

Business Law Program 2012–2013

The Business Law Program has continued to thrive across a wide spectrum of business law courses and programming, including headline events featuring the chairman of the SEC in a speech that was prominently covered in the national press as well as a private lunch for students, faculty, and alumni with David Rubenstein, who spoke of his work as a lawyer, investor, and philanthropist. The year has seen a burgeoning of interest and opportunity in transactional law as the American University Business Law Review sponsored a symposium on the subject, garnering national participation and attention, and the Transactional Law Society, founded just last year, began to participate in competitions, even piloting its own sponsored competition. Curricular and extracurricular offerings in international business continue to grow as the WCL Center on International Commercial Arbitration expands its programs and as a variety of student organizations reach further into international fields. The highly regarded scholarly workshop presentations continue throughout the year, and the Business Law Program is also offering increased opportunities for career development, networking, and student meetings with successful alumni. Highlights appear in the following pages.

SEC Chairman Elisse B. Walter: Harnessing Tomorrow's Technology for Today's Markets

Elisse B. Walter, Chairman of the Securities and Exchange Commission at the time, gave a special presentation to announce technological solutions to protect investors by enabling more powerful regulatory monitoring and swifter enforcement action. Her presentation provided a unique understanding of today's complex markets. In addition to announcing the initiatives, Chairman Walter provided the audience with an understanding of current technology and modern market trading practices, explaining how the SEC's embrace of cutting-edge technology would upgrade its oversight.



Elisse B. Walter, SEC Chairman, delivers a speech to American University Washington College of Law students, faculty, and the press.

David Rubenstein, CEO of the Carlyle Group, Speaks at WCL

The Business Law Program welcomed David Rubenstein, co-founder and co-CEO of the Carlyle Group, for a lunchtime presentation, preceded by a reception with WCL students, faculty, and administration. Mr. Rubenstein explained the role of private equity firms in the economy and how he moved from the practice of law and work in the government into the realm of business and finance. He also spoke about his commitment to public philanthropy, including his contribution to the restoration of the Washington Monument.



From left: Seth Grae '88, Dean Claudio Grossman, Robert Pence '71, David Rubenstein, Kenneth Lore '73

Events

White Collar Crime Career Panel

Representatives from the Antitrust Division and Public Integrity Section of the Department of Justice, as well as from the Securities and Exchange Commission, spoke about the intersection between business and criminal law in this panel discussion.

Insights into Bankruptcy Practice

The American College of Bankruptcy cosponsored this discussion of the role bankruptcy plays in the world economy. The panel addressed how to develop the problem-solving skills required to be a successful bankruptcy attorney and encouraged students to consider careers in bankruptcy law.

Business Law Society Distinguished Alumni Dinner

The Business Law Society honored Tom Morante, WCL '77, Partner at Holland & Knight, at the fourth annual Business Law Society Distinguished Alumni Dinner. Mr. Morante spoke about his successful career in the business and international law arenas. Students had the opportunity to connect with Mr. Morante and other WCL alumni while dining with their peers.



WCL Distinguished Alumnus Tom Morante with Business Law Society President Elizabeth Vaysman and Vice President Benjamin Ross.

One-on-One with Karen Leetzow, Deputy General Counsel and Vice President for NASCAR

Cohosted by the Sports and Entertainment Law Society, the Women's Law Association, and the Business Law Society, Karen Leetzow shared her perspective as a woman in the male-dominated sport of NASCAR, as well as her insight as Deputy General Counsel for a multibillion dollar association.



Guiding Students

Business Law Program Orientation

Business law faculty, program staff, student leaders, and publication editors provide students with an overview of the courses, organizations, externships, publications and other resources available to students interested in business law and related areas.

Business Law Curriculum Advising Sessions

The Business Law Program hosts special sessions where faculty and students offer wisdom on tailoring course selections to meet career interests as students choose courses from the 150-plus courses that WCL offers in business law and allied fields. Students ask questions about professors' styles, course content, and offerings at the AU Kogod School of Business as well as other schools on main campus.

International Business

Trade and Regulation Forum: Latin America / US M&A Trends

Hosted by Washington College of Law and Thomson-Reuters, the Forum provided lawyers, economists, government officials, businesses and academics an opportunity to examine Latin American markets. Expert faculty from the US, Brazil, Chile, Mexico, and other Latin American countries discussed the current and future economic, political, legal, and regulatory dynamics driving businesses and mergers and acquisitions in Latin America.

