
Index

- accounting restatements 2, 29, 32–3, 35–6
 - increase in 34
 - Qwest 34
 - WorldCom 34
 - Xerox 34
 - see also* restatement framework
- actionable losses 88–8
 - consequential losses 89
 - as fundamental losses 88
 - market signaling 91–9
 - reputational damage 88
- adequacy of representation 156, 172
 - badges of inadequacy 156
 - doctrinal standards 162–5
 - adequate care 168–9
 - appellate review 169
 - fast-filer presumption of inadequacy 166
 - inadequate representation 162–3, 165
 - meaningful discovery 168–9
 - quality of the pleadings 168
 - refining 166, 167
 - totality of circumstances test 166–7
 - as element of due process 158
 - evaluating 162, 169–71
 - benefits conferred through settlement 171
 - choice of forum in 170
 - in original litigation 170
 - timing and investment 169
 - requirement 157–9
 - sources of law 161–2
- ALI Principles of Corporate Governance 101
- American Rule 193, 194, 198, 353, 441
- amicus curiae* 143
- appraisal 244–5
 - actions *see* appraisal actions
 - arbitrage 243, 245, 251
 - forfeiture of rights of 245
 - legal developments 249–52
 - disclosure-only settlements in fiduciary duty class actions 249
 - in merits opinions 249, 250–51
 - statutory amendments 249–50
 - longstanding remedy 244
 - as replacement protection 244
 - as representative litigation 254–5
 - requirements 254
 - risk 248
 - statutes 244–5
- appraisal actions 243–4, 267
 - consolidation of multiple suits 257–8
 - control of proceedings 257–9
 - fair value in 245
 - see also* fair value
 - /fiduciary duty class action differentiation 245
 - fiduciary nature of 256–7
 - judicial response to 243–4
 - mitigating risk of opting in 255–6
 - modern 246–9
 - multiple petitions 247
 - number of 246–8
 - only mergers triggering in Delaware 244
 - settlement
 - costs sharing 262–5
 - disputes 259–60
 - with non-petitioners 261–2
 - with petitioners 260–61
 - recovery of fees and expenses 265–7
 - statutory framework of 259
 - values of dissenting shares 247–8
- arbitration 184
- backdating 60, 64–5, 127, 493, 494
- bad faith 133, 469
 - intentional illegal acts as 101
- board of directors
 - centrality of 333
 - power 334
 - primacy of 343–4
- brightline rule 105, 135
 - in Delaware 152, 153
- business judgment rule 128, 129
 - in Delaware 98, 101
 - and dismissal recommendations 129–30
 - high presumption of propriety in 129–30
 - not covering illegal business decisions 101, 106
 - qualified deference 129
 - and structural bias 75, 129
- business risk 92
- Canada 482, 485–6
 - Canadian Securities Administrators 487
 - Class Proceedings Act (1996) 501
 - Companies' Creditors Arrangement Act (1985) 507

- continuous disclosure regime
 - deficient disclosure 486
 - enforcement 486–7
 - periodic disclosure 486
 - timely disclosure 486
- non-contest settlements 508–9
- Office of the Superintendent of Financial Institutions 499
- Ontario
 - Class Proceedings Act 492, 493
 - Financial Services Commission 499
 - Securities Act 487, 493
 - Securities Commission 499
- Provincial-Territorial Council of Ministers of Securities Regulation Annual Progress Report (2016) 494
- public enforcement 505–6
 - /private enforcement relationship 503–4, 505
- public regulatory actions 504–8
 - enforcement, 504–505
 - investigations 504
 - non-public enforcement notices 504
 - Notice of Hearing 504
 - Statement of Allegations 504
- secondary market class actions 483–4, 506
 - certification requirement 502
 - defendant companies 484
 - judicial interpretation of leave requirement 484
 - leave requirement 502
 - other defendants 484
 - plaintiffs 484–5
 - plaintiffs' counsel 485
 - private and public enforcement 485
 - progression of cases 485, 501–3
- secondary market statutory liability 487–8, 506, 509–11
 - burden of proof 487–8
 - caps on 495–500
 - case law *see* case law
 - defendants 499–500
 - evidentiary requirements 490–91
 - gatekeeper role of courts 488–92
 - leave requirement 488–9, 490, 491–2
 - limitation period 492–5
 - no reliance requirement 487
