SEALSB
Southeastern Academy of Legal Studies in Business

62nd Annual Meeting
Durham, North Carolina
November 10–12, 2016

Hosted by
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This book affords a comprehensive study of intellectual property law, with coverage including: trade secrets, patents, copyrights, trademarks, right of publicity, legal protection of other valuable intangible assets, and international protection of intellectual property. The focus is on facilitating the student's learning of applicable legal principles, applying these principles to analyze potential legal liability, and managing legal risk to avoid liability or protect intellectual property assets.

Each chapter begins with background material that considers the historical and theoretical background for the particular area, and the basic requirements for obtaining each form of intellectual property protection are considered in detail. The rights obtained by the intellectual property owner are explored, as well as the scope of liability for violations of those rights, along with the remedies available and potential defenses to liability.

KURT M. SAUNDERS is a Professor of Business Law at California State University, Northridge. He received his B.S. in Economics from Carnegie Mellon University, his J. D. from the University of Pittsburgh, and holds an LL.M. in Intellectual Property Law from George Washington University. Professor Saunders is the author of the book, Practical Internet Law for Business (Artech 2001), as well as numerous law review articles on intellectual property law, business law, Internet law, and legal education. He currently teaches courses in intellectual property law, business law, estates and trusts law, and international business law. Prior to joining the faculty at California State University, he practiced law in Pennsylvania. As an attorney, his main areas of practice were business planning and estate law. He also served as Jury Commissioner in Pennsylvania. Professor Saunders has been an instructor at the George Washington University Law School and the University of Pittsburgh School of Law, and a clinical professor at the Duquesne University Law School.
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GENERAL SCHEDULE OF EVENTS

All events are at the Durham 21c Museum Hotel at 111 Corcoran Street unless otherwise noted.

Thursday, November 10
3:30–5:00 p.m. Conference Registration Main Gallery
5:00–7:00 p.m. Welcome Cocktail and Appetizer Reception The Vault, hotel lower level
Sponsored by Carolina Academic Press

Friday, November 11
7:30 – 8:30 a.m. Cengage Learning Focus Group Gallery One
8:00 – 5:00 p.m. Conference Registration Main Gallery
8:00 – 9:00 a.m. Breakfast Main Gallery
Sponsored by Cengage Learning
8:45 – 9:00 a.m. Welcome and Sponsor Introductions Main Gallery
9:00 – 10:30 a.m. Academic Session I Main Gallery & Gallery One
10:30 – 10:45 a.m. Break Main Gallery
10:45 a.m. – 12:15 p.m. Academic Session II Main Gallery & Gallery One
12:15 – 1:45 p.m. Luncheon Awards Banquet Main Gallery
Keynote Speaker:
Professor Michael J. Gerhardt
Samuel Ashe Distinguished Professor in Constitutional Law
Director, Program in Law and Government
UNC School of Law
1:45 – 3:15 p.m. Academic Session III Main Gallery & Gallery One
3:15 – 3:30 p.m. Break Main Gallery
3:30 – 4:15 p.m. Academic Session IV Main Gallery & Gallery One
4:15 – 4:30 p.m. Break Main Gallery
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<tr>
<th>Time</th>
<th>Event</th>
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<tr>
<td>4:30 – 6:00 p.m.</td>
<td>Film Screening, Discussion, and Reception</td>
<td>Main Gallery</td>
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<td><em>(Dis)Honesty – The Truth About Lies</em></td>
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<td>Film screening and discussion with staff from the Duke University Center for Advanced Hindsight, run by behavioral ethicist and author Dan Ariely</td>
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<td>Sponsored by Elon University, The Martha and Spencer Love School of Business</td>
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<tr>
<td>6:30 p.m.</td>
<td>Dinner and Jazz Outing</td>
<td>Beyù Caffè 341 West Main Street</td>
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<td><em>[Ticketed event]</em></td>
<td>Durham, NC 27701</td>
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**Saturday, November 12**

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<tr>
<th>Time</th>
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<tr>
<td>7:00 – 8:00 a.m.</td>
<td>McGraw–Hill Education Focus Group</td>
<td>Gallery One</td>
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<tr>
<td>8:00 – 9:00 a.m.</td>
<td>Breakfast</td>
<td>Main Gallery</td>
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<td><em>Sponsored by McGraw-Hill Education</em></td>
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<tr>
<td>8:00 – 9:00 a.m.</td>
<td>SEALSB Business Meeting</td>
<td>Main Gallery</td>
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<tr>
<td>9:00 – 10:30 a.m.</td>
<td>Academic Session V</td>
<td>Main Gallery &amp; Gallery One</td>
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<tr>
<td>10:30 – 10:45 a.m.</td>
<td>Break</td>
<td>Main Gallery</td>
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<tr>
<td>10:45 – 11:30 a.m.</td>
<td>Academic Session VI</td>
<td>Main Gallery &amp; Gallery One</td>
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<tr>
<td>11:30 a.m. – 12:00 p.m.</td>
<td>Break</td>
<td>Main Gallery</td>
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<tr>
<td>12:00 – 1:30 p.m.</td>
<td>Brown Bag Lunch Session on North Carolina’s HB2 Law</td>
<td>Main Gallery</td>
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<td>Moderator: Christina Benson</td>
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<td>Panelists:</td>
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<td></td>
<td>Eric Fink, Elon Law School</td>
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<td>Mark Dorosin, UNC School of Law Center for Civil Rights</td>
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<td>Matt Hirschy, Equality NC</td>
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<td>Alex Reed, University of Georgia Terry</td>
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<td>College of Business</td>
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**ADJOURN THE 62nd ANNUAL SEALSB CONFERENCE**
ACADEMIC SESSION SCHEDULE

