24
 external, 223, 224
 internal, 223, 224
 standardized determination of, 222–23
- independent directors
 definition of, 222–27
 under Delaware corporate law, 221–22, 224–27
 beholdeness, 224–25, 239–40
 business relationships for, 225
 clarification of, 238–40
 co-ownership of assets, 226
 personal relationships for, 226
 philanthropic contributions, 227
 under German corporate law, 228–38
 purpose of, 229
 recommendations for, 229–37
- India, corporate law in, 308
- indigenous nonprofits, in Japan, 265–66
Kan'on-kō, 265–66
- insider trading, *Dirks v. S.E.C.*, 33
- insolvency. *See also* clawbacks
 bankruptcy and
 clawbacks and, 163–64
 equity and, 166–67
 corporate rescue from, 164–65
 situational leverage, 165
 deepening insolvency doctrine, 216–17, 218
 duty in, 155–60
 of loyalty, 155, 163–64
 entitlement in, 155–60
 equitable realization and, 153–54, 167
 vicinity of insolvency and, 165–66
 equity and, 158
 avoidance powers, 158
 in bankruptcy, 166–67
 for bondholders, 158
 preference types and, 161
 in U.K., 158–60
 in U.S., 158–60
 going concern value and, 156
 pre-insolvency mechanism, 156
 situational leverage
 corporate rescue and, 165
 in U.K., 160–63

- in U.S., 160–63
 - vicinity of insolvency and, 160–63
- theoretical approach to, 153–55
- treatment of LLPs in, 49–50
- in U.K., 152
 - agency and, 160–63
 - analysis of, 170
 - clawbacks in, 164
 - equity and, 158–60
 - under EU Directive on Preventive Restructuring Frameworks, 156, 164
 - situational leverage and, 160–63
- in U.S., 152
 - agency and, 160–63
 - analysis of, 170
 - clawbacks in, 164
 - concerns about, 169–70
 - under Delaware corporate law, 159
 - equity and, 158–60
 - situational leverage and, 160–63
- value allocation, 156–58
- vicinity of, 158–63, 207, 214–17
 - agency and, 160–63
 - directors and, 158–60
 - equitable realization and, 165–66
 - officers and, 158–60
 - origins of, 215–16
 - situational leverage and, 160–63
 - zone of. *See* insolvency, vicinity of
- institutional investors, 148
- insurance products, 142–43
- internal independence, 223, 224
- investment advice. *See* advice
- Investment Advisers Act of 1940, U.S., 133, 134
- Investment Company Act of 1940, U.S., 133, 134, 138–39, 144
- investment contracts, 47, 48–49
- investment managers, 80
- investors, activist, 98
- Israel, corporate law in, 307–8

- Jackson, Howell, 7
- Jacoby, Melissa, 153–54, 165, 166, 169
- Japan, nonprofit organizations in
 - under Civil Code of 1896, 261, 262, 263–65
 - amendment of, 268–69
 - German Civil Code as influence on, 263
 - Napoleonic Code as influence on, 263
 - civil law tradition in, 262–65
 - under common law trust, 262
 - governance in, 266–69
 - fiduciary, 275–76, 278–79
 - hyogi-kai* (supervisory council), 267
 - historical perspective on, 262–70
 - indigenous nonprofits, 265–66
 - Kan'on-kō*, 265–66
 - non-profit sector, integration of, 280
 - under Public Interest Corporation Authorization Act, 272
 - public-interest corporations, 262
 - abuse prevention, 276–78
 - encouragement of voluntary works, 278–79
 - transparency for, 279
- public-interest trusts, 262, 269–70
 - Public-Interest Commission, 274–75
 - reform of, 273
 - transition to new regime, 274
- reform movements in, 270–80
 - assessment of, 273–80
 - for public-interest trusts, 273
 - sociopolitical background for, 270–71
 - in 2006, 271–73
 - theoretical approach to, 261–62
- Jensen, Michael, 5–6, 8
- judgment rules. *See* business judgment rule

- Kan'on-kō* (Society of Gratitude), 265–66
- Karst, Kenneth, 253–54
- Kelly, Daniel, 24
- Kenjiro Ume, 262
- Kershaw, David, 69
- Kraakman, Reinier, 304
- Kumpan, Christoph, 10