 - plaintiffs 500–501
 - pocket shifting of damages 496
 - reasonable possibility threshold 489–90, 491
 - sectors involved 498–9
 - settlement 497
 - standing 500
- securities class actions 482
 - Sino-Forest class action 507, 509
 - TSX Committee on Corporate Disclosure (Allen Committee) 482–3
 - Final Report (1997) 483, 487
 - formation 487
 - Wells Notice 504, 505, 506
- capitalization rate 84
- case law
 - Allappattah Services, Inc. v. Exxon Corp.* 289, 290
 - ATP Tour, Inc. v. Deutscher Tennis Bund* 75, 179, 180, 184, 186
 - Atzmon v. Bank Hapoalim Ltd.* 231–2, 233, 234, 237
 - Barkan v. Amsted Indus., Inc.* 205, 209, 214
 - Basic Inc. v. Levinson* 12, 13, 14, 16
 - Blue Chip Stamps v. Manor Drug Stores* 14, 89
 - Boilermakers Local 154 Retirement Fund v. Chevron Corp* 178–9, 181, 182, 185, 195
 - C & J Energy Servs., Inc. v. Miami Gen. Empls.' & Sanitation Empls.' Ret. Tr.* 215–16, 217, 218–19, 220, 221, 222–3
 - Chiarella v. United States* 21, 22, 23
 - Copeland v. Fortis* 355–60
 - Dirks v. SEC* 21–2, 24–5
 - Eisen v. Carlisle & Jacquelin* 122, 123, 126
 - Flanagan, Lieberman, Hoffman & Swaim v. Ohio Public Employees Retirement System* 288, 298
 - Foss v. Harbottle* 462
 - Goldstein v. Pinros Holdings Ltd.* 233–4
 - Gorman v. Salamone* 342, 343
 - Graham v. Olympus Corporation* 362, 363, 367
 - Halliburton Co. v. Erica P. John Fund Inc (Halliburton II)* 12, 13–16
 - decision, 16–18
 - Hazout v. Tsang Mun Ting* 321–2
 - Hogg v. Cramphorn* 419, 423, 432
 - In re Cendant Corp. Litigation* 278, 294–5, 298
 - In re Appraisal of Dell Inc.* 235, 248, 251, 258, 264, 266–7
 - In re Enron Corp. Sec., Derivative & ERISA Litig.* 35, 288, 289, 293, 300
 - In re EZZCORP Inc. Consulting Agreement Deriv. Litig.* 73, 114, 173
 - In re Revlon, Inc. Shareholders Litigation* 5, 135, 178, 196, 202, 204, 205, 207, 210, 211, 213–14, 225
 - In re Riverbed* 110, 113, 115, 119
 - In re Royal Dutch/Shell Transport Sec. Litig.* 358, 359, 368

- In re Synthroid Marketing Litigation* 291, 296
- In re Trulia* 4, 67, 110, 112, 113, 115, 119, 134, 136–7, 140–1, 142, 146, 150, 191–2
- In re Wal-Mart Delaware Derivative Litigation* 156, 161, 164
- Ironworkers District Council of Philadelphia and Vicinity Retirement & Pension Plan v. Andreotti* 132–3
- Kital Holdings & Int'l Dev. Ltd. v. Maman* 231, 232, 234, 235, 236, 238, 240
- Mannix v. PlasmaNet, Inc.* 261–2, 265–6
- Mills Acq. Co. v. Macmillan, Inc.* 208–9, 210, 211, 213, 221, 225
- Morrison v. National Australia Bank Ltd* 8, 354, 363, 365, 405–6
- Omnicare, Inc. v. Laborers District Council Construction Industries Pension Fund* 124
- Paramount Communications Inc. v. QVC Network Inc.* 204, 209–10, 211–13, 221
- Pennoyer v. Neff* 316–17
- R v. Panel on Takeovers and Mergers ex p Datafin* 427, 430
- Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.* 196, 202
- Rosenbloom v. Pyott* 130–31
- Shaffer v. Heitner* 318, 319, 323
- Sharma v. Timminco Ltd.* 493–4, 502
- Silverman v. Motorola, Inc.* 291, 295
- Smith v. Van Gorkom* 118, 202, 204–5, 337
- Standard Iron Works v. Arcelormittal et al.* 290–91
- Teva see Teva*
- Theratechnologies Inc. v. 121851 Canada Inc.* 488, 490, 491–2
- United States v. Newman* 24, 25
- United States v. O'Hagan* 22–3, 24
- Unocal Corp. v. Mesa Petroleum Co.* 202, 203, 208, 213
- Volkswagen litigation* 360–61
- Zapata Corp. v. Maldonado* 101, 132
- causation 85, 125
- cash outflow 85–6
- discount rate 86–7
- expected return 87–8
- causes of action 2, 408
- common law fraud 39, 40
- federal 71, 83
- misrepresentation 81
- private 40, 44, 369
- securities fraud 12, 13–14, 35, 83
- China
- Companies Law Article 470, 20.2
- Securities Regulatory Commission *see* CSRC
- stock markets 513–14
- circularity 36, 37, 94
- in FOTM class actions 47–8
- of secondary market fraud gains and losses 51
- of settlement payments 48, 86
- class action
- abuses of 192
- covered 17
- FOTM *see* FOTM class action
- securities fraud *see* securities fraud class actions
- class conflict 96
- Code of Federal Regulations
- 17 C.F.R.