Friday, November 11
9:00 – 10:30 a.m.  Academic Session I

**Session A: Antitrust; Intellectual Property; Corporate Law**  Main Gallery
Moderator: Haskell Murray
Ramsi Woodcock  Big Data, Price Discrimination, and Antitrust
Greg Day  Economic Pirates
J. Royce Fichtner  Clarifying the Original Clawback: Interpreting Sarbanes-Oxley Section 304 Through the Lens of Dodd-Frank Section 954
Vince Buccola  Corporate Law’s Domain

**Session B: Employment Law; Home Warranties; Pedagogy**  Gallery One
Moderator: Jason Gordon
Chad Marzen  Home Warranty Regulation Through the Lens of Florida’s Home Warranty Statute: Claims, Issues and Remedies
Sherry Olsen & Ginger Devine  Non-Compete Law: Where Are We in 2016
Jehan El-Jourbacy & Matt Roessing  Toward a More Perfect Pedagogy: Developing Constitution Week Activities to Support a Business Law & Ethics Curriculum
R. Lainie W. Harris, Eun Bae Lee & Lucy Santos Green  Law Is a ‘Foreign’ Language: An Analysis of the Language of Law and the Use of Second-Language Teaching Pedagogy in an Undergraduate Business Law Course

10:45 a.m. – 12:15 p.m.  Academic Session II

**Session A: Intellectual Property; Sports Law**  Main Gallery
Moderator: Christina Benson
Deepa Varadarajan  Trade Secret Precautions, Possession and Notice
Nathaniel Grow  Protecting Big Data in the Big Leagues: Trade Secrets in Professional Sports
Kenneth J. Sanney  Creative Differences: An Integrated Representational Approach to the Division of Intellectual Property in Divorce Proceedings
Haskell Murray  Legal Strategy and Negotiation Theory in Athlete Endorsement Contracts
Joseph Long  Does a Self-Imposed Post-Season Ban Trigger Promissory Estoppel Claims for Affected Student-Athletes?: The 2015-16 Louisville Basketball Season

**Session B: Employment Law; Statutory Interpretation**  Gallery One
Moderator: Charlotte Alexander
Laura Dove  Absurdity in Disguise: How Courts Create Statutory Ambiguity to Conceal Their Application of the Absurdity Doctrine
Stephanie Sipe  No More Rose-Colored Lenses: A Comparative Study of University Students’ Changing Perceptions of Sexual Harassment in the Workplace from 2006 to 2013
Alex Reed  Reconsidering the Role of Associational Discrimination Theory in the Struggle for LGB Employment Protections
Griffin Pivateau  
*Class Action Waivers in Employment Arbitration Agreements: The FAA, the NLRA, and a Path Forward*

1:45 – 3:15 p.m.  
**Academic Session III**

**Session A: Intellectual Property; Compliance; Innovation and its Regulation**  
**Main Gallery**

Moderator: Kurt Schulze

Chris Birkel  
*Entrepreneurship: The Effects of Local Political Monopoly on New Business Formation*

Step Tokic  
*The Interplay Between User Innovation, the Patent System, and Product Liability Laws: Policy Implications*

Abbey Stemler  
*The Myth of the Sharing Economy and Its Implications for Regulating Innovation*

Kevin Fandl  
*Incentivizing Compliance for Emerging Market Micro-Entrepreneurs*

**Session B: International and Comparative Business and Financial Regulation**  
**Gallery One**

Moderator: Lawrence Trautman

Lydie Pierre Louis & Frederic Chartier  
*Vulnerable Economies: Banking Regulations in South Africa and Ireland which Encourage Economic Development*

Tim Samples & Stephen Park  
*Opportunism and Opportunity in Sovereign Debt Finance: Argentina’s Experience with Investor-State Arbitration and Prospects for Cross-Regime Enforcement*

Philip Nichols  
*The Panama Papers as Training Wheels for Corruption Prosecutions*

3:30 – 4:15 p.m.  
**Academic Session IV**

**Session A: Securities Law and Regulation**  
**Main Gallery**

Moderator: Kenneth Sanney

Kurt Schulzke  
*Toward a Unified Theory of Materiality in Securities Law*

Brian Elzweig  
*Closing a Split in the Circuits Relating to Exclusive Federal Jurisdiction of Section 27 of the Exchange Act*

**Session B: Intellectual Property**  
**Gallery One**

Moderator: Lydie Pierre Louis

Debbie Kemp  
*Satava’s Glass Jellyfish: Resurrecting Copyright’s Idea-Expression Dichotomy*

Mike Schuster  
*Public Choice Theory, the Constitution, and Public Perception of the Intellectual Property System*