- Laby, Arthur, 9
- Langbein, John, 243, 248–49
 - on charity as contract, 248–51
- law. *See specific types*
- law and economics approach, to corporations, 291
 - in business law scholarship, 2
 - fiduciary duties ignored in, 3
- Leib, Ethan, 38
- Licht, Amir, 8, 62–63, 159–60
- limited liability companies (LLCs)
 - agency relationships and, 24
 - under Delaware corporate law, 4
 - fiduciary duties in, 53–54
 - narrowed through LLCs, 3
 - growth of, 2–3
 - management rights in, 43
 - publicly-held, 53
- limited liability limited partnership (LLLLP), 42–43
- limited liability partnerships (LLPs), 11, 41–50
 - for bankruptcy purposes, 49–50
 - under Bankruptcy Code, 50
 - creation of, 41–42
 - definition of, 41–43
 - for employment purposes, 44–46
 - categorization of employees, 45
 - governance purposes of, 43
 - partner immunity in, 42
 - as partnership, 44
 - purpose of, 41–43
 - for securities law purposes, 46–49
 - investment contracts, 47, 48–49
 - separation of ownership and control in, 43–44
 - tort shield and, 42
- limited partnerships (LPs). *See also* limited liability companies; limited liability limited partnership
 - fiduciary duties in, 53–54

- limited partnerships (LPs) (cont.)
 - size limitations for, 50, 51
 - livelihood business, 40
 - LLCs. *See* limited liability companies
 - LLLP. *See* limited liability limited partnership
 - LLPs. *See* limited liability partnerships
 - loyalty, as duty. *See* duty of loyalty
 - LPs. *See* Limited Partnerships

 - Macey, Jonathan, 250
 - managed accounts, 145–46
 - management rights, in LLCs, 43
 - managers, 338. *See also* officers
 - decision making by, 343–45
 - fiduciary regulation of, 171–72
 - self-interest of, 341–43
 - shareholders and, relationship with, 7–9
 - Manne, Geoffrey, 250
 - Manne, Henry, 250
 - Marchand v. Bamhill*, 295–96
 - market failure corrections, 98–99
 - market realist critique, in proto-contractarian positions, 5–7
 - Martin v. Heindol Commodities, Inc.*, 30–31
 - Masaaki Tomii, 264
 - master limited partnerships (MLPs), 11. *See also* publicly traded partnerships
 - consolidations and mergers among, 53
 - under Delaware corporate law, 51
 - fiduciary duties in, 53–54
 - McChesney, Fred, 317
 - McDaniel, Morey W., 215
 - Means, Gardiner, 285, 288
 - Meckling, William, 5–6
 - Mehotra, Vikas, 309
 - Meinhard v. Salmon*, 211
 - mergers, of MLPs, 53
 - Miller, Paul, 10, 83
 - Mitchell, Lawrence, 215
 - MLPs. *See* master limited partnerships
 - Model Benefit Corporation Act, 318–19, 323
 - Model Business Corporation Act, U.S., 248
 - Model Non-Profit Corporation Act, U.S., 248
 - The Modern Corporation & Private Property* (Berle and Means), 285, 288
 - monistic/pluralistic divide, in corporate law, 17, 302, 303–10
 - normative aspects of, 308–10
 - for Canadian law, 306–7
 - for global corporate law, 304
 - for Indian law, 308
 - for Israel law, 307–8
 - for U.K. law, 306
 - for U.S. law, 305
 - Morck, Randall, 309
 - Muir, Dana, 6, 9
 - mutual funds, 133–38
 - collective investment trusts, 147
 - disclosure regimes, 136
 - integrated, 149–50
 - requirements in, 147–48
 - SEC rules for, 149
 - fiduciary obligations of investment advisers, 134
 - fiduciary protection systems, 137–38
 - Financial Industry Regulatory Authority, 136, 144–45
 - Global Investment Performance Standards, 146
 - by independent board members, 133–34
 - proposals for elimination of, 141–42
 - statutory requirement for, 133
 - institutional investors, 148
 - insurance products, 142–43
 - under Investment Advisers Act of 1940, 133, 134
 - under Investment Company Act of 1940, 133, 134, 138–39, 144
 - mandatory shareholder approvals, 135
 - NAV requirements in, 136–37
 - new challenges in, 142–48
 - for distribution of funds, through individual accounts, 144–45
 - for ERISA pension plans, 147–48
 - for managed accounts, 145–46
 - for omnibus accounts, 143–44
 - policy considerations for, 148–51
 - for integrated disclosure, 149–50
 - for pooled vehicle distribution, 149–50
 - portfolio restrictions, 135
 - retail investors and, 149–50
 - robo-advisers and, 145, 151
 - SEC regulation of, 143–45
 - for disclosure regimes, 149
 - under Securities Act of 1933, 136
 - under Securities Exchange Act of 1934, 136, 139
 - shareholders and, 135
 - supervisory accommodations, 138–42
 - corporate governance accommodations, 140
 - exemptive relief from statutory restrictions, 138–39
 - fundamental investment policies, 140–41
 - statutory adjustments for soft dollar practices, 139–40
 - use of sub-advisers, 140–41
-
- named fiduciaries, 79–80
 - Naniwadekar, Mihir, 308
 - net asset value of fund assets (NAV), 136–37
 - nexus of contracts
 - corporations as, 3, 242, 285–86
 - disadvantages of, 6
 - non-profit law, 241–43. *See also* charitable law
 - contract paradigm and, 258–59
 - corporate law and, convergence with, 248
 - non-profit organizations
 - contract paradigm and, 251–59
 - duty of obedience and, 256–58
 - fiduciaries and, 246–47
 - in Japan. *See* Japan
 - under Model Non-Profit Corporation Act, 248
-
- obedience, as duty. *See* duty of obedience
 - officers, 59–61
 - under business judgment rule, 60
 - under Delaware corporate law, 59–61

