

Preface	xxv
Acknowledgments	xxxii
PART I THE PRACTICE OF BUSINESS LAW	1
Chapter 1 Practicing Corporate Law	3
A. What Do Corporate Lawyers Do?	4
1. A Different Paradigm from Litigators	4
2. The Typical Roles of the Corporate Lawyer	5
B. Where Do Corporate Lawyers Work?	11
1. Private Practice	11
2. Corporations (In-House Lawyers)	12
3. Other Practice Settings	14
4. Who Practices Corporate Law?	14
C. What Do Corporate Lawyers Need to Know?	15
1. Core Areas of Knowledge	16
2. Secondary Areas of Knowledge	17
D. Federal Securities Regulation	18
E. Terms of Art in This Chapter	18
Chapter 2 Business and Businesses	19
A. What Is a “Business”?	19
1. Why Businesses Vary in Size	19
2. Background and Context—Two Examples	21
In Bow to Retailers’ New Clout, Levi Strauss Makes Alterations	21
Suzanne Kapner and Joshua Jamerson, Coach to Buy Kate Spade in \$2.4 Billion Deal	26
B. The Development of Big Business in America	28
Alfred D. Chandler, Jr., The Visible Hand: The Managerial Revolution in American Business	28
1. Management Patterns in Large Corporations	31
Alfred D. Chandler, Jr., The Visible Hand: The Managerial Revolution in American Business	32

C. Form Follows Function—Entities for Businesses	35
1. The Current Setting—From Partnerships to Corporations	35
Alfred D. Chandler, Jr., <i>The Visible Hand: The Managerial Revolution in American Business</i>	36
Margaret M. Blair, <i>Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century</i>	36
2. Background and Context—A Vignette	38
Margaret M. Blair, <i>Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century</i>	38
3. Which State’s Law?—The Rise of Delaware	40
William E. Kirk, III, <i>A Case Study in Legislative Opportunism: How Delaware Used the Federal-State System to Attain Corporate Pre-Eminence</i>	40
D. Terms of Art in This Chapter	43
Chapter 3 Economics	45
A. Risk	45
B. Valuation	50
1. Value as Discounted Cash Flow	51
a. “I’ll Gladly Pay You Tuesday for a Hamburger Today” — The Time Value of Money	52
b. Discounting to Present Value	53
c. An Example	54
2. A Practical Illustration	57
<i>Kruse v. Synapse Wireless, Inc.</i>	58
3. Background and Context: Options and How to Value Them	72
C. Making Economic Decisions	74
1. Rational Self-Interest: The Classical Paradigm	74
2. The Myth of Rational Self-Interest: How Humans Actually Make Economic Decisions	75
a. Self-Interest	75
Richard H. Thaler, <i>The Winner’s Curse: Paradoxes and Anomalies of Economic Life</i>	75
b. The Limits of Rationality	76
i. Heuristics	77
Amos Tversky & Daniel Kahneman, <i>Judgment Under Uncertainty: Heuristics and Biases</i>	77
c. The Affective Component of Economic Decision-Making	81
D. Accounting	83
E. Terms of Art in This Chapter	94

Contents	xiii
PART II AGENCY	95
Chapter 4 Agency	97
A. Background and Context	97
1. The Economic Concept of “Agency” and the Problem of Agency Costs	97
2. Where Do Agency Questions Arise?	100
B. The Current Setting	102
1. Definition of the Agency Relationship	102
2. Creation of the Agency Relationship	103
<i>Rezac Livestock Comm’n Co., Inc. v. Pinnacle Bank</i>	103
<i>Rezac Livestock Comm’n Co., Inc. v. Pinnacle Bank</i>	107
3. Relation of the Principal to Third Parties	113
a. Actual Authority	113
b. Apparent Authority	114
<i>Udall v. T.D. Escrow Services, Inc.</i>	114
<i>CSX Transportation Inc. v. Recovery Express, Inc.</i>	118
c. Principal’s Liability to Third Parties for Actions Actually or Apparently Authorized	123
d. Estoppel	124
e. Ratification	124
f. Restitution	126
g. Principal’s Liability for Agent’s Torts	126
<i>Jefferson v. Missouri Baptist Medical Center</i>	126
<i>Solberg v. Borden Light Marina, Inc.</i>	132
<i>Valentine v. Hodnett</i>	136
h. Liability of the Third Party to the Principal	143
4. Relation of the Agent to Third Parties	143
a. Agent’s Liability on Contract	143
b. Other Sources of Agent’s Liability to Third Party	144
5. Relation of the Principal to the Agent	145
a. Duties of the Agent	145
<i>Wall Systems, Inc. v. Pompa</i>	145
b. Duties of the Principal	156
6. Termination of the Agency Relationship	156
a. Termination of Actual and Apparent Authority	156
C. Terms of Art in This Chapter	157