Robert Emerson  
*"Refuse to Lose" Track of the Trademark*
### Saturday, November 12

**9:00 – 10:30 a.m.  Academic Session V**

**Session A: Sustainability; Strategic Contracting**

**Moderator:** Enrique Guerra-Pujol

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<tr>
<td>Jamie Parson</td>
<td>That Wet Blanket Better Be Made of Recycled Material: A Look at the Liability Exposures Associated with Sustainable Business Practices</td>
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<tr>
<td>Christina Benson</td>
<td>The Degree to Which Sustainability Improves Stock Price Performance: An International Comparison</td>
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<tr>
<td>James E. Holloway</td>
<td>The Court, Takings Clause and Environmental Sustainability: Constitutional Challenges to the Exercise of Property Rights to Develop Land</td>
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<tr>
<td>David Orozco</td>
<td>Ticketmaster, Inc.: A Case Study of Strategic Contracting and Law-Enabled Business Models</td>
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**Session B: Business Entities; Tax Law**

**Moderator:** Haskell Murray

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<tr>
<td>H. Justin Pace</td>
<td>Equitable Fiduciaries, Business Organization Fiduciaries, and Cognition: Explaining the Divide in Fiduciary Obligation Law</td>
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<tr>
<td>Nicholas Misenti</td>
<td>Why You Should Form an LLC in Illinois... Unless You Provide Professional Services</td>
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<tr>
<td>Kathryn Kisska-Schulze</td>
<td>Identifying the Tax Home of Paid Student-Athletes - Analyzing the Applicability of IRC Section 162 on the Pay-For-Play Model</td>
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<tr>
<td>Roxane DeLaurell</td>
<td>&quot;Whack a Mole&quot; Regulation: Inversions 2004-2012</td>
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#### 10:45 – 11:30 a.m.  Academic Session VI

**Session A: Litigation; Comparative Consumer Contracts**

**Moderator:** Roxane DeLaurell

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<tr>
<td>Patricia Sánchez Abril &amp;</td>
<td>The Right of Withdrawal in Consumer Contracts: A Comparative Analysis of American and European Law</td>
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<tr>
<td>Ann Morales Olazábal</td>
<td>Litigation as a Dollar Auction</td>
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<tr>
<td>Enrique Guerra-Pujol</td>
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**Session B: Ethics**

**Moderator:** Tim Samples

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<tr>
<td>Laura Demarse, David Baumer &amp; Wade &amp; Chumney</td>
<td>Post Postdocalypse 2.0: Employment, Markets, Postdocs, and Ethics</td>
</tr>
<tr>
<td>Lawrence J. Trautman</td>
<td>Personal Ethics and the Financial Collapse of 2007-08</td>
</tr>
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ABSTRACTS

Benson, Christina & Neeraj Gupta, Ph.D., The Degree to Which Sustainability Improves Stock Price Performance: An International Comparison
This paper utilizes an empirical event study framework to evaluate correlations between sustainability and stock price performance on international markets. We use a dataset drawn from companies named to Innovest’s ‘Global 100 Most Sustainable Corporations’ at the World Economic Forum each year, as one of the most widely respected lists recognizing sustainable companies. We conclude that the data reflect a positive correlation between sustainability and stock price over time worldwide, then we address why this correlation appears to be even stronger for Non-US firms headquartered in developed countries in Europe and Asia as compared to US based firms.

Birkel, Chris, Entrepreneurship: The Effects of Local Political Monopoly on New Business Formation
The effects of monopoly power in business are well understood. Antitrust laws have increased competition and reduced predatory behavior. However, political monopoly is ill-defined, has no legal corrective measure and the effects on the business environment are poorly understood. This paper will attempt to define political monopoly in a meaningful way and contribute to the literature by measuring the effects of local political monopoly on entrepreneurship, the growth engine of the macroeconomy.

Buccola, Vince, Corporate Law’s Domain
The internal-affairs doctrine defines corporate law as a distinctive field of practice and inquiry. This article supplies an account of the doctrine’s origin and persistence. It argues that, although there is no conceptual or a priori reason to divide the constituents of business enterprise into “insiders” and “outsiders,” the internal-affairs doctrine nevertheless encouraged capital formation in the nineteenth century by forestalling a latent collective-action problem unique to stockholders. The value of any one share increases with its associated control and withdrawal rights, which are apt to vary across jurisdictions. In equilibrium, were it not for the internal-affairs rule, all shares would be sold into jurisdictions providing robust stockholder power relative to management, undermining the corporate form’s signal advantage, namely its capacity to lock in capital. The internal-affairs doctrine, by assigning to a single jurisdiction the authority to resolve disputes over such issues as dividend policy and managerial discretion, can be understood as an ingenious way to facilitate capital formation without hobbling secondary markets.

Day, Greg, Economic Pirates
By insulating patent and copyright holders from competition, commentators assert that IP rights incentivize a variety of anticompetitive behaviors, including tying arrangements, patent pools, and refusals to license. This Article argues that piracy is a rational response to marketplace inefficiencies; in instances when holders sell patented and copyrighted goods at significantly above market prices, black marketers may undersell these products by infringing upon their IP rights. This generates competition and greater market efficiency. The Article then urges reforms to the current IP system based up these findings.