- director duties compared to, 61, 67
- duty of oversight for, breach of, 293–99
- standard of care for, 60–61
- standard of review for, 61
- vicinity of insolvency, 158–60
- omnibus accounts, 143–44
- open-ended waivers, 28
- oppression doctrine, 172–73
 - in Commonwealth jurisdictions, 179–80, 181
 - definition of, 172
 - equity and, 185–87
 - ex post* judicial review for, 179–81
 - as remedy, 184–87
 - shareholders and, 181–85
- oversight, as duty. *See* duty of oversight
- The Ownership of Enterprise* (Hansmann), 246
- partner immunity, in limited liability partnerships, 42
- partnerships. *See also* limited liability partnerships; master limited partnerships; publicly traded partnerships
 - extra large, 7, 40–41
- plan assets, in employee benefit plans, 189
- plan sponsors, 77–78
 - settlor doctrine and, 199, 200
- pluralistic divide. *See* monistic/pluralistic divide
- Posner, Richard, 3, 45–46
- post-default governance, of indenture trustees, 94
- post-retirement asset management, 123
- pre-default duties and governance, for indenture trustees, 95, 97–101
 - bondholder protections, 98
 - formalism as influence on, 101
 - market failure correction, 98–99
 - maximization of efficiency, 99–100
 - normative rules, 101, 102–8
 - resolution of ambiguities, 108–9
- principals. *See also* fiduciaries
 - characterization of, in corporate law, 8
 - after termination of agency relationship, 34–36
- private/public divide. *See* public/private divide
- proto-contractarian positions, in fiduciary law, 3–4
 - challenges to, 4–10
 - within corporate law, 7
 - fiduciary traditionalists, 9–10
 - market realist critique, 5–7
 - stakeholder/pluralist critique, 7–9
- prudent person rule, in fiduciary theory, 2
- PTPs. *See* publicly traded partnerships
- public benefit corporations, 318–19
 - benefit corporation legislation, 320. *See also* corporate law
 - shareholder primacy and, 323–24
 - stakeholders under, 324
- creation of, 319–20
- Public Interest Corporation Authorization Act, Japan (2006), 272
- public ownership, 258
- public trust, 243–51
 - philanthropy and, 244–45
 - public ownership and, 243–46
 - Public-Interest Commission, in Japan, 274–75
 - public-interest corporations, in Japan, 262
 - abuse prevention, 276–78
 - encouragement of voluntary works, 278–79
 - transparency for, 279
 - public-interest trusts, in Japan, 262, 269–70
 - Public-Interest Commission, 274–75
 - reform of, 273
 - transition to new regime, 274
 - publicly traded partnerships (PTPs), 50–55
 - as extra large partnership, 7
 - fiduciary duties in, 53–54
 - freely transferable shares in, 51–52
 - under Delaware corporate law, 51
 - under federal taxation law, 51
 - partnership taxation, 52–53
 - qualifying income criteria, 52
 - publicly-held limited liability companies, 53
 - public/private divide, in corporations, 17, 288–89
- qualified institutional buyers (QIBs), 99
- qualifying income criteria, in PTPs, 52
- regulatory arbitrage, 191–92
- retirement plans
 - defined benefit, 14
 - defined contribution, 14
 - employee benefit plans and, 190
- retirement strategies, advice for, 123
- reverse churning, 121
- Revised Uniform Partnership Act (RUPA), U.S., 45
 - amendments to, 49
 - compensation for services under, 49–50
 - distribution under, 49–50
- Ribstein, Larry, 3, 336–37
- robo-advisers, 145, 151
- Rock, Edward B., 335
- RUPA. *See* Revised Uniform Partnership Act
- Russell, Jacob, 7
- Sage, William, 195
- sales commissions. *See* commissions
- Sarbanes-Oxley Act, U.S. (2002), 1, 72
- savings accounts, advice on, 121–23
- SEC. *See* Securities and Exchange Commission
- secured bond issues, 96
- Securities Act of 1933, U.S., 49, 136
- Securities and Exchange Commission (SEC), 91–92
 - mutual funds regulation by, 143–45
 - for disclosure regimes, 149
 - Regulation Best Interest rule, 113, 128–30
- securities brokers, 31–32
- Securities Exchange Act of 1934, U.S., 136, 139
- self-dealing, by controlling shareholders, 62
- separation of ownership and control
 - agency issues as result of, 5–6
 - in LLPs, 43–44
- settlor doctrine, 196–200
 - defined contribution plans and, 197–98