VIII Symposium on International Trade

With the support of the Embassy of Brazil in Washington and WCL's International Trade and Investment Law Society, Washington College of Law hosted the VIII Symposium on International Trade. Panel discussions covered trade policy outlook with respect to major trading partners, foreign exchange, and economic development issues. Ambassador Mauro Vieira of Brazil provided welcoming remarks, and C. Fred Bergsten, Director of the Peterson Institute for International Economics, provided the keynote address on the relationship between currency and trade issues.

Third Annual American Bar Association National Institute on Consumer Financial Services

This two-day program provided a comprehensive explanation of the sources of regulation in the consumer financial services industry. Faculty covered the major financial services regulations, explored policies behind regulation, and provided guidance for practitioners regarding new regulatory requirement.



Washington College of Law team members Fernando Ortega, Jorge Vera, Estefania San Juan, Jessica Lynd, Joanne Baxter, Athena Arbes, and Daniel Parga advanced to the quarterfinals, placing fifth overall in the International Commercial Arbitration Competition. Ricardo Chirinos and Caroline Richard of Freshfields Bruckhaus Deringer LLP coached the team.

Fifth Annual International Commercial Arbitration Competition

The WCL Center on International Commercial Arbitration cosponsors this competition together with the University of Buenos Aires (Argentina) and the University of El Rosario (Colombia). The competition, conducted exclusively in Spanish, promotes the study of international commercial law and the use of arbitration as a method of conflict resolution in international business. It provides nearly 200 students from 39 law schools practical arbitration experience. In addition, more than 150 arbitrators and coaches participated.

Moot Court

Students interested in business law participate in moot court competitions in the United States and around the world. With ever-increasing interest, WCL students also plan to participate in more competitions and anticipate adding more transactional law moots next year.



WCL students Mike Gebauer , Ashley Stelfox, Brenna Nelinson, and Corey Casbarro with coach Katie Coniglio (center) in Hong Kong for the Vis International Commercial Arbitration Moot.

Vis International Commercial Arbitration Moot

WCL students continue to participate in the annual Willem C. Vis International Commercial Arbitration Moot, traveling to both its venues in Vienna and Hong Kong. The moot is designed to introduce students to the law governing international sales of goods and to practice in the leading forums for international commercial arbitration. The students are given a particular problem that raises substantive commercial issues and procedural arbitral questions. They prepare for months under the tutelage of coaches experienced in the practice of international commercial arbitration and eventually compete abroad before well regarded arbitrators. This year the teams did well, and Mike Gebauer and Ashley Stelfox both earned individual honorable mentions.

Alternative Dispute Resolution

The Alternative Dispute Resolution (ADR) Society promotes the study of negotiation techniques, client counseling, mediation, and arbitration through a variety of annual competitions.

International Chamber of Commerce Mediation

Competitors tackle intricate international business problems applying ICC commercial mediation rules to mock cases. Held in Paris, this prestigious international competition draws teams from across the globe.

Securities Dispute Resolution Triathlon

Student teams negotiate, mediate, and arbitrate a realistic securities dispute at this competition, held annually in New York. Students play the roles of attorneys, clients, investors, and broker-dealers. FINRA's experienced neutrals serve as mediators, arbitrators, and judges

Frankfurt Investment Arbitration Competition

Held annually in Frankfurt, Germany, the Investment Arbitration Moot is a moot court-style competition in which students respond to questions from a panel of experts about a complex foreign investment dispute. Competitors are provided with a case study in advance and must research substantive foreign investment protection law.



WCL students Greg Reed, Alex Haney, Kyle Bates, and Matthew Peterson placed 2nd in the 2013 Frankfurt Investment Arbitration Competition.

Faculty Workshop Series

The Business Law Faculty holds a monthly scholarly workshop where faculty from WCL and around the nation present drafts of papers they are preparing for publication. The workshop functions as a faculty seminar in which the author introduces the discussion and the gathered scholars provide comments and questions based on their reading of the paper and on their knowledge of the law, business, and academic research. In addition, the WCL distinguished speaker series features workshops each year in business law.



