Where the defendant has breached an equitable duty which he or she owed to the claimant, a restitutionary relief is available. The defendant can be deterred from exploiting the relationship by ensuring that, at the very least, the value of any benefit which he or she obtained from the breach of duty should be paid to the claimant to whom the duty was owed. Where the defendant is more culpable in breaching his or her equitable duty, a more extensive form of restitutionary remedy may be available. This chapter examines the rationale behind the award of restitutionary remedies for equitable wrongdoing, types of remedy which are available for equitable wrongdoing (account of profits, proprietary remedies, interest, and equitable compensation), and categories of equitable wrongdoing including breach of fiduciary duty, breach of confidence, unconscionability, and dishonestly inducing or assisting in a breach of trust or fiduciary duty.

Obstacles to SRI: Investment Regulation
Benjamin J. Richardson

This chapter examines how the legal system has traditionally hindered SRI. It focuses on the governing fiduciary duties, the decision-making procedures within financiers, and the international framework for financial markets regulation. It finds that the fiduciary duties of institutional investors prioritize the maximization of financial returns,
although they can accommodate business case SRI. It also examines a widely ignored barrier to SRI, namely undemocratic methods of decision-making within financial institutions. Owing to their governing legal constitutions, few financial institutions provide the space for fund members to participate in investment policy, let alone to debate ethical choices. Finally, given the transnational character of modern financial markets, the chapter examines the gaps and weaknesses in international financial regulation from the SRI perspective.

Judicial Ambivalence to Public Fiduciary Duties
Evan Fox-Decent

in Sovereignty's Promise: The State as Fiduciary
Published in print: 2011 Published Online: January 2012
Chapter VI seeks to explain why Canadian courts have recognised so few public fiduciary duties outside of the Crown-Native context, and why the connection has yet to be drawn between public law duties of fairness and reasonableness, on the one hand, and public fiduciary obligations, on the other. Courts have insisted that the claimant show a pre-existent right to the subject matter of the alleged fiduciary obligation. They have also clung fast to a formal private/public distinction according to which fiduciary duties belong almost exclusively to private law. The reasons that explain the dearth of fiduciary doctrine in public law, however, do not justify its absence. In developing this argument I rely on the work of Paul Finn, and in particular, his careful explanation of how the idea of the state as fiduciary came to be neglected in commonwealth public law.

Fiduciary Law as Equity’s Child
Irit Samet

in Equity: Conscience Goes to Market
Published in print: 2018 Published Online: February 2019
This chapter challenges the argument that one of Equity’s most distinctive doctrines, fiduciary law, must be fused with a common law doctrine—the law of contract. In particular, it highlights the disadvantages of transforming the equitable duty of loyalty into an ordinary contractual obligation. The chapter first considers the
‘contractarian’ interpretation of fiduciary law according to which fiduciary duties are no more than a species of contractual obligations before explaining why, in contrast with the contractarian argument, Equity was right in claiming that the fiduciary relationship was essentially different from contract. After making the case of why fiduciary law should be treated as a sui generis equitable doctrine, the chapter examines two features of equitable fiduciary law that will change dramatically if the fusion suggestion is adopted (the language in which it is set and the way into the relationship) and shows the adverse consequences of moving in that direction. It concludes with the contention that the concept of ‘conscience’ still has an active role to play in the legal reasoning about fiduciaries.

Restitution for Equitable Wrongdoing

Graham Virgo

in The Principles of the Law of Restitution

Published in print: 2015 Published Online: September 2015
Item type: chapter

This chapter begins by explaining the rationale behind the award of gain-based remedies for equitable wrongdoing and the types of remedy available for equitable wrongdoing, which are account of profit, proprietary remedies, and equitable compensation. It then identifies the key categories of equitable wrongdoing which can trigger gain-based remedies: breach of fiduciary duty, breach of confidence, equitable estoppel, and dishonestly inducing or assisting in a breach of trust or fiduciary duty. It discusses how fiduciary relationships may be identified, and the nature and ambit of fiduciary duties. For each category of wrongdoing, it analyses when gain-based remedies will be awarded and the type of gain-based remedies which are awarded.