- § 240.10b5-1 23
- § 10b5-2 23
- § 240.14e-3 23
- § 243.100 (2015) 23
- Rule 10b-5 (Private Right of Action) 2, 24
- see also* Rule 10b-5 private right of action
- collateral estoppel 156, 157, 164
- collusion 164
- common fund doctrine 193
- competing claims 82–3
- buyer-holders 82
- prioritizing corporate claims 82–3
- prioritizing direct claims of buyers 82
- conflict of interest 9, 163, 306, 367, 378, 389
- in derivative suits 75
- direct 166
- and shareholder litigation 460–61
- corporate benefit doctrine 193
- absence of 200
- /common fund doctrine distinction 5, 193
- as exception to American Rule 193
- not widely recognized 193, 194, 196–7
- corporate governance
- ALI Principles of 101
- board's centrality in 333
- documents
- as contractual 182
- limiting litigation through *see* limiting litigation
- market-oriented approach to 8–9, 415
- mechanisms 341
- reforms 61, 63, 68, 73
- subnational regulation of 443
- suits 442
- tools 43, 50
- corporate internal affairs *see* internal affairs doctrine

- corporate law
 - underproduction of 119–20
- corrective justice 41–2
 - FOTM 41–2, 48–9
- cost of equity 84
- costs 19,
 - agency 52, 61–2, 305, 306
 - deadweight 50, 51, 433–4
 - direct 44
 - enforcement 42
 - English rule 473–4
 - FOTM class actions 52–3
 - litigation *see* litigation costs
 - overdeterrence 44, 53
 - private Rule 10b-5 44
 - PSLRA not reducing 29
 - reputational 42
 - riskbearing 49, 52
 - sharing 262–5
 - social 42, 49
- counsel
 - bidders, 307
 - de a, 307
 - litigation 307
 - plaintiffs' 308
- crosslisting 8, 372
 - failure of laws 378–9
 - Israel regulation 374–5
 - US regulation 374
 - weak enforcement of laws 375–6
- CSRC
 - Administrative Sanction Commission 516
 - administrative sanctions (*xingzheng chufa*) 517–18
 - Enforcement Bureau (*jicha ju*) 514
 - Enforcement Contingent (*jicha zongdui*) 514
 - enforcement process 514–15
 - conclusion 515–16
 - filing orders 513
 - formal enforcement proceedings 516
 - formal investigation 515
 - industry bans (*shichang jinru*) 517, 518
 - regulated entities 518–19
 - regulated individuals 519
 - sanctions 516–17, 519, 526–7
 - barred individuals 524–6
 - culpable firms 519–23
 - culpable individuals 523–4
 - monetary 517
 - remedy orders/warnings 517
 - suspension/barring of company 517
 - types of violations 526
- damages*
 - collateral 91
 - consequential 88, 90
 - crash 88
 - fundamental 94–95
 - measure of 80
 - reputational 88
- de minimis* requirement 249, 250
- deal price 234, 235, 250, 305
- Deepwater Horizon 93
- defenses
 - lockup 417
 - meaningful cautionary language 12–14
 - puffery 123–4
 - truth on the market defense 123
- defining characteristic of corporate form 330
- Delaware
 - appointment of lead plaintiffs 150–52
 - bar 199
 - Code Title 10
 - § 366 (sequestration) 317–18
 - § 3104 (long arm) 316
 - § 3114 (implied consent) 316, 319
 - see also* implied consent; long arm statute
 - corporate charters 118
 - debtors' rights cases 318–19
 - development of corporate law 119
 - disclosure settlements 140, 142–5
 - external decisions 146–7
 - distinction between equity and law courts 142
 - enhanced scrutiny 202–3
 - fairness hearings 142–3
 - fiduciary obligations 203
 - General Corporate Law
 - litigation limits 180
 - § 142 342
 - § 109 342
 - § 220 (inspection rights) 111, 114
 - § 262 244
 - implied consent statute 319
 - constitutionality 320, 322–3
 - enactment 319
 - extension 319, 321–2
 - limitations 320, 322
 - personal jurisdiction under 321, 322
 - two-part test 319–20
 - jurisdiction 316, 326, 328–9
 - conspiracy theory of 327–8
 - implied consent statute *see* implied consent statute above
 - long arm statute *see* long arm statute below
 - over non-resident officers 337
- landmark M&A decisions 202–3
 - see also* mergers and acquisitions

- leading jurisdiction for corporate law 110, 112
 - potential loss of status 115–16
- long arm statute
 - adoption 323
 - amenability to service of process 323, 324, 325, 326
 - asserting jurisdiction under 326–7
 - current application 323–4
 - extension 326
 - limitations 324
 - not source of personal jurisdiction 325
- need to emphasize own decisions 152–3
- nuisance claims 141–2, 146–7, 150
 - migration of from 152
- public takeovers speed of adjudication 432
- ratification of misconduct 137
- slowing number of merger cases in 112
- top destination for incorporations 112
- demand requirement 3, 71, 76, 128–33, 461
 - demand-futility 130, 138
 - in direct actions 463
 - excused demand 128, 129
 - screening via *see* screening
 - special litigation committees 132
 - weakening 129
- derivative claims 58–9, 78, 81, 83, 89
 - Allergan 130–31
 - for backdating 64–5
 - bond requirement in 71
 - collateral estoppel in 172–4
 - escaping scrutiny 65
 - no perceived crisis 66–7
 - forum shopping in, 74
 - geographically dispersed 68
 - /merger litigation distinction 66, 67
 - new approach to 72
 - corporate self-help 74–6
 - increased judicial oversight 73–4
 - legislative 76–8
 - no judicial or legislative support for 67–8
 - no motivation for reform 68–9
 - numbers of 64
 - payment of expenses 71
 - primarily filed under state law 58
 - problems with 59–60
 - agency costs 61–2
 - few financial recoveries 60–61
 - lack of effectiveness 62–4
 - nonmonetary settlements 61