- settlor doctrine (cont.)
 exceptions from, 198–200
 operation of, 196–97
 plan sponsors, 199, 200
 settlors, in employee benefit plans, 193–94
 shareholders
 controlling, 61–64
 under business judgment rule, 63–64
 conflict of interest transactions by, 62
 duty of care for, 61–62
 duty of loyalty for, 62, 64
 self-dealing, 62
 corporate governance by, 172, 173, 176
 duty of loyalty for, 183
 for controlling shareholders, 62, 64
 fiduciary regulation of, 182–84
 managers and, relationship with, 7–9
 mutual funds and, 140
 regulation of, 135
 oppression of, 181–85
 primacy of
 benefit corporations and, 323–24
 benefit corporations legislation and, 323–24
 counter-arguments against, 324–27
 implications of, 327–31
 non-mandatory approach, 331–32
Shen v. Leo A. Daly Co., 34–35
Simpson v. Ernst & Young, 46
 Smith, Henry, 185, 186
Smith v. Van Gorkom, 2
 Smithson, James, 245
 social enterprise, 318–19. *See also* public benefit corporations
 business corporations and, 322–23
 Society of Gratitude. *See Kan'on-kō*
 stakeholder/pluralist critique, in proto-contractarian positions, 7–9
 stakeholders, 17–18
 under benefit corporation legislation, 324
 duty of impartiality for, 303, 310–17
 classical doctrine, 310–13
 theoretical approach to, 313–17
 proto-contractarian positions and, critiques of, 7–9
 in U.K., 302
 standard of care, for officers, 60–61
 standard of conduct
 under Delaware corporate law, 67–72
 anomalies to, 69–70
 divergence of standards theory, 68–69
 Eisenberg on, 68–69
 under Model Business Corporation Act, 71–72
 use of standard construct, 68–69
 standard of review compared to, 12
 standard of review
 under Delaware corporate law, 68–72
 anomalies to, 69–70
 business judgment rule and, 70–71
 divergence of standards theory, 68–69
 Eisenberg on, 68–69
 use of review construct, 68–69
 doctrine for claim denials, of employee benefit plans,
 200–3
 challenges to, 201–3
 development of, 200–1
 implications of, 201–3
 operation of, 200–1
 rationale of, 201
 for officers, 61
 standard of conduct compared to, 12
 Stark, Robert, 7, 169
 Stebbings, Chantal, 311
 Steele, Myron, 3
 Stout, Lynn, 8
 Strine, Leo, 301
 sub-advisers, 140–41
 substantial conflict of interest, 233
 supervisory council. *See hyogi-kai*
 Tadao Koseki, 270–71
 Tamaruya, Masayuki, 7, 255
 Tax Cuts and Jobs Act of 2017, U.S., 55
 taxation
 of corporations, 55–56
 of PTPs, 52–53
 freely transferable shares, 51
 qualifying income criteria, 52
 Tax Cuts and Jobs Act of 2017, 55
 termination, of agency relationships, 24–27, 32–36
 corporate officers after, 36
 fiduciary duties after, 33–35
 under general agency law, 36
 preparation for, 35–36
 principals after, 34–36
Theory of the Firm (Jensen and Meckling), 5–6
 Tirole, Jean, 309
 Tocqueville, Alexis de, 244
 Tokuji Kojima, 267–68
 tort law, agency relationships under, 29
 tort shield, LLPs and, 42
 tort theory, 28
 transferable shares, in PTPs, 51–52
 under Delaware corporate law, 51
 under federal taxation law, 51
 trust, as confidence/faith
 advice and, 87–89
 definition of, 37
 trust fund doctrine, 15, 207–14
 applicability of, 213
 limitations of, 213
 origins of, 208–9
 rise of, in equity jurisprudence, 209–11
 slow decline of, 211–14
 Trust Indenture Act of 1939, U.S., 95
 trust law, 243
 duty of impartiality and, 302–3
 employee benefit plans under, 189–90
 trustees. *See also* indenture trustees
 directed, 80
 duty of impartiality for, 17–18
 in employee benefit plans, 193–94