Fiduciary Duty in Public Law

Martin Loughlin

in Legality and Locality: The Role of Law in Central-Local Government Relations

Published in print: 1996 Published Online: March 2012
Item type: chapter

This chapter discusses the doctrine of fiduciary duty which the local authority owes to its ratepayers. It considers the nature and
The Fiduciary Relationship
Paul B. Miller

in Philosophical Foundations of Fiduciary Law

Fiduciary law is rife with references to fiduciary relationships. Most notably, the attribution of fiduciary duties turns on the existence of a “fiduciary relationship.” But does private law admit of such a construct, and if it does, is the fiduciary relationship distinctive relative to other kinds of private law relationship? Many fiduciary law scholars are skeptical on both counts. Leading scholars have claimed that the fiduciary relationship is indefinable. Others say that, when properly defined, the fiduciary relationship is seen to be non-distinctive. This chapter argues that the fiduciary relationship is both definable and distinctive. It advances a theory of the fiduciary relationship—the fiduciary powers theory—which suggests that fiduciary relationships are typified by the fiduciary’s exercise of powers derived from the legal personality of persons (normally, the person of the beneficiary or her benefactor).

The Path to Ethical Investment for Sustainability
Benjamin J. Richardson

in Socially Responsible Investment Law: Regulating the Unseen Polluters

This chapter outlines possible regulatory reforms to improve the quality and impact of SRI. Given the gravity of the environmental crisis and the central role of the financial sector in that crisis, it argues that governments need to adopt more comprehensive reforms. Ethical investment to ensure protection of the environment should be the main goal. Among the options, the chapter focuses on redefining the fiduciary duties of financial institutions to promote sustainable development, as these duties determine the overarching goals of investment policy.
Complementary measures, including social accounting and sustainability performance indicators, should be introduced to give substance to a new fiduciary standard.

**Introduction**

Andrew S Gold and Paul B Miller

in Philosophical Foundations of Fiduciary Law

This chapter offers an introduction to each of the works contained in this volume. As the chapter notes, the authors’ contributions cover a range of important topics in fiduciary theory, including: fiduciary relationships; fiduciary duties; the economic theory of fiduciary law; fiduciary principles in private law contexts; and fiduciary principles in public law contexts. This chapter explains the significance of each author’s contribution to core questions in fiduciary theory and, where applicable, to broader questions in private law theory, political theory, and legal and moral philosophy. As the chapter indicates, these contributions offer groundbreaking insights into the nature of fiduciary law.

**The Market for Financial Advisers**

John A. Turner and Dana M. Muir

in The Market for Retirement Financial Advice

This chapter discusses the market for financial advisers. Because many people are not financially sophisticated, the quality of financial advice is a retirement policy concern. Financial advisers provide a valuable service, and many provide unbiased advice. The United States Department of Labor has estimated that pension participants save billions of dollars a year in financial mistakes avoided due to financial advice. Financial advisers, however, provide many types of services, sometimes have conflicts of interest, and do not always have a fiduciary duty to provide advice in the best interest of the client. Some financial advisers engage in ‘hat switching,’ interacting with the same clients as a fiduciary for some transactions, but without fiduciary responsibility for
other transactions. Understanding the adviser’s sources of compensation, including third party compensation, will help identify conflicts of interest that may affect the quality of advice clients receive.

Fiduciary Authority and the Service Conception
Evan Fox-Decent

in Philosophical Foundations of Fiduciary Law
Published in print: 2014 Published Online: October 2014
Publisher: Oxford University Press
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Item type: chapter

Under Joseph Raz’s service conception of authority, the normal justification thesis asserts that A is an authority for B if B is likely to comply better with reason by treating A’s directives as authoritative rather than by acting on her own judgment. Scholars have criticized Raz’s theory on the grounds that it cannot account for the special standing of authorities to impose duties. This chapter argues that the challenge can be met if Raz’s theory is located within an interpersonal fiduciary framework. Within this framework, the putative authority has a fiduciary duty to issue directives that respect the reasons that warrant her possession of a directive-giving moral power. The authority’s duty explains her authority because that duty binds her to exercise power in a way that reflects the reasons for which she has it in the first place.