PART III	CORPORATIONS	159
	A. Creation	161
Chapter 5	The Incorporation Process	161
A.	Promoter Liability	161
	<i>Quest Engineering Solutions, Inc. v. Wilbur</i>	161
B.	Choice of Jurisdiction	165
	1. Why the Corporation's Jurisdiction Matters—The Internal Affairs Doctrine	165
	a. The Current Setting	165
	b. Background and Context	167
	2. The Special Role of Delaware	168
C.	Incorporation Mechanics	169
	1. Reserving the Name	170
	2. The Incorporation Documents	171
	3. Filing	171
	4. Organizing the New Corporation	172
D.	Defective Incorporation	173
	1. Background and Context	173
	Robert S. Stevens, <i>Handbook on the Law of Private Corporations</i>	174
	2. The Current Setting	177
	a. Corporations by Estoppel	177
	<i>Brown v. W.P. Media, Inc.</i>	177
	b. <i>De Facto Corporations</i>	180
	<i>Duray Development, LLC v. Perrin</i>	180
	In re <i>Hausman</i>	187
	c. The Effect of Modern Corporation Statutes	190
E.	Lawyer's Professional Responsibility to Multiple Clients and Entity Clients	193
	American Law Institute, <i>Restatement (Third) of the Law Governing Lawyers</i>	193
	Utah Rules of Professional Conduct	194
F.	Terms of Art in This Chapter	200

	B. The Corporation and Its Finances	201
Chapter 6	Capital Formation	201
A.	Financing: Getting Money into the Business	201
1.	Background and Context	201
2.	The Current Setting	203
a.	Corporate Securities	203
i.	(Common) Stock	203
ii.	Preferred Stock	204
iii.	Other Relative Rights	206
iv.	Debt	207
v.	More Exotic Securities	210
b.	Planning the Corporate Capital Structure	212
i.	The Consequences of Debt—Leverage	213
ii.	The Economic Risks of Excessive Debt	216
iii.	Other Costs of Debt	218
iv.	A Real-World Example of the Dangers of Excessive Debt	219
v.	The Legal Dangers of Excessive Debt	220
vi.	Other Factors That Make Equity Attractive	222
vii.	Choosing a Capital Structure for the Startup Corporation	224
viii.	Background and Context: A Note on Financing by Going Public and by Venture Capital	226
	<i>Greenmont Capital Partners I, LP v. Mary's Gone Crackers, Inc.</i>	231
c.	The Mechanics of Issuing Stock	239
i.	Statutory Authorization	239
ii.	Issuance of Stock	240
iii.	The Meaning of <i>Outstanding</i>	247
iv.	Preemptive Rights: The Economic Component	247
B.	Federal Securities Regulation	249
1.	Definition of a Security	250
2.	Registration	251
a.	Registration Requirements and Exemptions	251
b.	The Process of Registration—“Going Public”	253
C.	Terms of Art in This Chapter	255

Chapter 7	Cashing Out: Distributing Money to Shareholders	257
A.	Making a Profit Part I: Dividends	258
1.	The Current Setting	258
a.	Board Discretion	258
b.	Statutory Restrictions	261
c.	The Mechanics of Paying Dividends	262
d.	Stock Splits	264
	<i>Mason v. Mason</i>	265
e.	Reverse Share Splits	269
2.	Background and Context: The Difference Between “Stock Splits” and “Stock Dividends”	271
B.	Making a Profit Part II: Sale of Stock by Shareholders	272
	<i>Henry v. Phixios Holdings, Inc.</i>	274
	<i>Beauchamp v. AB & T National Bank</i>	284
1.	When the Purchaser Is the Corporation That Issued the Shares	293
a.	Limitations on a Corporation’s Power to Purchase Its Shares	293
b.	Motivations to Repurchase Shares	294
c.	The Metaphysics of Repurchased Shares	295
C.	Federal Securities Regulation	296
1.	Restrictions on Resale	297
a.	Section 16(b)	297
b.	Rule 144	297
2.	Rule 10b-5	298
	<i>City of Warren Police & Fire Retirement System v. Prudential Financial, Inc.</i>	298
	<i>Halliburton Co. v. Erica P. John Fund, Inc.</i>	309
a.	Insider Trading	317
	<i>Salman v. United States</i>	321
D.	Terms of Art in This Chapter	328
Chapter 8	Getting Money to Creditors When the Corporation Can’t Pay	329
A.	The Current Setting	330
1.	Individual Shareholder Liability by Piercing the Corporate Veil	330
	<i>Lunneborg v. My Fun Life</i>	334
2.	Enterprise Liability and Direct Participant Liability	345
	<i>Pertuis v. Front Roe Restaurants, Inc.</i>	347
3.	Commercial and Bankruptcy Doctrines	356
4.	Successor Liability	357
	<i>DeJesus v. Bertsch, Inc.</i>	358