DeLaurell, Roxane, Billy Van Denburgh & Parks Barroso, "Whack a Mole" Regulation: Inversions 2004-2012
This paper looks at the regulations passed by the Treasury to dissuade U.S. corporations from inverting their forms in order to seek more favorable tax havens. It examines the three sets of regulations and the effects each round had on corporate behavior.
Universities greatly benefit from the efforts of Postdocs, who are often vastly under-compensated relative to their years of training. Current employment data reveal that fewer than 20% of the Postdocs will obtain tenure track positions at research oriented universities. In this paper, we propose a Business Certificate Program as an ethical response by universities to significantly enhance the employability of Postdocs in both the private sector and in government. Given the current economic realities, which include lean budgets, a Business Certificate Program for Postdocs can be created with modest front end investments, which should generate positive cash flows in the second year of operation and thereafter.

Dove, Laura, Absurdity in Disguise: How Courts Create Statutory Ambiguity to Conceal Their Application of the Absurdity Doctrine
The absurdity doctrine is far more robust in practice than commonly assumed because of a phenomenon I call “absurdity in disguise,” wherein judges use the undesirable results of applying a statute’s plain meaning to “create” statutory ambiguity. Ironically, the use of ambiguity to conceal the use of the absurdity doctrine is a direct result of judges’ increasing acceptance of textualist methods of statutory interpretation. Because textualism eschews results-oriented interpretive approaches, judges who wish to avoid a result of applying statutory text as written must employ text-centric arguments to do so. This article identifies the concept of absurdity in disguise and reveals its use in a variety of decisions at all levels of the federal courts.

Emerson, Robert, "Refuse to Lose" Track of the Trademark
Trademarks just are not what they used to be. The rights in trademark have become overgrown. This article thus examines and synthesizes several criticisms underlying the expansions of these rights. The first Section reviews a few of the fundamentals underlying and organizing the trademark system. The spectrum of distinction used to grant and organize marks is also discussed. The abandonment of trademark law’s foundations is illustrated, to allow for a consideration of how to reinvigorate commitment to essential trademark jurisprudence. Some commentators fear a formalistic legal climate will preserve codified expansions, but the underlying foundations may present an opportunity to tailor the law into narrower, more sensible policies. Sections II and III detail different considerations that emerged in step with the expansion of a trademark’s purpose, to far beyond that of a source signifier. They address matters, such as inherent goodwill, that have been largely ignored to the detriment of the public interest, and others, such as functionality, that have not been applied to their full, logical extent. Section IV details the influence mark holders have had in shaping this progression— one of lowering requirements and escalating powers— and exemplifies some of the unreasonable consequences. Finally, Section V indicates how courts and regulatory agencies may bring a significant portion of the trademarks, which have gone awry, back into the fold.

Elzewig, Brian, Closing a Split in the Circuits Relating to Exclusive Federal Jurisdiction of Section 27 of the Exchange Act
The Supreme Court has recently closed a circuit split as to whether section 27 of the Securities Exchange Act expands exclusive federal jurisdiction further than general federal question liability in securities law cases.

Fandl, Kevin, Incentivizing Compliance for Emerging Market Micro-Entrepreneurs
Microenterprises are a driving economic force in emerging markets, and in most countries, they occupy the majority of the business sector. However, in most emerging markets, a significant percentage if not the majority of microenterprises fail to comply with the law, operating in the unregulated or informal
marketplace. It has long been suspected that legal barriers, such as overregulation and taxation, have caused this phenomenon. In this paper, I argue that business productivity may be a more prominent cause of firm non-compliance and informality and I assess a pilot project in Colombia that tackles this issue.

Fichtner, J. Royce, Patrick Heaston & Lou Ann Simpson, Clarifying the Original Clawback: Interpreting Sarbanes-Oxley Section 304 Through the Lens of Dodd-Frank Section 954
This article will analyze Sarbanes-Oxley section 304 which creates an explicit procedure to disgorge or claw back a CEO or CFO’s incentive-based compensation or ill-gotten stock gains when such profits were based on inflated financial statements that were later required to be restated. The article will also discuss the new Dodd-Frank clawback and the proposed regulations interpreting and implementing this clawback. It will then suggest how these regulations could provide clarity to some of the more ambiguous questions surrounding the application of the original section 304 clawback.

Grow, Nathaniel & Lara Grow, Protecting Big Data in the Big Leagues: Trade Secrets in Professional Sports
This paper explores the trade secret practices of teams in the four major North American professional sports leagues. Although sports teams rely on a variety of traditional and advanced forms of proprietary information, little empirical data exists regarding trade secret protection in the sports industry. Drawing upon freshly collected survey data, this paper examines the types of information over which teams are asserting trade secret protection, along with the methods used to safeguard this data. The paper concludes by considering the implications of these results for the professional sports industry, and the academic literature regarding trade secrecy law more generally.