 - procedural hurdles 69–72
 - control of suit 71–2
 - difficulty filing suit 70–71
 - heightened procedural rules 70–71, 76
 - representative plaintiffs in 61–2
 - settlements 65
 - superiority of 96
 - and varying procedural requirements 196–7
 - deterrence 42–4
 - direct actions 89, 92, 197, 459
 - advantage of 463
 - demand requirement in 463
 - /derivative claim distinction 197
 - direct claims 81, 197
 - buyers' 82
 - precedence of derivative claims 82
 - stockholders' 81
 - directors
 - board *see* board of directors
 - duties *see* directors' duties
 - independence 130, 131
 - legal obligations 186
 - /officers
 - distinction 332–4
 - overlap 337
 - /shareholder power differential 185
 - as shareholder trustees 186
 - directors' duties 449, 462, 472
 - fiduciary 100
 - see also* fiduciary duties
 - loyalty 101
 - obeying the law 99–102, 104–5
 - stockholder wealth maximization 100
 - directors' liability 471
 - net loss rule 100
 - disclosure claims 159
 - whether direct or derivative action 197
 - disclosure settlements 138, 140, 143–5, 191
 - attorney's fees 194–5
 - and corporate benefit doctrine 197–8
 - as deal tax 192
 - and forum selection clauses 192
 - judicial review of 191, 193
 - applicable law 195
 - application of internal affairs doctrine 195–6
 - authority to award attorneys' fees 197–9
 - reasonableness of fees 199
 - only addressing disclosure claims 197
 - opposing 200
 - supplemental disclosures 199–200
 - Trulia* materiality standard 145, 150, 191, 194, 200
 - as substantive law 196
 - discount rate 80, 83, 84, 86–7, 92
 - Federal Reserve 245
 - diversifying away loss 83, 87, 95
 - doctrines of repose 156, 157
 - due process 161, 328
 - adequacy-of-representation 158, 174

- clause 299, 322
- federal 173
- rights 114
- earnings game 34
- enforcement
 - continuous disclosure 486–7
 - costs 42
 - CRSC 514–15
 - see also* CRSC
 - modes of 10, 512
- enhanced scrutiny 202–203, 204–6, 209, 214, 219
 - for illegality 100, 101, 104, 105
 - range-of-reasonableness test 223
- entrepreneurial litigation 351–4, 368–9
 - in Asia 362
 - as controversial 352
 - counterreaction 367–8
 - definition 352
 - in Europe 354–5
 - by American law firms 357–8, 367
 - consolidation of claims 356–7
 - financing 357
 - Fortis* litigation 355–60
 - opt-in principle 355
 - two-step strategy 360
 - using *stichting* as vehicle for 356–7, 358
 - Volkswagen* litigation 360–61
 - future directions 368
 - globalization of 352, 353–4, 364–6
 - in Japan 362–4
 - in Korea 364
 - new players 366
 - potential for 365
 - reverse auctions 367
 - skepticism over 353
 - third party funders 366–7
 - unequal distribution 367
- EU
 - arbitration 452–3
 - arbitrability of derivative suits 453
 - arbitrability of securities disputes 452
 - bondholder/shareholder comparison 451
 - Brussels Ia
 - Article 4 447
 - Article 7 No 1(b) 448
 - Article 7 No 2 447
 - Article 19 448
 - Article 24 No 2 446–7
 - Article 25(1)(a) and (c) 448
 - Article 31(4) 448
 - Article 63 447
 - consumer protection regime 453–4
 - rebuttable presumption of unfairness in 453
 - derivative suits 445–6
 - choice of forum 445
 - default jurisdiction 445, 448
 - loser pays rule 446
 - Directive 93/13/EEC
 - Article 3 and Annex 1(q) 453, 454
 - Article 6 453
 - Directive 2003/71/EC
 - Article 14 452
 - Directive 2004/25 (takeovers) 419, 420
 - Directive 2007/36/EC (shareholder rights) 464–465
 - intracorporate litigation 445, 446
 - choice of court agreements 448–9
 - exclusive jurisdiction rule 446
 - matters outside exclusive jurisdiction 447–8
 - relevant connecting factors in 447, 448
 - primary/secondary market transaction
 - differentiation 451
 - validity of jurisdiction agreements 451–2
 - Regulation (EU) 2016/301
 - Article 6(3) 450
 - representative litigation 454–5
 - securities litigation
 - breach of the securities terms and conditions 450
 - choice of forum agreements 449, 450–51
 - default jurisdiction 449
 - fraud on the secondary market 450
 - prospectus liability 449, 450
 - tortious liability 449–50
 - tortious liability 447
 - Treaty on the Functioning of the European Union 445
 - /US differences on shareholder litigation 445, 454–5
 - intracorporate claims 457
 - securities claims 458
- fair value 230, 241
 - burden of proof 245
 - calculation of 245
 - DCF method of valuation 230
 - and merger price 245
 - objective anchors in 231
 - consent of most of minority 232–3
 - consent of sophisticated offeree 237–9
 - consent of sophisticated shareholder 235
 - institutional/private shareholders 236
 - market price 231–2
 - negotiations 236–7, 239
 - prior deal 234–5
 - share price manipulation 233–4
 - when lacking objective anchors 239–41

- Federal Civil Rules Advisory Committee 17, 77
- Federal Rule of Evidence 706 200
- Federal Rules of Civil Procedure
 Rule 23 15, 122, 351
 commonality requirement 16
 23.1 73
- fee agreements
 presumption of reasonableness 294–5
 overriding 295
- fee awards 288–9
 contingent 293
 regulating *see* regulating fee awards
see also fees
- feedback 86
- fees
 contingent 287
 in securities class actions 300–2
 sliding scales 293–4
 ex ante negotiations 299
 ex post negotiations 299
 retainers 298–9
 sliding scales 300
 terms 287–8
 establishing upfront 297–9
see also fee awards
- feeshifting 71, 179, 180, 184, 281