Assessing the Hard Impact of Soft International Law: Global Economic Governance and Africa **by Professor Daniel Bradlow**

American University Washington College of Law

The institutions and mechanisms of global economic governance seldom rely on formal legal agreements to achieve their ends. Instead they use a range of ostensibly diplomatic or technical instruments, such as the communiqués and reports of the G20 and its

various working groups, the standards set by standard setting bodies like the Basel Committee on Banking Supervision, and the various indicators of the Millennium Development Goals. While these instruments are nonbinding and can even be drafted to avoid establishing firm commitments, they often have a regulatory force that can make them effective governance instruments. Professor Bradlow seeks to test whether these instruments may have different and unequal effects on different participants in the international community based on how the instruments are negotiated, drafted, and applied.



Financialization at the Fed: Thematizing Its New Balance Sheet **by Professor José Gabilondo**

Florida International University College of Law

As a result of the Fed's recent efforts to stabilize the financial sector and reanimate the economy, its own financial structure has changed, tripling in size and diversifying its asset holdings. Professor Gabilondo examines these trends in the Fed's balance sheet as a case study of "financialization," which refers generally

to shifts in which the financial sector's influence over the real economy increases. The paper proposes a balance sheet approach to financialization that builds on economist Hyman Minsky's work on borrowing.



Fixing FRAND: A Pseudo-Pool Approach to Standards-Based Patent Licensing **by Professor Jorge Contreras**

American University Washington College of Law

"Fair, reasonable and nondiscriminatory" (FRAND) licensing commitments have been utilized by standards-development organizations (SDOs) for years in an attempt to alleviate the risk of patent hold-up in standard-setting. These commitments have proven to be vague and offer few real assurances to product

vendors or patent holders. A recent surge of litigation concerning the meaning of FRAND commitments has highlighted the importance of discovering a better approach. Professor Contreras identifies "first principles" that underlie the licensing and enforcement of standards-essential patents and proposes an SDO-driven approach based on certain beneficial attributes of patent pools to address the uncertainty of FRAND commitments.



CDS ZOMBIES **by Professor Anna Gelpern**

American University Washington College of Law

In this paper, Professor Gelpern examines the contract interpretation strategies adopted by the International Swaps and Derivatives Association (ISDA) for its credit derivatives contracts in the Greek sovereign debt crisis. She argues that the economic function of sovereign credit default swaps (CDS) after Greece is

limited and uncertain, partly thanks to ISDA's insistence on narrow textualist interpretation. Contract theory explanations for textualist preferences emphasize either transactional efficiency or relational factors, which do not fit ISDA or the derivatives market. Professor Gelpern poses an alternative explanation: the embrace of textualism may have been a means for ISDA to reconcile the competing political demands from state regulators and its market constituents.

Faculty Workshop Series (continued)



Contracting to Oblivion—Property Concepts and Financial Regulation **by Professor Heather Hughes**

American University Washington College of Law

The theme that property law concepts can justify regulatory innovation is emerging in current debates over whether regulation should address the complexity of financial products. This theme appears in arguments relating anti-fragmentation and numerus clausus principles to financial markets, as well as calls to regulate financial products as products per se (like bicycles or ladders). As lawmakers assess challenges that complexity presents, the private law of property already contemplates the notion that complexity in contractual obligations can present market risk. In this article, Professor Hughes discusses the theoretical grounding of a distinction between contract law and property law, and the utility of this distinction in financial markets. She then examines the potential relevance of property law to financial regulation, vetting possibilities for applying property rules to financial products.



Securities Law's Dirty Little Secret **by Professor Usha Rodrigues**

University of Georgia School of Law

Securities law's dirty little secret is that rich investors have access to special kinds of investments—hedge funds, private equity, private companies—that everyone else does not. This disparity stems from the fact that from its inception federal securities law has jealously guarded the manner in which firms can sell shares to the general public. Perhaps paternalistically, the law assumes that the average investor needs the protection of the full panoply of securities regulation, and thus can only buy public securities. In contrast, accredited—i.e., wealthy—investors, who it is presumed can fend for themselves, have the luxury of choosing between the public and private markets. In this article, Professor Rodrigues uses the emergence of new secondary markets in the shares of private companies to illustrate the disparity that has long characterized the world of investment access and proposes that the general public be allowed to participate in the private market via mutual fund investment.