Guerra-Pujol, Enrique, Litigation as a Dollar Auction
Yale economist Martin Shubik introduced the dollar auction game in 1971. In the original version of Shubik’s game, an auctioneer auctions off a dollar bill (or other fixed prize) to the highest bidder. In addition, both the highest bidder and the second-highest bidder must pay their respective bids to the auctioneer. Scholars have discovered real-life “dollar auctions” in a wide variety of settings, including mergers and acquisitions, free agency in sports, arms races and patent races, international conflict, and even romance. To this list of real-world applications of the dollar auction, we would add civil litigation. Although some commentators have remarked in passing on the possible parallels between civil litigation and the dollar auction game, in this paper we explore this potential connection in greater detail. In particular, we explain the equivalence between placing a bet and making a bid in the context of litigation.

Harris, R. Lainie, Eun Bae Lee & Lucy Santos Green, Law Is a ‘Foreign’ Language: An Analysis of the Language of Law and the Use of Second-Language Teaching Pedagogy in an Undergraduate Business Law Course
Lawyers are notorious for using language that the general public cannot understand. Some accuse lawyers of “poisoning language in order to fleece their clients” (Baker 291 supra). In light of the progression of the plain-meaning movement, it is at least equally possible that lawyers are more like Harry Potter speaking Parseltongue, speaking legal language without even realizing it. Either way, when the audience doesn’t have a law school education, they may benefit from guidance relating to legal language that may otherwise be ignored. A brief review of the history and other aspects of the language of law support the suggestion that law is like a second language. In light of this reality, students in undergraduate business law classes may benefit from teaching efforts to consider and borrow from the pedagogy of second-language teaching. Moreover, a view of these options yields practical considerations for those teaching undergraduate business law, or other lexicon-rich disciplines, interested in improving student fluency.
Holloway, James & D. Tevis Noetling, *The Court, Takings Clause and Environmental Sustainability: Constitutional Challenges to the Exercise of Property Rights to Develop Land*

The paper examines the conflict between real estate development and environmental sustainability under the Takings Clause. Real estate developers affect the quality of natural resources to provide houses, offices and other products. Environmental sustainability includes the need to protect environmental quality and natural resources under federal and state environmental and natural resources regulation. Situated squarely in the middle between conflicting real estate development needs and environmental sustainability is the Takings Clause. The paper explore efforts by the United States Supreme Court under the Takings Clause to balance real estate development needs and environmental sustainability by weighing private property rights.

Kemp, Debbie, *Satava’s Glass Jellyfish: Resurrecting Copyright’s Idea-Expression Dichotomy*

In Satava v. Lowry, Lowry “copied” Satava’s glass jellyfish statues. The Ninth Circuit, reversing the district court, wisely held there was no copyright infringement since Lowry’s work copied only the “ideas,” not the “expression.” Trial courts in such cases often presume infringement, requiring the defendant to expend funds to raise the affirmative defense of fair use, which financially strapped artists cannot do. The result is copyright law stymies, rather than promotes, social progress. Trial courts should conduct an idea-expression dichotomy analysis prior to requiring defendant to assert a fair use affirmative defense. A suggested judicial analysis is offered.

Kisska-Schulze, Kathryn, *Identifying the Tax Home of Paid Student-Athletes - Analyzing the Applicability of IRC Section 162 on the Pay-For-Play Model*

Identifying the federal tax home of professional athletes has been a minimally examined area in academic scholarly works, but an important analysis for IRC §162 business expense deduction purposes. However, due to the inconsistency among circuits in defining the term 'home' from a §162 perspective, and because the U.S. Supreme Court has decidedly not clarified the definition of the term 'home' for business expense deduction purposes, applying the conflicting interpretations could eventually pose an intriguing federal tax issue facing student-athletes and college athletic programs in the future should the pay-for-play model eventually be endorsed.

Long, Joseph, *Does a Self-Imposed Post-Season Ban Trigger Promissory Estoppel Claims for Affected Student-Athletes?: The 2015-16 Louisville Basketball Season*

This paper explores the application of the equitable remedy of promissory estoppel to the recruitment practices currently used in college athletics exploring the question, "When a student-athlete is promised certain specific benefits during the recruiting process, and those promises are not fulfilled, might an student-athlete pursue a promissory estoppel claim?" The paper uses the University of Louisville’s men basketball program as an example.

Marzen, Chad, *Home Warranty Regulation Through the Lens of Florida's Home Warranty Statute: Claims, Issues and Remedies*

This Article examines claims, issues and remedies concerning the home warranty industry with a focus on the state of Florida. Florida’s unique example provides insight nationally into varied questions faced by many jurisdictions regarding regulation of home warranty contracts, such as whether a home warranty contract is considered insurance, the effect of arbitration agreements in home warranty contracts and the question of whether a home warranty company can be held liable for bad faith. For the benefit of consumers who choose to obtain a home warranty, this Article concludes that states should recognize bad faith liability for home warranty companies and provide increased protections for consumers from discriminatory, reckless, intentional, and/or malicious denials of valid home warranty claims.
Misenti, Nicholas, *Why You Should Form an LLC in Illinois... Unless You Provide Professional Service*