Firms and Fiduciaries
D Gordon Smith

in Contract, Status, and Fiduciary Law
Published in print: 2016 Published Online: January 2017
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DOI: 10.1093/acprof:oso/9780198779193.003.0013
Item type: chapter

Economists who study the theory of the firm strive to draw a line between firms and markets. This line corresponds to the line lawyers draw between fiduciary and nonfiduciary relationships. The Critical Resource Theory (CRT) of fiduciary relationships is motivated by the property-rights theory of the firm. CRT holds that the distinguishing feature of fiduciary relationships is that a fiduciary exercises discretion with respect to a critical resource belonging to the beneficiary, whereas most contracting parties exercise discretion only with respect to their own performance under the contract. This chapter refines the description of ‘resources’ under CRT using the property-rights theory of the firm.
and the resource-based view of the firm and extends the analysis of CRT to two important implications flowing from the basic structural insight: (1) while some features of fiduciary relationships are traceable to the logic of contract and some features are traceable to the logic of property, fiduciary relationships are unique hybrid institutions; and (2) the distinctive duty of loyalty that is imposed on fiduciary relationships is designed to protect the beneficiary’s property-like interest in critical resources.

Sharing Ex Ante and Sharing Ex Post
Daniel Markovits

in Philosophical Foundations of Fiduciary Law
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Item type: chapter

Contract sharing and fiduciary sharing proceed qualitatively differently; contract and fiduciary relations display distinct structures; and contracting parties and fiduciaries assume distinct deliberative postures. Doctrine elaborates these differences. Expectation damages constitute the preferred remedy for breach of contract, and this remedy at least permits and perhaps encourages “efficient breach.” By contrast, restitutionary disgorgement of the breacher’s gain constitutes a common remedy for the breach of a fiduciary obligation, and the law thus rejects a practice of efficient breach of fiduciary duties. Contract law also establishes the mandatory duty of good faith in performance as the earnest of contract obligation. By contrast, the fiduciary’s central duties involve not contractual good faith, but rather loyalty and care. Contracting parties thus share ex ante while fiduciaries share ex post. Understanding fiduciary law requires a model besides contract. The theory of sharing ex post elaborates the required model.

The Idea of Status in Fiduciary Law
Paul B Miller

in Contract, Status, and Fiduciary Law
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Item type: chapter

Much of fiduciary law is built upon status-based characterization of fiduciary relationships. Thus most fiduciary relationships—indeed, all
relationships that we think of as being inherently fiduciary—are so designated as a type or kind of relationship to which fiduciary status attaches (e.g. director–corporation, trustee–beneficiary, agent–principal, and lawyer–client relationships). Notwithstanding the prevalence of status-based reasoning in fiduciary law, the idea of status in fiduciary law—and in the law more generally—is poorly understood. This chapter provides a novel account of fiduciary status. The chapter explains conceptual properties that fiduciary status enjoys in common with social, moral, and (other) legal statuses. It also explains the distinctive semantic and functional significance of fiduciary status. The chapter provides a conditional justification for the reliance on status-based reasoning in fiduciary law, but it also emphasizes the limits of fiduciary status and indicates the conceptual and normative implications of recognition of these limits.