Critical Tax Theory: Earning a Place at the Table **by Professor Nancy Knauer**

Temple University Beasley School of Law

Since Critical Tax Theory emerged as a distinct field of inquiry in the late 1990s, it has produced an impressive body of work. Scholars writing from a relatively diverse range of perspectives, including critical race theory, feminist legal theory, and queer theory have re-examined seemingly neutral tax provisions to illustrate how existing tax law and policy can both reflect and reinforce discrimination based on race or ethnicity, socio-economic status, gender or gender identity/expression, sexual orientation, or disability. Critical Tax scholars have also engaged the more obviously gendered or otherwise exclusionary provisions of the tax code, such as the marital provisions and the exclusion of same-sex couples from the joint filing provisions. In this paper, Professor Knauer expands on this work by exploring practical ways to integrate these important insights of Critical Tax Theory in the development of federal tax policy and asserts that it is time for Critical Tax Theory to take its place at the table and become a constituent feature of tax policy.



Portion Control, Paternalism and Public Health **by Professor Lindsay Wiley**

American University Washington College of Law

Drawing on evidence regarding the influence of smoke-free-environments legislation, Professor Wiley addresses New York's so-called Big Gulp Ban and argues that the ban has the potential to denormalize extra-large soda sizes and reduce overconsumption. Popular anti-paternalism critiques of the ban threaten its effectiveness, however, even if these critiques do not successfully halt implementation of the ban. Anti-paternalism critiques may contribute to the emergence of a positive social norm that associates the consumption of extra-large sodas (and perhaps other unhealthy foods and beverages) with support for personal liberty and rebellion against an overreaching government. Based on these concerns, Professor Wiley proposes a "proportional pricing and small soda mandate," which would require that vendors selling fountain drinks offer a small size (which could be 16 ounces or smaller) at the same per-ounce price as any other portion sizes, to eliminate bonus pricing of high-calorie beverages while also mandating the availability of more reasonable portion sizes for consumers who choose to purchase them.

Faculty Workshop Series (continued)



The Psychology of Caveat Emptor

University of Pennsylvania Law School

In this paper, Professor Wilkinson-Ryan uses methods from the psychology of judgment and decision-making to unpack the beliefs, preferences, assumptions, and biases that constitute our assessments of consent to unread fine print and boilerplate terms. Through five studies of boilerplate transactions, the paper addresses how consumers think about modern contracting and how the context of modern contracting bears on judgments of transactional harms. Professor Wilkinson-Ryan lays out evidence that consumer contracting invokes conflicting norms: that people understand consent one way in the context of contract formation and another in the context of enforcement. The paper provides psychological explanations for differential evaluations of consent at formation and enforcement and concludes with a discussion of these findings in light of procedural justice research.

Faculty Roundtable

Each year faculty members gather to discuss current work, gaining instant feedback and allowing cross-fertilization across subdisciplines within the business law field. Some of the works discussed included Jonas Anderson's investigations into the interplay between Congress and the Federal Circuit on the subject of patent law; Jonathan Baker's recent and current papers in antitrust; Jorge Contreras's continuing research on FRAND (see page 5); Heather Hughes' work on lawyers' issuance of legal opinions in corporate and commercial transactions; Benjamin Leff's writing on the tax implications of increasing marijuana legalization; Mary Siegel's research into the sometimes illusory character of so-called "enhanced review" of business decisions; and David Snyder's writings on corporate social responsibility and supply chain management.

Law Review Symposia

American University Business Law Review

Transactional Lawyering: Theory, Practice and Pedagogy

The symposium focused on the evolution of transactional lawyering, "deal lawyers," and governance, as well as current conditions affecting transactional practice and law school pedagogy. The symposium also addressed the relationship between lawyers and financial markets.

Law Review Symposia (continued)

Administrative Law Review

Lessons from Broadcast Regulation for the Twenty-First Century

The symposium reexamined the landmark article, *A Marketplace Approach to Broadcast Regulation* by Mark Fowler and Dan Brenner. It featured an author retrospective and considered the "lessons learned" from broadcast regulation that will inform future Internet regulation.