 banning 187
 bylaws 249, 441
 limited 77, 362
 loser pays 354, 355, 357
- fiduciary doctrine
 divergence in 336–41
 weakness of 331
see also fiduciary duties
- fiduciary duties 187, 330–31, 334
 care 335, 336, 337
 directors' 332, 335
 /officers' distinction 331–2
 effectiveness 331
 enforcing 331, 334–5
 director preference in 339
 evolution of 335
 holding managers to account 331
 loyalty 335, 336
 officers' 332, 335–6, 340–41, 344
 absence of case law on 336–7, 339
 and director preference 339
 /directors' distinction 331–2
 procedural law preventing development
 of 337–9
 purposes in corporate law 344–5
 as unyielding 334
 value of 345
see also directors; fiduciary doctrine; officers
- fiduciary duty class actions 248–49, 251–2
- first to file rule 196
- foreseeability 322, 323, 328
- forum
forum non-conveniens doctrine 147, 442
 shopping *see* forum selection
- forum selection 156, 183–4
 parallel suits 63, 159
 race to the bottom 159–60
- FOTM class action 45–8, 53
 compensatory damages in 46
 definition 45
 efficiency of 50
 expanded liability in 46–7
 incentives to settle in 47
 no privity of dealing in 46
 pre-trial dismissal 47
 reliance in 125
 settlement 47
 circularity of 47–8
 social function of
 corrective justice 48–9
 costs of 52–3
 deterrence 49, 53
 discouragement of victim precautions
 51–2
 forced cost internalization 49–51
 reduction of riskbearing costs 52
- fraud on the market 12–13, 14–15, 16, 36
 class action *see* FOTM class action
 secondary market fraud 48
 social function of 48
- fraud tax 282
- frivolous litigation 110
 deterring 110–12, 113–14
 adequate investigation requirement 114
 Section 220 actions 114
 limiting *see* limiting litigation
 merit thresholds 111, 112, 113
 and merger suits 113
 multijurisdictional litigation 111, 114–15
 private ordering solutions 176–7, 181
 arbitration clauses 176
 enforceability 177
 fee shifting 177
 forum selection clauses 176
 limiting jurisdiction 176
 minimum stake requirements 177
 rationale for 177
 and war chests 112
- Germany
 Act on Model Procedures for Mass Claims
 in Capital Market Cases 360
 appraisal rights 467
 arbitrability in 452–3

- rescission suits in 475–8
 - Berufskläger* 475
 - Freigabeverfahren* 477
 - number of 475–6
 - räuberische Aktionäre* 475
 - settlement 476–7
 - similar function to shareholder class actions 477–8
 - types of shareholders resolution challenged 476
 - widespread 478
 - standing to sue in 472–3
- good faith 117, 129, 132, 179, 218, 335, 489
- hindsight bias 129, 163
- illegality 98–9, 102–4
 - and advancing technology 103
 - as breach of fiduciary duty 101
 - and corporate law 98–9, 106–7
 - criminal and civil liability 98
 - director liability 99
 - drivers of change 102–3
 - greater scrutiny for 100, 101, 104, 105
 - no business judgment rule protection 104, 106
 - regulatory entrepreneurs *see* regulatory entrepreneurialism
 - and self-driving cars 106
 - stockholder suits as supplemental law enforcement 105–6
 - and *ultra vires* doctrine 105
 - as violation of duty of loyalty 101
- insider trading
 - liability 22–3, 24
 - predicate breach of fiduciary duty requirement 2122
 - Insider Trading and Securities Fraud Enforcement Act (1988) 22
 - § 2 24
 - Insider Trading Sanctions Act (1984) 22
- institutional investors 274
 - effect of 276–8
 - effectiveness of 276
 - hedge funds 275
 - increase in 222–3, 226
 - as lead plaintiffs 274
 - see also* lead plaintiffs
 - as litigation gatekeepers 15
 - pay to play 278–9
 - public pension funds 274–5
 - mutual funds not being 275
 - union pension funds 275–6
- internal affairs doctrine
 - enforceability of forum selection clauses 181
 - litigation limits 181–3
 - scope of 182–3
- international shareholder litigation 8
 - comparative 8–9
 - globalization of 8
- Ireland
 - Companies Act (2014) 424
 - public takeovers *see* public takeovers (Ireland)
 - Takeover Panel Act (1997) 421, 429
- Israel
 - appraisal rights 230
 - in complete tender offers 229
 - only for ‘going private’ tender offers 229
 - case law 241
 - Companies Law
 - amendment of 232
 - § 336 229
 - § 337 229–30
 - § 337(a) 230
 - § 338 230
 - /Delaware comparison 235
 - estimating fair value 230
 - see also* fair value
- Italy
 - appraisal rights 466
 - Article 34 legislative decree No 5/2003 453
 - corporate arbitration 453
- judicial waiver 71
- jurisdiction
 - asserting 326–7
 - choice of 308–9
 - default 441–2, 449
 - Delaware 316, 326, 328–9
 - see also* Delaware
 - limiting 176
 - personal 316–17
 - extension of 322
 - subject matter 355
- law firm quality 304
 - defense firms 311–12
 - gaps in knowledge 312–13
 - in M&A litigation 307
 - choice of jurisdiction(s) 308–9
 - selection of counsel 307–8
 - measuring
 - in class actions 305–7
 - effect of agency costs 305, 306
 - by outcome 304–5
 - successful plaintiffs’ firms 310–11
 - lawmaking partnership 12–13, 16, 18, 26
 - advantages of in private securities fraud litigation 19

- common objective 19
- common objectives 24
- conceptualizing 18–20
- developing financial regulation 24–5
- dynamic processes of 20–21
- exploiting institutional competencies 20
- and insider trading regulation 21–3
 - implications of 18, 24–6
- open-textured original statute 19, 24
- preventing agency capture 20
- responsiveness 25