Contents	xvii
B. Background and Context: Direct Liability of Corporate Officers	365
<i>B & R Resources, LLC v. Department of Environmental Protection</i>	366
C. Terms of Art in This Chapter	374
C. Board Power to Govern the Corporation	375
Chapter 9 How Corporations Take Actions	375
A. The Board of Directors	375
1. The Role of the Board of Directors	375
a. The Current Setting	375
Ronald J. Gilson & Jeffrey N. Gordon, Board 3.0: An Introduction	379
b. Background and Context	383
Victor Morawetz, A Treatise on the Law of Private Corporations, Vol. 1	383
2. Number, Selection, Election, Term, and Removal of Directors	385
a. Number and Selection of Initial Directors	385
b. Election and Term of Directors	385
c. Removal of Directors	387
d. Background and Context	390
Victor Morawetz, A Treatise on the Law of Private Corporations, Vol. 1	390
3. The Mechanics of Board Action	391
a. The Current Setting	391
i. Call	392
ii. Notice	392
iii. Quorum	393
iv. Sufficient Vote	393
<i>Klaassen v. Allegro Development Corp.</i>	395
4. Curing Defective Board Action	401
a. Background and Context	405
Victor Morawetz, A Treatise on the Law of Private Corporations, Vol. 1	405
B. Officers	405
1. Officers and Agents	405
a. The Current Setting	405
2. Power of Officers	408
a. The Current Setting	408
<i>Dilek v. Watson Ent., Inc.</i>	409

xviii	Contents
b. Background and Context	415
C. Federal Securities Regulation	416
D. Terms of Art in This Chapter	417
D. Restrictions on the Board's Power	419
Chapter 10 Restrictions on the Board's Power	419
A. Legislation That Restricts Board Power	419
B. Ultra Vires and Waste	421
Harwell Wells, The Life (and Death?) of Corporate Waste	422
C. Ultimate Beneficiaries	427
1. The Current Setting	428
William T. Allen, Our Schizophrenic Conception of the Business Corporation	428
Leo E. Strine, Jr., Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit	432
Jessica Floum, Portland to Stop Corporate Investing Despite Mayor Ted Wheeler's Opposition	435
2. Background and Context	436
Adolf A. Berle, Jr. & Gardiner C. Means, The Modern Corporation and Private Property	436
Stephen M. Bainbridge, The Board of Directors as Nexus of Contracts	439
Eric W. Orts, Is There Really a Fiduciary Duty to Destroy the Planet?	441
D. Federal Securities Regulation	447
Foreign Corrupt Practices Act	447
E. Terms of Art in This Chapter	448
Chapter 11 The Fiduciary Duties of Directors (and Officers)	449
A. The Duty of Loyalty	450
1. The Corporate Opportunity Doctrine	451
<i>Brewer v. Insight Technology, Inc.</i>	452
<i>Grove v. Brown</i>	455
2. Self-Dealing	462
<i>In the Matter of the Estate of Richard C. Poe, Deceased</i>	463
3. Failure to Monitor and the Duty of Good Faith	470
In re <i>The Boeing Company Derivative Litigation</i>	470
4. Trying to Generalize	486
5. Compensation of Directors and Senior Officers	489