The Illinois LLC statute has a standard limited liability shield that is found in other states. Thus, the shield provides that personal liability cannot be imposed on a member by virtue of being a member. This language has been uniformly interpreted as allowing for the imposition of personal liability on members who engage in tortious conduct, and in other situations, such as an undisclosed/partially disclosed principal, except in Illinois. The Illinois appellate courts have adopted a unique interpretation of this provision. This interpretation is based on the history of this provision in the Illinois LLC statute. Thus, the courts have held that a member could not be held personally liable even where he engaged in fraud while carrying out the LLC's business. The courts also have held that a member could not be held personally liable for debts incurred on behalf of an LLC prior to its formation, even though under the law of agency, the member would have been personally liable for contracts he executed on behalf of the unformed LLC. According to the courts, the rule is that a member has the power to avoid personal liability simply by not agreeing to assume personal liability in the Articles of Organization or otherwise. Illinois is unique with respect to this interpretation of the LLC limited liability shield. The law of the state in which an LLC is domestic governs liability of its members. Thus, this interpretation should extend to an Illinois LLC that is operating in other states as a foreign entity. Imposition of personal liability on LLC members, notwithstanding the limited liability shield, is a significant risk to members. The Illinois LLC offers an exceptional, and unique, planning opportunity to avoid this risk. However, the Illinois exception does not apply to Illinois corporations, or to LLC's that render professional services, because separate limited liability shields govern those entities.

Murray, Haskell, *Legal Strategy and Negotiation Theory in Athlete Endorsement Contracts*

In the months surrounding the 2016 Summer Olympic Games, athlete endorsement contracts have drawn significant media attention. Immediately prior to the Games, a legal dispute over the endorsement contract of 800-meter runner Boris Berian, involving dueling athlete sponsors Nike and New Balance, played out in public. During the Games and immediately following the Games, the media paid significant attention to the sponsorship fallout involving the controversy around swimmer Ryan Lochte. This essay uses the Berian and Lochte situations to analyze use of athlete endorsement contracts by sponsoring firms under the lens of legal strategy and negotiation theory.

Nichols, Philip, *The Panama Papers as Training Wheels for Corruption Prosecutions*

The “Panama Papers” provided extraordinary detail on the structure of corrupt activities around the world. Their release provoked strong reaction, including calls for legal reform. Sound laws, however, are not sufficient – a number of countries have been criticized for failing to prosecute wrongdoers. Much of that failure to prosecute may be due to a lack of experience and knowledge, particularly in investigating the complex financing of corruption. The Panama Papers and similar projects provide ready-made investigations – “training wheels” for countries learning to prosecute. The experience gained by countries may constitute the lasting effect of the leaked papers.

Olsen, Sherry & Ginger Devine, *Non-Compete Law: Where Are We in 2016*

State law defines the enforceability of non-compete agreements. Where does state law stand with respect to the use of non-compete agreements? There have been proposed and passed statutory changes, including interesting cases involving the use of non-compete agreements with lower-level employees and their applicability and enforceability. We will explore the current state of non-compete law and its relationship to the Constitution and public policy, with particular attention to Massachusetts and their proposed “Garden Leave” requirement.
Orozco, David  *Ticketmaster, Inc.: A Case Study of Strategic Contracting and Law-Enabled Business Models*

This article assesses the strategic contract terms of a company that has achieved long-term competitive advantage.

Pace, H. Justin  *Equitable Fiduciaries, Business Organization Fiduciaries, and Cognition: Explaining the Divide in Fiduciary Obligation Law*

It is underappreciated that there are two separate bodies of fiduciary obligation law: a traditional, equitable body and a modern, positive law body. The latter is a rational response to changes in the law and economy and to a design problem. Much of the confusion in the case law can be attributed to judges attempting to apply assumptions developed for equitable fiduciary relationships to fiduciary relationships set by positive law where those assumptions no longer belong. Rather than the top-down analysis that has typically been applied to fiduciary obligations, judges should apply a bottom-up analysis to fiduciary obligations set by positive law.


Sovereign debt markets, lacking a global insolvency regime, are fundamentally shaped by the specter of conflicts between debtors that refuse to pay and holdout creditors that refuse to settle. Never was this more evident than in Argentina’s most recent sovereign debt crisis, which spurred daring, innovative, and often controversial legal strategies. This Article focuses on one of the legacies of Argentina’s sovereign debt crisis: the use of investor-state arbitration under international investment law to enforce sovereign bond contracts. Following Argentina’s financial collapse in 2001, private creditors brought dozens of cases against Argentina before the International Center for the Settlement of Investment Disputes (ICSID). With the proliferation of investor-state dispute settlement mechanisms in bilateral investment treaties and the investment chapters of free trade agreements, this remedy will likely grow in importance. We analyze Argentina’s experience with sovereign debt claims brought before ICSID, with special attention to their interaction with concurrent bondholder litigation before national courts and ongoing measures being undertaken by Argentina in response to these cases. Looking forward, we consider the opportunities and complications arising from this example of cross-regime enforcement and examine its implications for sovereign debt finance and international law.

Parson, Jamie,  *That Wet Blanket Better Be Made of Recycled Material: A Look at the Liability Exposures Associated with Sustainable Business Practices*

Imagine a company who sells a good and agrees for every one good sold, they will give a good away to a disadvantaged community. Did their act of good will open up a can of product liability? Now, imagine that a company hosts an Adopt-a-street where employees volunteer to clean a local street and an employee is injured. Did their efforts to make a positive impact on the environment backfire with an endless worker’s compensation claim? This presentation will address potential liability exposures, current risk control and financing measures as well as gaps in current mechanisms for sustainable business practices.