- and the SEC 23–4
- sequential adjustments 19
- lead plaintiffs 32, 121, 271, 273, 284–5
 - authority 272
 - Delaware appointment of 150–51
 - effect of 274–6
 - on attorney's fees 277–8
 - on settlement amounts 276–7
 - figurehead plaintiffs 281, 282
 - government-sponsored pension funds 272
 - having largest financial interest 271–2
 - individual investors 282
 - institutional investors 274
 - effect of 276–8
 - effectiveness of 276
 - hedge funds 275
 - mutual funds not being 275
 - pay to play 278–9
 - public pension funds 274–5
 - union pension funds 275–6
 - monitoring 273–4
 - reforms
 - campaign contributions 280
 - fee arrangements 280–81
 - fee shifting 282, 284
 - repeat plaintiffs 280
 - standing 281–3
 - transparency 279
 - success of 272
 - legal origins 459
- limiting litigation 176–7
 - arbitration clauses 177–8, 184
 - Delaware General Corporate Law 180
 - see also* Delaware
 - fee shifting 179–80, 184
 - forum selection 178–9, 180–81
 - history 177–81
 - ownership requirement 180
 - whether corporate internal affair 181–3
 - see also* frivolous litigation; litigation limits
- litigants and law firms 6
 - officers and directors 7
 - plaintiffs 6–7
- litigation
 - costs *see* litigation costs
 - frivolous *see* frivolous litigation
 - funding 116–18
 - contingency fees 121
 - income smoothing 117–18
 - litigation finance companies 118
 - limiting *see* limiting litigation
 - limits *see* litigation limits
 - merger *see* merger litigation
 - multijurisdictional 112, 159–60
 - see also* forum selection
 - representative
 - appraisal as 254
 - see also* appraisal
 - vexatious *see* vexatious litigation
- litigation costs 126–8
 - effect on volume of litigation 126–7
 - procedural requirements raising 126
 - raising 126–8
 - substantive requirements raising 126
- litigation limits 186, 187–8
 - and contract & consent 185–7
 - directors' powers to enact 185
 - forum selection 183–4
 - unilaterally imposed 183
 - whether appropriate subject for private
 - ordering 183–5
 - whether matter of corporate internal affairs 181–3
- loss 95–6
 - actionable 88–9
 - see also* actionable losses
 - avoidable 83
 - causation 85
 - cash outflow 85–6
 - discount rate 86–7
 - expected return 87–8
 - component factors of 93–4
 - crash damages 88
 - diversifying away 83
 - fundamental 94–5
 - reputational 92
- management buyouts 205, 209, 251, 306, 310
- managers *see* directors; officers
- mapping shareholder lawsuits 459, 478
 - access to information 474–5
 - allocation of cost 473–4
 - allocation of risk 473–4
 - appraisal rights
 - EU 466
 - France 467
 - Germany 467
 - Italy 466
 - US 466

- closely held corporations 461
- conflicts of interest 460–61
- direct harm to shareholders 460–61, 463–6
 - in civil law jurisdictions 463–4
 - in concentrated ownership systems 465
 - France & Germany 463
 - nullity suits 465
 - rescission suits 464–5
 - UK 463
 - US 463
- harm upon the corporation 460, 461–3
 - China 462
 - Continental Europe 462
 - UK 462, 463
 - US 461
- institutional preconditions 471
- oppression claims 467–8, 469
 - /inquiry proceeding comparison 470
- publicly traded firms 461
- rescission suits in Germany 475–8
 - Berufskläger* 475
 - Freigabeverfahren* 477
 - number of 475–6
 - räuberische Aktionäre* 475
 - settlement 476–7
 - similar function to shareholder class actions 477–8
 - types of shareholders resolution challenged 476
 - widespread 478
- standing to sue 471–3
 - China 473
 - France 472
 - Germany 472–3
 - Japan 472
 - Switzerland 472
 - UK 472
 - US 471
- unfair prejudice claims 468–70
- merger litigation 3, 58
 - appraisal actions 5–6
 - backlash against 66–7
 - black hat 141
 - ‘deal tax’ 66, 140–42
 - Delaware courts’ authority in 67
 - /derivative suits distinction 66
 - and forum selection 67
 - In re Trulia* see case law
 - judicial perspectives 4–5
 - merger tax 118–19
 - multijurisdictional 3–4
 - nuisance claims in 140, 141–2
 - post-*Trulia* 141
 - sorting of 141, 153–4
 - white hat 141
- mergers
 - cashout 232
 - challenging 3, 66, 73, 178
 - crackdown on 244
 - deal tax on 73
 - freezeout 460
 - squeezeout 460
- mergers and acquisitions 227
 - case law see case law
 - current attitudes to 214–15
 - bidders’ contract rights 220
 - in Delaware Supreme Court 218–21
 - management-led single-bidder process 215–16
 - in Delaware Court of Chancery 216–18
 - shareholder voting 221
 - early attitudes to 204
 - defensive measures in merger agreements 207–10
 - asset lockups 208–9
 - no-shop clauses 207, 208, 209
 - termination fees 208
 - enhanced scrutiny 204–6, 209, 214, 219
 - connotation of multiple bidders 205, 206
 - management-led single-bidder processes 204–7, 209–10
 - multiple bidders 205
 - judicial preference for 206–7
 - primacy of fiduciary duties 210–11
 - over third party contract rights 211–13
 - shareholder voting in 213–14
 - hostile bids 205
 - reasons for changing attitudes to 222–6
 - failure of stockholder-led M&A litigation 223–5, 226
 - increase in institutional investors 222–3, 226
 - increased judicial comfort over defensive measures 225
 - severability in 225–6
 - targeted preliminary injunctions 210–11, 219–20
 - see also preliminary injunctions
 - misappropriation theory 22–3, 24
 - misrepresentation 81, 87, 487, 520
 - experts’ liability 495