Intellectual Property Brief

Patent Subject Matter Eligibility Today: Software, Genomics, and Business Methods

The symposium examined the current conflicted state of the law in the context of electronics and software patents, diagnostic and biotechnology patents, and computer-implemented business method patents. Panelists discussed the significance, advantages, and drawbacks of each in an attempt to contribute certainty and perspective to an ever-changing area of the law.



"What Do Transactional Lawyers Do?" A distinguished panel of practitioners and professors gathered to answer this question and discuss its implications for law schools and law students.

Student Organizations

BUSINESS LAW SOCIETY

The Business Law Society's mission is to provide a forum for law students interested in all aspects of business law. The Society provides students with access to alumni at events throughout the year, culminating in a dinner for alumni and current students and featuring a brief talk by a distinguished alumnus (see page 2). In addition to networking opportunities, meetings cover topics ranging from job prospects and career advice to hot areas of practice and choosing courses.

INTERNATIONAL TRADE AND INVESTMENT LAW SOCIETY

The International Trade and Investment Law Society (ITILS) promotes discussion of international trade law issues (see page 3) and helps students explore careers in international trade law. In 2012-2013 ITILS sponsored discussion forums on topics such as transparency, anti-corruption, and the World Trade Organization, among others. ITILS strives to provide a balance of views on trade issues all over the world and in all types of trade agreements.

JD/MBA CLUB

The JD/MBA program at WCL provides an excellent opportunity for students who desire to combine skills and develop expertise in both law and business. The JD/MBA Club offers a social outlet and forum for students pursuing the dual JD/MBA degree and hosts events that cater particularly to students who are both business students and law students.

SOCIAL ENTERPRISE LEGAL SOCIETY

The Social Enterprise Legal Society combines business associations, corporate, tax, and nonprofit law as part of an effort to understand the legal implications of this emerging sector. The Social Enterprise Legal Society's second year brought events and weekly meetings where students shared research about the field, interviewed social entrepreneurs, and produced content for their blog in addition to other publications.

TRANSACTIONAL LAW SOCIETY

The Transactional Law Society is a new student organization to promote interest in and pursuit of transactional law in the WCL community. In 2012-2013, the Transactional Law Society sent teams to transactional and negotiation competitions in addition to hosting a pilot competition of its own.

Clinical Program

THE COMMUNITY AND ECONOMIC DEVELOPMENT LAW CLINIC

During 2012-2013 students in the Community and Economic Development Law Clinic (CEDLC) assisted community-based organizations in D.C. and the suburban counties in matters ranging across the transactional practice of community development. Clients included benefit corporations, the newest form of social enterprise; food-based enterprises such as urban farms and farmers markets, and a church-based federal credit union.

CEDLC also extended its reach to nonprofits and advocacy organizations in New Orleans through a collaboration with staff from the Community Economic Development (CED) Project of the Lawyers Committee for Civil Rights Under Law. Since Hurricanes Katrina and Rita, the CED Project has represented organizations that focus on recovery efforts in Louisiana and Mississippi.

JANET R. SPRAGENS FEDERAL TAX CLINIC

The Janet R. Spragens Federal Tax Clinic represents low-income individuals who are being audited by the Internal Revenue Service. Students do not fill out current tax returns for taxpayers, do bookkeeping, or provide accounting services; as a litigation clinic, students provide legal representation for clients before the Internal Revenue Service in appeals conferences and, if the cases do not settle, in the United States Tax Court.

This year tax clinic students assisted low income taxpayers in refuting asserted tax liabilities due to cancellation of mortgage and other debt, characterization of litigation settlements, and many other reasons. Students successfully obtained innocent spouse relief for a number of taxpayers and helped small business owners establish deductible expenses. Other matters included establishing entitlement to family status benefits and helping many taxpayers get collection relief from tax liabilities due to their present economic circumstances

THE GENERAL PRACTICE CLINIC

The General Practice Clinic represents low-income clients in such areas as consumer protection, employment, and bankruptcy, among others. Student attorneys use a range of legal skills on behalf of clients in settings that include administrative tribunals and trial and appellate courts in the District of Columbia and Maryland. The clinic covers topics such as client-centered representation, interviewing, theory of the client, fact investigation, counseling, and negotiation.