- Tsutomu Hotta, 275
 Tuch, Andrew, 62–63
 Tyler, John, 258
- U.K. *See* United Kingdom
 ULPA. *See* Uniform Limited Partnership Act
 UMIFA. *See* Uniform Management of Institutional Funds Act
 Uniform Limited Liability Company Act, U.S. (2013), 4
 Uniform Limited Partnership Act (ULPA), U.S. (1916), 40
 Uniform Management of Institutional Funds Act (UMIFA), 253
 Uniform Partnership Act (UPA), U.S. (1914), 40
 Uniform Prudent Management of Institutional Funds Act (UPMIFA), 253
 United Kingdom (U.K.)
 clawback in, 153
 Companies Act (1940), 179
 Companies Act (2006), 302
 corporate law in. *See* corporate law
 fiduciary duty in, 153
 insolvency laws in, 152. *See also* insolvency
 stakeholder interests in, 302
 United States (U.S.). *See also* Delaware corporate law
 Age Discrimination in Employment Act, 45–46
 clawback in, 153
 corporate law in. *See* corporate law
 Dodd-Frank Act, 31, 72
 fiduciary duty in, 153
 insolvency in, 152. *See also* insolvency
 Investment Advisers Act of 1940, 133, 134
 Investment Company Act of 1940, 133, 134, 138–39, 144
 Model Business Corporation Act, 248
 Model Non-Profit Corporation Act, 248
 Revised Uniform Partnership Act, 45
 amendments to, 49
 compensation for services under, 49–50
 distribution under, 49–50
 Sarbanes-Oxley Act, 1, 72
 Securities Act of 1933, 49, 136
 Securities Exchange Act of 1934, 136, 139
 Tax Cuts and Jobs Act of 2017, 55
 Trust Indenture Act of 1939, 95
 Uniform Limited Partnership Act, 40
 Uniform Partnership Act, 40
 unsecured bond issues, 96
 UPA. *See* Uniform Partnership Act
 UPMIFA. *See* Uniform Prudent Management of Institutional Funds Act
 U.S. *See* United States
- value allocation, 156–58
 Varottil, Umakanth, 308
 Velasco, Julian, 8, 71
 vicinity of insolvency. *See* insolvency, vicinity of
- waivers. *See* open-ended waivers
 Warren, Elizabeth, 152
 wealth maximization, 293, 319
 arguments against, 321–22
 Weinrib, Ernest, 82–83
 Weisbord, Reid, 251
 welfare benefit plans, 192–93
 Wiedenbeck, Peter, 198
 Williams, Kelli Alces, 6, 8
 Woolley, Alice, 83–84
- Yuzo Matsuzawa, 268
- Zingales, Luigi, 309
 Zollman, Carl, 244–45
 zone of insolvency. *See* insolvency, vicinity of