 - secondary market 482, 498, 500, 509
- multijurisdictional litigation 3–4, 111, 114–15, 159–60, 183
- negative value claims 354
- Netherlands
 - Act on Collective Settlement of Mass Claims (the Netherlands) 8, 358

- New York Arbitration Convention (1958) 454
 North Carolina Rules of Professional Conduct 198
 Rule 1.5 199
 nuisance claims 106, 115, 140–141, 144, 147, 283
 and *de minimis* rule 249–50
 provable losses 284
 nuisance settlements 146, 148, 282
 fees 154
 migration outside Delaware 152
nunc pro tunc doctrine 494
- officers
 accountability 341–4
 via directors 341–2
 proxy battles to remove 342–3
 via stockholders 342–4
 /directors overlap 337
 /directors distinction 332–4
 fiduciary duties *see* fiduciary duties
 malfeasance 340–41
 powers 333–4
- Oklahoma Code
 § 18-1126 71
- overdeterrence 44, 53, 96
- pay to play 278–9
- policy considerations 16
- policy objectives 23–4
- preclusion 165, 167
 addressing 162
 claim 156, 161, 69
 issue 111, 114, 165, 169, 174
- preclusive effect 4, 157, 158, 161, 167, 171
- preliminary injunctions 135–6
 of future claims 282
 as powerful tools 221
 targeted M&A 210–11, 219–20
- private ordering 439
 dispute resolution provisions 439–40
 choice of forum 440, 442
 emergence of 440–41
 fee shifting 441
 mandatory arbitration 441
 US approach 443–5
 default rules in corporate governance 444
 governing of content of corporate charters and bylaws 443–4
 organizational documents can be treated as documents 444–5
- Private Securities Litigation Reform Act (1995)
 2, 13, 15, 47, 58, 117, 273
 discovery bar 17, 126
 effects of 127
- goals of 271
 lead plaintiff provision 17
 see also lead plaintiffs
 pleading standard 17, 29, 124, 126
 response to abuses of securities class actions 273–4
 screening effect 32
 § 21D(a) 17
- procedural rules 70
 heightened 70–71, 76
 control of suits 70, 71–2
 cost sharing 77
 creating difficulty filing suits 70–71
 limited fee shifting 77
 pleading standards 77
 transsubstantive 70
- proximate cause 88, 89, 90, 91
- pseudo-foreign corporations 317
- public character of corporate litigation 187
- public takeovers 415–17
 Ireland/UK/US differences 416, 437
 Ireland/UK/US similarities 415–16
 see also public takeovers (Ireland); public takeovers (UK)
- public takeovers (Ireland)
 regulatory regime 416–17
 certainty of 432–3
 deadweight costs 433–4
 proactive approach to rulemaking 431–2
 process advantages of 431
 relative absence of litigation 434, 435
- Takeover Panel 415, 427–31
 adjudicatory speed 432
 applying Rule 21 423–4
 Board 428
 Executive 428–29 432
 expenditures 435–6
 independence of 427–8
 judicial review of decisions 430–31
 powers 429
 restrictions on 429–30
 self-financing 435
 statutory duties 428
 statutory hearings 429
- Takeover Rules 417, 420–21
 disclosure of information 421–2
 equivalent treatment 422–3
 mandatory bid 422–3
 no frustration principle 423, 424
 substantive requirements 421–4
 timescales 421
- public takeovers (UK)
 City Code on Takeovers and Mergers 417, 419–20
 disclosure of information 421–2

- expanding scope of 423
 - General Principle 1 422
 - General Principle 2 422
 - General Principle 3 423
- no frustration principle 423, 424
- substantive requirements 421–4
- timescales 421
- defensive tactics 417–18
- first appearance 417
- Notes on Amalgamation of British Businesses 418–19
- Panel on Takeovers and Mergers 415, 419, 424–7
 - adjudication process 425
 - Code Committee 424–5
 - decisions subject to review 426–7
 - Executive 425, 432
 - expenditures 434–5
 - judicial function 424
 - legislative function 424
 - monitoring compliance with City Code 424
 - powers of 424, 425–6
 - proactive approach to rulemaking 431–2
 - self-financing 435
 - on tactical litigation 423–4
- regulatory regime 416–17
 - certainty of 432–3
 - cost of dispute resolution under 435
 - deadweight costs 433–4
 - process advantages of 431
 - relative absence of litigation 434
- public takeovers
 - regulatory regime 416, 417
- race to laxity 373–4
 - crosslisting legislation in Israel 374–5
 - crosslisting legislation in US 374
 - as good thing 376–7
 - Teva* case *see* *Teva*
 - weak enforcement of crosslisting laws 375–6
 - see also* crosslisting
- reasonableness 203
 - of fees 199
 - presumption of 294–5
 - range-of-reasonableness test 223
- regulating fee awards 287–9
 - establishing fee terms upfront 297–9
 - in Fifth Circuit 296
 - mimic-the-market method 287–9, 290, 291–2, 302–3
 - percentage-based fees 290–93
 - in Ninth Circuit 296–7
 - setting terms 287
 - in Seventh Circuit 287
 - in Third Circuit 288, 294–6
 - judicial assessments 295–6
 - presumption of reasonableness for *ex ante* fee agreements 294–5
 - securities-specific 294–6
- regulation
 - as revenue source 102–3
 - circumventing 103
 - securities 372–3
 - race to the bottom in *see* race to laxity
- regulatory entrepreneurialism 99, 102, 105
 - combating inefficient laws 103
 - potential of 106
- reliance 125, 487
 - presumption of 16, 125
- remedies
 - aggregate litigation 354
 - appraisal 243
 - see also* appraisal
 - oppression 467–8, 469
 - unfair prejudice 468–9
- required rate of return 84
- res judicata* 156, 157
- respondeat superior* liability 41–2, 43, 49
- restatement framework 156, 163, 165
 - applying 174
 - interpreting 161, 171–172