Pierre Louis, Lydie & Frederic Chartier,  *Vulnerable Economies: Banking Regulations in South Africa and Ireland which Encourage Economic Development*

"On résiste à l’invasion des armées; on ne résiste pas à l’invasion des idées.”  -- Victor Marie Hugo. Economic and financial crises can be devastating for vulnerable economies. Vulnerable communities have often been viewed as risky investments because of the higher likelihood of lower return on investments or default. As such, the most vulnerable economies which primarily consist of working class, under-employed or unemployed residents have struggled to capture the interest of investors to spur
economic development within their particular economy. However, banking regulations in Ireland have shown that the challenge to create innovative economic development programs, and business opportunities for vulnerable economies although exceedingly difficult, is not insurmountable. Recently, the South African National Treasury has promulgated new banking regulations designed to spur development in some of the most vulnerable economies within South Africa.

Pivateau, Griffin, *Class Action Waivers in Employment Arbitration Agreements: The FAA, the NLRA, and a Path Forward*

Employers now face a difficult decision. Wary of the costs and uncertainties inherent in litigation, many employers have introduced mandatory arbitration clause into their employment agreements. Moreover, in recent years, employers have often insisted on individual arbitration. The legality of these individual arbitration agreements, however, has been cast into doubt. An employer that requires employees to execute arbitration agreements containing class action waivers faces the possibility of action by the National Labor Relations Board (NLRB). In this paper, I examine whether a court should compel arbitration for employment related disputes, where the employment agreement mandates individual arbitration and prohibits collective action. Does the federal policy favoring arbitration apply to these agreements? Or does the National Labor Relations Act’s protection of the right to engage in concerted activities invalidate such agreements? Must employment related disputes be resolved through arbitration on an individual basis where the agreement mandates it? Or should the option to file a class action lawsuit remain an option, notwithstanding the language of the agreement?

Reed, Alex, *Reconsidering the Role of Associational Discrimination Theory in the Struggle for LGB Employment Protections*

Whereas associational discrimination theory (ADT) has been championed as a means of securing workplace protections for lesbian, gay, and bisexual (LGB) Americans, this article contends that ADT should be abandoned in light of its inherent limitations and the existence of robust alternative theories. Unlike ADT, which has not been recognized by the Supreme Court and on which Circuits are split as to the degree of association necessary to sustain a claim, the Supreme Court’s rulings in Manhart and Price Waterhouse provide an established framework for contesting instances of sex-based employment discrimination, including discrimination against LGB persons.

Roessing, Matt & Jehan El-Jourbagy, *Toward a More Perfect Pedagogy: Developing Constitution Week Activities to Support a Business Law & Ethics Curriculum*

Each U.S. educational institution that receives federal funds must hold educational programming on the U.S. Constitution every Constitution Day (9/17) and is encouraged to do so throughout Constitution Week (9/17-9/23). Rather than just “checking the box,” teachers can take this opportunity to develop programming that encourages civic engagement while supporting student learning outcomes. The authors, who teach business law and ethics at a public university, developed an interactive program of speakers, discussions, and activities for Constitution Week, and then assessed the impact of each event on participating students.


European law gives consumers the right to withdraw from certain consumer contracts for any reason, for fourteen days after receipt of the goods or service. The law’s advocates suggest it is necessary to protect consumers in a world of online commerce. American contract law adopts a different methodology regarding consumer withdrawal rights, favoring ex ante disclosures, narrowly-applicable cooling-off statutes, and the consumer’s freedom to negotiate contract cancellation. In an increasingly online
consumer environment, what can U.S. law learn from its European counterpart? This article examines
the European Union’s model of consumer protection in tandem with the traces of a right of withdrawal in
the United States.

Sanney, Kenneth, Creative Differences: An Integrated Representational Approach to the Division of
Intellectual Property in Divorce Proceedings
For owners of intellectual property, a divorce proceeding without proper legal counsel may have a more
significant impact on their long-term financial health than their first hit song or bestselling novel. The
financial risks posed to these parties and their estranged spouses are often exacerbated by matrimonial
attorneys who, while highly competent in the division of most marital assets, may not fully appreciate the
differences between real and personal property and statutory grants of intellectual property rights. This
article analyzes the potential for representational failures and proposes an integrated representational
approach to the division of intellectual property in divorce proceedings.

Schulzke, Kurt & Gerlinde Berger-Walliser, Toward a Unified Theory of Materiality in Securities La
U.S. and EU securities regulators have recently come to the realization that materiality, an essential
securities regulation term, may indeed require a formal definition. Ideally, this definition would be shared
across national boundaries. Yet, some acknowledge that because of materiality’s contextual nature, a
single definition may be infeasible. Recognizing the contextual limitation, this article proposes a
theoretical framework for defining materiality in particular cases as well as procedural mechanisms for
applying and interpreting the framework, drawn from common law and civilian legal traditions in the
United States and the European Union.