Contents	xix
B. The Duty of Care	489
1. The Current Setting	490
<i>FDIC v. Rippy</i>	490
2. Background and Context	499
a. The Propriety of Analogy to Tort	499
b. Is There a Duty of Care?	500
C. Federal Securities Regulation	502
D. Terms of Art in This Chapter	503
Chapter 12 Standards of Review of Board Actions	505
A. The Duty of Loyalty	507
<i>United Food and Commercial Workers Union v. Zuckerberg</i>	507
<i>CCSB Financial Corp. v. Totta</i>	520
B. The Duty of Care	530
C. Gross Negligence and <i>Caremark</i> Prong Two	531
<i>McPadden v. Sidhu</i>	531
D. Defendants Can Prevail Despite the Rebuttal of the Business Judgment Rule Presumption—The Entire Fairness Standard	539
E. Plaintiffs Can Prevail Despite Application of the Business Judgment Rule—No Rational Business Purpose	541
F. Amelioration of Liability for Violations of Fiduciary Duties	542
1. Duty of Loyalty: Statutory Safe Harbor for Conflict of Interest Transactions	543
a. The Current Setting	544
i. Transactions Eligible to Be Affected	544
ii. Prerequisites to Being Affected by the CoI Safe Harbors	545
iii. The Effect of Compliance with the CoI Safe Harbor	546
b. Background and Context	546
i. A Note on Shareholder Ratification	546
2. Duty of Care: Limitations Contained in the Articles of Incorporation	548
<i>In re Cornerstone Therapeutics Inc., S'holder Litig.</i>	548
3. Indemnification by the Corporation	553
a. The Current Setting	553
i. Advancement of Expenses	553
ii. When Must the Corporation Indemnify?	554
iii. Procedural and Substantive Prerequisites to Indemnification	555
4. Insurance	556
G. Terms of Art in This Chapter	557

E. Shareholder Power in Public and Private Corporations	559
Chapter 13 Shareholder Governance Powers: Paradigms and Public Companies	559
A. Shareholders' Power to Take Action	560
1. Actions That the Shareholders May Take as a Group	560
2. How Shareholders Take Action in a Meeting	561
a. The Current Setting	561
i. Call	561
ii. Notice	562
iii. Sufficient Vote	563
iv. The Shift to Simple Majority Vote	565
v. The Importance of Being Present	567
b. Background and Context—The Annual Meeting of the Public Corporation	568
3. How Shareholders Take Action by Consent in Lieu of a Meeting	569
4. Tabulating the Votes	570
a. Whose Vote Counts?	571
b. Who Counts the Votes?	574
B. Shareholders' Rights to Information	576
1. Periodic and Transaction Reporting	576
2. Inspection Right	577
a. Background and Context	577
b. The Current Setting	578
<i>Louisiana Municipal Police Employees' Retirement System</i>	
<i>v. The Hershey Company</i>	580
<i>Chitwood v. Vertex Pharmaceuticals, Inc.</i>	584
C. Shareholders' Power to Redress Harm to the Corporation	590
1. The Current Setting	590
D. Federal Securities Regulation	595
1. Matters Requiring Shareholder Vote Under Federal Law	595
2. Regulation of Proxy Solicitations	596
3. Reporting Requirements	597
4. Ownership Reporting Requirements	597
E. Terms of Art in This Chapter	598

Contents	xxi
Chapter 14 Shareholder Governance Questions Most Often Seen in the Privately Held Corporation	599
A. Self-Imposed Restrictions on Shareholder Governance Rights	599
1. Preemptive Rights: The Management Component	600
2. Supermajority Provisions	601
a. Superquorum Provisions	602
3. Cumulative Voting	602
4. Agreements Regarding Shareholder Voting	608
a. The Current Setting	608
i. Voting Trusts	608
ii. Pooling Agreements	610
b. Background and Context	611
i. Vote Buying	611
5. Other Shareholder Agreements Affecting Shareholder Governance Power	615
6. The Problem of Deadlock	616
B. External Restrictions on Shareholder Governance Rights	618
1. Shareholder Fiduciary Duties	619
a. The Current Setting	619
2. Oppression and Unfairness by Shareholders	622
a. From a New Remedy for Deadlock ...	622
<i>Shawe v. Elting</i>	623
b. ... to a New Cause of Action ...	632
Charles W. Murdock, The Evolution of Effective Remedies for Minority Shareholders and Its Impact upon Valuation of Minority Shares	632
<i>Mason v. Mason</i>	635
c. ... to More Remedies	645
Charles W. Murdock, The Evolution of Effective Remedies for Minority Shareholders and Its Impact Upon Valuation of Minority Shares	645
C. Terms of Art in This Chapter	648
F. Change of Control	649
Chapter 15 Change of Control	649
A. Background and Context	649
B. The Current Setting	652
1. Motivations for Changing Control	652