- Restatement (Second) of Judgments 162
- restatement test 162
- risk
 - allocation 473–4
 - appraisal 248
 - bearing 49, 92
 - business 92
 - materialization 93–4
- Rule 10b-5 private right of action 39, 53
 - early 39–41
 - corrective justice in 41–2
 - costs of 44
 - deterrence in 42–4
 - evolution of 44
 - doctrinal innovation 44–5
 - FOTM Class Actions 45–8
 - see also* fraud on the market
- Sarbanes–Oxley Act (2002) 15, 89
- scienter requirement 14, 24, 31, 36, 88, 124, 126
- screening
 - via approval of settlement 133, 136–8
 - see also* settlement
 - causation 125
 - via demand requirement 128–33
 - see also* demand requirement
 - dismissal recommendations 130
 - for economic loss 125

- heightened pleading requirement 124–5
- materiality 123–4
- motions to dismiss 134–5
- preliminary hearings 122–3
- preliminary injunctions 135–6
 - for reliance 125
- Section 220 inspection rights 111
- Securities & Exchange Commission 13
 - adoption of Rule 14e-3 24
 - exercise of authority 20
 - increasing threat of scrutiny 34
- Securities Act (1933) 180
- Securities and Exchange Act (1934)
 - Rule 10b-5 13–14, 80
 - § 10(b) 39
 - § 10(b) 13, 14
 - § 10b-5 80
 - § 14, 309
 - § 21D, 88
- securities fraud 12
 - actionable causes of loss 80–81
 - class actions *see* securities fraud class actions
 - Enron, 33, 35
 - fraud on the market *see* fraud on the market
 - as lawyer-driven litigation, 15
 - limitations on scope, 14
 - policy considerations in 14
 - private 13–14
 - importance of 15
 - limiting litigation abuse 14
 - limiting vexatious litigation in 15
 - as political hot potato 19–20
 - protecting investors 14
 - statute of limitations 15
 - severe 29–30, 33–5
 - increase in 34
 - WorldCom 33, 35
- securities fraud class actions 1–2, 12, 37
 - abuses of 273
 - by bondholders 34
 - causation in 125
 - Cendant 33
 - as Congress/Court lawmaking partnership 12–13, 16, 18
 - as enforcement tool 17
 - and first internet stock bubble 33
 - as form of insurance 90–91
 - future implications 35–7
 - HealthSouth 33
 - impact of PSLRA 31–2, 37
 - accounting restatements 34, 35
 - lead plaintiffs in 32
 - lower fees in 300–302
 - pre-PSLRA 30–31
 - pretrial evaluations in 123
 - private class actions 17
 - RiteAid 33
 - screening in 122–6
 - see also* screening
 - and securities fraud 29–30
 - severe fraud 33–5
 - see also* securities fraud
 - Sunbeam 33
 - as system for redistributing stockholder wealth 91
- Securities Litigation Uniform Standards Act 13, 15
 - adoption of 17
- Securities-Related Class Action Law (Korea) 364
- Senate Committee on Banking, Housing, and Urban Affairs 30
- separation of control 334
- settlement 133–8
 - approval of 137–8
 - disclosure 138, 140, 142–5
 - see also* disclosure settlement
 - judicial preference for 192, 197
 - preclusive 160
 - weakness as screening process 136–7
- severability 225–6
- shareholder
 - consent 185–6
 - derivative suits, 2–3
 - see also* derivative claims
 - /director power differential 185
 - not autonomous agents 186
 - power 185
 - rights 187
 - suits *see* shareholder suits
- shareholder suits
 - class actions *see* class actions
 - derivative *see* derivative claims
 - externalities 121–2
 - individual 121
 - lawyer driven 121, 176
 - representative 121
 - screening 122–6
 - see also* screening
 - as vexatious 176
- side payments 273
- standing 89, 281–3, 471–3, 500
 - China 473
 - France 472
 - Germany 472–3
 - Japan 472
 - Switzerland 472
 - UK 472
 - US 471
- stare decisis* 16

- stichting* 8, 356
- Stop Trading on Congressional Knowledge Act (2012) 23, 25
- strike suits 489
- Teva* 377
 - aftermath 381–2
 - Brodet Committee 393
 - causes of action 408–9
 - class action 379–80
 - corporate avoidance of duty 378
 - Court as last resort 392, 407–8
 - Decision 381
 - executive remuneration disclosure 397–400, 404
 - failure of crosslisting laws 378–9
 - importance of individual disclosure 400–404
 - ISA reaction 380–81
 - Israeli court as only forum 405–6
 - Israeli disclosure rules 394–5
 - main arguments 386
 - continuation of violation of law 391
 - contradictory interpretation of duty to disclose 390, 404–5
 - disclosure obligations 387–8
 - failure to disclose directors' compensation 389–90
 - failure to disclose intent to stop individual reporting 390–91
 - general 386–7
 - no self-created exemption from disclosure 391–2
 - reports after Dual Listing Law 388–9
 - reports before Dual Listing Law 387
 - motion 385
 - to certify as class action 409–11
 - movants 406–7
 - no regulation 378
 - not reporting individual executive pay 377–8
 - remedies 411–13
 - US disclosure duties, expansion of 393–4
 - US disclosure rules 395–7
 - tramp corporations 317
 - two-tier plaintiffs' bar investigation 148–9
 - methodology 149
 - results 149–50
- UK
 - Companies Act (2006) 419–20, 424
 - § 171 463
 - public takeovers *see* public takeovers (UK)
 - shareholder primacy 418
 - ultra vires* doctrine 99–100, 105
 - Uniform Interstate and International Procedure Act (1986) 323
- US
 - Berle-Means corporation 460
 - /EU differences on contractual agreements on shareholder litigation 445
 - non-public enforcement notices 504
 - public takeovers *see* public takeovers
- valuation,
 - factors 84–5
- vexatious litigation 14, 176
- vicarious liability
 - overdeterrence costs 53