**Financial Crisis and the Decline of Fiduciary Law**
Joshua Getzler

in *Capital Failure: Rebuilding Trust in Financial Services*

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Item type: chapter

Fiduciary duty requires that fiduciary agents serve their client’s ‘best interests’. In practice this resolves into component duties to avoid unauthorised profit, to eschew unauthorised conflict of duties, to apply prudent and diligent judgement to client business, and to perform primary duties rather than offer remedial damages for efficient or non-harming breach. Classical fiduciary duties support well-functioning markets, but fiduciary law has declined and no longer performs as it ought. In finance, fiduciary duties are often attenuated by implicit or explicit agreements that give intermediaries too much unmonitored power over beneficiaries, allowing incompetent or predatory performance. In addition, judges and legislators have cut the scope of duties and weakened the remedies. To restore fiduciary law to full efficacy, agreements that reduce presumptive fiduciary duties should themselves be subjected to fiduciary standards of loyalty and informed consent. Also, extant fiduciary relationships should be upheld through the classical approach enforcing primary duties.
This chapter addresses the question of the role of a person’s status or office in the law concerning fiduciaries. Put in different terms, what is the relevance of the “fiduciary relationship” to the nature and content of duties owed by a fiduciary? The answer is that status, office, or relationship is a background fact from which implications are drawn. This is true in relation to implied terms, common callings, as well as fiduciary duties. The content of the fiduciary duty is informed by the scope of a fiduciary’s undertaking which is, itself, informed by the fiduciary’s status, office, or relationship with his or her principal.

Fiduciary Loyalty as Kantian Virtue
Irit Samet
in Philosophical Foundations of Fiduciary Law

The term ‘loyalty’, as it is used in the context of fiduciary duties, has two senses: one, thin ‘juridical’ sense, in which ‘loyalty’ stands for the requirement that fiduciaries act only in the best interests of their principals. The other, thick ‘virtue’ sense of loyalty implies a specific emotional and intellectual orientation towards one’s principals. It is an attitude towards another person in which selfless action comes easily, and exploitation of weakness is unthinkable. By invoking this rich concept of loyalty the courts of equity advise fiduciaries that the serious commitment they took upon themselves calls for the adoption of an unusual disposition. The second part of the chapter shows how the recommendation to adopt a stance of fully-fledged loyalty can, in spite of its appeal to emotions, be incorporated into a Kantian analysis of fiduciary duties.
This chapter argues that we should understand the employee duty of loyalty as a contractual duty, not a fiduciary duty that attaches by virtue of employee status. The chapter considers several risks associated with a contract paradigm but concludes that those risks are less acute than they might at first appear. It examines several possible contractual conceptions of the duty of loyalty, including those in which it is imputed by public policy or inferred as an element of party agreement. The chapter ultimately argues that understanding the duty as an instance of the general duty to perform in good faith makes the best sense of a historically suspect obligation. This understanding not only redeems the duty of loyalty as a reasonable obligation of employees but also generates guidance on how the duty can be construed in the most normatively satisfactory way. In particular, understanding the duty of loyalty as an instance of the duty of good faith suggests that its scope should hinge on other terms of an employment contract, including the scope of employer discretion and the terms of employee exit.

Defining Agency and Its Scope (II)
Deborah A DeMott

This chapter discusses the definition of agency and how the standard definition has been tailored to accommodate the variety of relationships to which the term agency may apply. It examines the US law of agency, a key issue being the ability of a principal to consent to agent conduct that would otherwise be considered as a breach of the agent’s fiduciary duties. In examining issues of conflict of interests, contractual obligation, and the scope of fiduciary duties, the chapter uses the case of art auctions as an illuminating example. It also explores the implications of art auction cases for the theoretical treatment of fiduciary duties as default rules.
A duty of loyalty is often said to be the defining characteristic of the fiduciary relationship, but an examination of the concept of loyalty shows that it is best conceived as a negative virtue, which is singularly inapt to characterize what fiduciaries owe their principals. Fiduciaries should not act with loyalty to their principals in any normal sense of loyalty: they should not “identify” emotionally with their principals, as one of their main tasks is to make impartial decisions with respect to their principals’ best interests; nor should they give “deliberative priority” to their principals—what they owe their principals is deliberative exclusivity, taking only the interests of their principals into account in exercising their discretions. Taking the leading English case of Boardman v Phipps as a point of departure, the traditional idea that fiduciary liability regulates conflicts of interest in the exercise of discretions is elaborated and defended.