2. Techniques for Combining Entities	653
a. Purchase of Assets	654
<i>Altieri v. Alexy</i>	654
b. Purchase of Stock	658
c. Merger	659
d. Reverse Triangular Mergers	660
3. Choosing the Appropriate Acquisition Technique	661
4. The Acquisition Process	663
5. Corporate Law Issues	665
a. Deal Protective Measures	665
b. Sale of Control	668
M. Thomas Arnold, Shareholder Duties Under State Law	668
c. Appraisal	671
i. Which Transactions Trigger Appraisal Rights?	671
ii. What Is “Fair Value”?	672
<i>Shawnee Telecom Resources, Inc. v. Brown</i>	672
<i>In re Appraisal of Regal Entertainment Group</i>	689
C. Background and Context—Deal Protective Measures, Hostile Takeovers, and Defensive Measures	698
1. Corporate Structures That Deter Hostile Changes of Control	698
2. Standard of Review of a Target Board’s Actions	700
3. The Target Board’s Obligation to Maximize Shareholder Value	701
<i>Lyondell Chemical Co. v. Ryan</i>	701
4. Expanded Deference to Boards	708
<i>Kahn v. M & F Worldwide Corp.</i>	709
<i>Corwin v. KKR Financial Holdings LLC</i>	711
5. State Antitakeover Statutes	715
D. Federal Securities Regulation	716
1. “Groups” under Section 13(d)	716
2. Going Private Transactions	717
3. Tender Offers	717
E. Terms of Art in This Chapter	719
PART IV UNINCORPORATED ENTITIES	721
Chapter 16 Partnerships	723
A. General Partnerships	723
1. Background and Context	723
a. Formation	726
<i>Ziegler v. Dahl</i>	726

Contents	xxiii
b. Financing and Partners' Ownership Interests	733
i. Partner Contributions	733
ii. Partnership Property	734
iii. Partners' Interest in the Partnership	735
iv. Allocations and Distributions to Partners	736
<i>Overland v. Scheper Kim & Harris LLP</i>	736
c. Personal Liability	741
d. Management	743
<i>Barrett v. Jones, Funderburg, Sessums, Peterson & Lee, LLC</i>	743
e. Fiduciary Duties	754
<i>Meinhard v. Salmon</i>	754
<i>Clancy v. King</i>	763
f. Dissociation	774
g. Dissolution	776
<i>In re Estate of Peter J. Caruso, III</i>	778
B. Other Partnership Forms	786
1. Joint Ventures	786
2. Limited Partnerships	787
a. Background and Context	787
b. The Current Setting	788
3. Limited Liability Partnerships and Limited Liability Limited Partnerships	789
C. Federal Securities Regulation	790
D. Terms of Art in This Chapter	791
Chapter 17 Limited Liability Companies	793
A. Background and Context	793
Susan Pace Hamill, <i>The Origins Behind the Limited Liability Company</i>	793
B. The Current Setting	796
1. Introduction	796
2. Formation	800
a. Statutory Requirements	800
b. Promoter Liability and Defective Formation	800
c. Operating Agreements	801
3. Financing	801
a. Capital Contributions	801
b. Allocations and Distributions to Members	801
4. Members' Interest	803

xxiv	Contents
a. Financial	803
b. Disregarding the Entity	804
<i>Puleo v. Topel</i>	<i>804</i>
c. Managerial	809
d. Additional Members, Transferability, and Dissociation	810
5. Management	811
a. Statutory Default Rules	811
b. Manager-Managed Structures	811
6. Fiduciary Duties	812
<i>Clingman & Hanger Management Associates LLC v. Rieck</i>	<i>816</i>
7. Dissolution	822
C. Federal Securities Regulation	824
D. Terms of Art in This Chapter	825
PART V CHOICE OF FORM	827
Chapter 18 Choice of Entity	829
A. Variable Characteristics Important in Choosing an Entity	830
1. Organizational Differences	830
2. Operational Differences	831
a. Financial	831
b. Managerial	832
3. Differences Regarding Transferred Ownership Interest	833
B. How to Choose the Appropriate Entity	834
C. Fixing the Problem	836
Harry J. Haynsworth, The Unified Business Organizations Code: The Next Generation	836
Richard A. Booth, Form and Function in Business Organizations	840
D. Terms of Art in This Chapter	849
Glossary	851
Table of Cases	871
Index	881