Schuster, Mike, Public Choice Theory, the Constitution, and Public Perception of the Intellectual Property
System
The Constitution states that copyright must benefit society by promoting the progress of science and
useful arts. The literature argues that our special interest-dominated Congress no longer respects this
mandate, at the public’s expense. For several reasons, this state of affairs is likely to change only via
electoral pressure on legislators. I hypothesize that citizens don’t appreciate that their benefit should be
paramount, and thus, exertion of the necessary influence is impossible. This Article presents a survey-
based look at the public’s understanding of the copyright system and proposes remedies to return the
system to its Constitutional goals.

Sipe, Stephanie, Lindsay Larson, Brit McKay & Janet Moss, No More Rose-Colored Lenses: A Comparative
Study of University Students’ Changing Perceptions of Sexual Harassment in the Workplace from 2006 to
2013
The intention of the current research is to determine whether the perspective of university students has
shifted since a 2006 survey of student perceptions regarding sexual harassment in the workforce (Sipe,
Johnson & Fisher, 2009). As noted by a publication on the changing student perceptions regarding
gender discrimination over this same time period (Sipe, Larson, McKay and Moss, 2016), it might be
assumed that university students today might be less likely to anticipate gendered issues such as sexual
harassment in the workforce because of increased public outcry and heightened legal protections against
such discrimination. University students today have been exposed to a plethora of information that
might lead them to believe that they will be entering a modern, egalitarian work environment, with
measures in place that would effectively block out inappropriate conduct. Conversely (as noted in Sipe
etc. AMLE, 2016 regarding gender discrimination), today’s university student might be more likely to
anticipate issues such as sexual harassment in the workplace because of the increased attention currently
given to these kinds of issues.
Stemler, Abbey, *The Myth of the Sharing Economy and Its Implications for Regulating Innovation*

This Article demonstrates how Airbnb and others like it rely on the myth of the Sharing Economy to drive regulatory agendas. It argues that they use rhetoric to avoid or minimize regulation in the start-up stage, some grow strong and powerful, and when it is time for regulation, they push hard (and often succeed) to write the rules that govern them. The aim of this Article is less to propose concrete regulatory reforms for the Sharing Economy and more to explore the intersection between narrative, innovation, and regulation. As new technologies transform and disrupt existing paradigms, it is important to question the difference between rhetoric and reality in order to effectively achieve the desired ends of regulation.

Tokic, Stijepko, *The Interplay Between User Innovation, the Patent System, and Product Liability Laws: Policy Implications*

This Article seeks to broaden an on-going policy debate about user innovation, which refers to individual inventors or firms that expect to benefit from using (rather than selling) their overwhelmingly unpatented innovations. In particular, the Article examines the interplay between user innovation, the patent system and product liability laws. The influential empirical studies of MIT’s Eric von Hippel and his colleagues have documented the extent and importance of user innovation and, subsequently, that has prompted discussions about reevaluating laws and policy related to the patent system. It was even implied that evidence of thriving user innovation indicates that innovation can thrive without the patent system altogether, as user innovators did not need incentives to innovate provided by the patent system. This Article challenges that notion by explaining the multifaceted role of the patent system in promoting innovation. Moreover, the Article argues that the lack of exposure to product liability laws offers an explanation on why user innovation is thriving, as user innovation is principally outside of the scope of the product liability laws, so user innovators can take more risks and be more innovative than producers/manufacturers. The Article identifies “diffusion” as the main issue in user innovation, and argues that diffusion of user innovation is currently not substantial enough to promote innovation, but it is significant enough to raise product liability issues, which have largely been ignored in user innovation literature. The Article concludes by warning that calls to reevaluate intellectual property rights fueled by research on user innovation should be taken with much caution not only because of the barefaced issues related to promoting and diffusing innovation, but also because of latent issues related to product liability laws.

Trautman, Lawrence, *Personal Ethics and the Financial Collapse of 2007-08*

The seeds for the 2007-09 financial collapse were sewn over many years and nurtured by ill-advised governmental housing policy, the presence of pervasive fraud both large and small and the widespread failure of personal integrity. A chronology of bad choices made by individuals and the daisy-chain of complicit truth-bending and fraud at many levels of the mortgage loan origination and securitization food-chain is presented. This paper contributes to the accounting, banking, business and personal ethics, economic, mortgage lending, regulatory and policy making literature.

Varadarajan, Deepa, *Trade Secret Precautions, Possession and Notice*

To obtain trade secret protection, a firm must take “reasonable secrecy precautions” (RSP) to guard the confidentiality of claimed information. I suggest that traditional property law’s “possession” doctrine can provide a useful lens for understanding the RSP requirement. Drawing insights from possession doctrine, this Article argues that the primary purpose of the RSP requirement should be to notify a relevant audience (e.g., employees) about claimed trade secrets and thus reduce information costs for that audience. Requiring trade secret owners to provide clearer ex ante notice promotes follow-on innovation and employee mobility, concerns that are important to trade secret law.
Antitrust guarantees a particular distribution of wealth between consumers and producers. Big data allows firms with pricing power to identify the highest price a consumer is willing to pay for a good and charge it to her. The practice upends the current distribution of wealth by allowing firms to charge the highest possible prices to everyone. Current antitrust rules cannot respond because they proscribe the formation, but not the exercise, of pricing power. Two options preserve the current distribution of wealth. One is deconcentration of industry. The other is use by government of big data to set prices.
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