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ABOUT THE ROCKY MOUNTAIN LAW JOURNAL

Each of the articles in the *Rocky Mountain Law Journal* was recommended for publication by the staff editors and reviewers using a double, blind review process. The journal continues to attract large numbers of submissions from across the country.

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EDITOR'S CORNER

We had a record number of quality submissions this year. We had to make tough decisions, but are delighted to publish five articles. Submissions came from authors across the country.

The Rocky Mountain Law Journal is listed in both *Cabell's Directory of Publishing Opportunities in Management* and in *Washington & Lee University Law Journals: Submissions & Rankings*. This is a significant achievement. Additionally, our Editorial Board has grown and includes members from the law school community and non-business law community as well. Our website showcases the natural beauty of Vail, Colorado, a conference location that offers hiking, dining, biking, and sunshine at our fall gatherings.

I would like to thank the outstanding editorial staff who reviewed for the *Rocky Mountain Law Journal* this year. This includes several new volunteers as well who spent considerable time screening articles and providing comprehensive suggestions to make the articles even better. I truly value the time commitment all of you made to the review, acceptance and editorial process. Your input is very important. Many thanks to the Rocky Mountain Academy of Legal Studies in Business conference organizers who support us.

Volume 6 begins with an outstanding article and winner of the 2017 Best Paper Award. Congratulations to the authors, Professors Eric Blomfelt, Elizabeth McVicker, and Whitney Traylor. Professor McVicker's presentation at the conference was superb. Professors Amy Hendrickson and Amanda Wheeler will surprise readers interested in concert tickets with their analysis of effectiveness of the Better Online Ticket Sales Act of 2016. Be sure to read the survey responses by in-house attorneys to Evan Peterson's questions about their role in business strategy. Professor Connie Bagley's books and her leadership at the ALSB emphasizes the strategic value of law. Talking about divorce in a business law class has traditionally been taboo. However, Professor Read's article makes a new argument for including a topic that often is an individual's first encounter with the legal system. Finally, Professor McGarry's timely article raises the question of sustainable investment and financing decisions. He examines Norway's divestment decisions, Environmental, Social, and Governance ("ESG") metrics, and their relationship to human rights violations.

Pamela Gershuny
Editor-In-Chief
December 31, 2017

-ARTICLES-

**“Concerted Activity,” Mandatory Arbitration Clauses, and Unfair Labor Practices:
The Murphy Oil Trilogy Case***

By

Eric Blomfelt,** Elizabeth McVicker,*** and Whitney Traylor****

INTRODUCTION

In January of 2017, a week before the inauguration of President Donald Trump, the Supreme Court agreed to opine on the enforceability of employment agreements that require employees to waive class action law suits or any collective proceedings to resolve employment disputes, and instead demand that employees must resort to individual arbitration.¹ *National Labor Relations Board v. Murphy Oil USA* combines three cases that resulted in decisions protecting the ability of employees to engage in “concerted activities”—such as joining together in class action proceedings to protest underpaid wages or overtime.² These three cases—the “Murphy Oil Trilogy”—advance a decision by the National Labor Relations Board (NLRB) that Section 7 of the National Labor Relations Act (NLRA) requires that employees be allowed to bring class actions either in court or in arbitration.

In *NLRB v. Murphy Oil USA, Inc.*, the Board found that an employer had engaged in an unfair labor practice by forcing its employees to enter into individual, mandatory arbitration agreements.³ Similarly, in the other two cases of the trilogy, *Epic Systems Corp. v. Lewis and Ernest & Young LLP v. Morris*, the Seventh and Ninth Circuit Courts agreed with the employees that challenged their arbitration agreements with their private employers, agreements that insisted that they waive their rights to “concerted activities.”⁴ In these two cases, the employees relied on the NLRB’s decision in the *D.R. Horton* case of 2012. In the *D.R. Horton* case, the NLRB rejected the precedent of numerous federal and state courts that have upheld agreements where employees give up their statutory right to collectively enforce employment rights.⁵

Some circuit courts have overturned the NLRB’s decision in the *D.R. Horton* case: the Fifth Circuit ruled that mandatory individual arbitration agreements as a condition of employment are

* With kind acknowledgement to Joseph Goldhammer, Esquire, without whose input this paper would not have come to fruition.

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¹ *National Labor Relations Board v. Murphy Oil USA, Inc.*, SCOTUSBlog, <http://www.scotusblog.com/case-files/cases/national-labor-relations-board-v-murphy-oil-usa-inc> (last visited 08/07/2017).

² *NLRB v. Murphy Oil USA*, No. 16-307; oral arguments Oct. 2017; <http://www.scotusblog.com/case-files/cases/national-labor-relations-board-v-murphy-oil-usa-inc>.

³ *In re Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72 (2014); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015).

⁴ *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016); *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016).

⁵ *In re D.R. Horton, Inc.*, 357 N.L.R.B. No. 184 (2012); <https://www.nlrb.gov/case/12-CA-025764>.

valid,⁶ as did the Second Circuit and Eighth Circuit.⁷ These decisions relied on a 2011 U.S. Supreme Court decision, *AT&T Mobility v. Concepcion*,⁸ which held that the Federal Arbitration Act (FAA) requires the enforcement of arbitration agreements in employment contracts that waive class or collective proceedings.⁹ However, the *Concepcion* decision involved consumer sales agreements, not employer/employee agreements related to working conditions, and focused on the application of Rule 23 of the Federal Rules of Civil Procedure (FRCP) to consumer class action arbitration proceedings. The Court was concerned with “procedural morass” in the application of Rule 23 in the *Concepcion* case;¹⁰ in the Murphy Oil Trilogy, collective employment arbitration does not, in any way, present the probability that such joint or collective arbitrations among co-workers would sacrifice the benefits of “simplicity, flexibility, informality and expedition” that collective arbitration offers.¹¹

The employer agreements at issue in the Murphy Oil Trilogy ring familiar with the days of Yellow Dog Contracts that insisted that, as a condition of employment, employees could not organize in any manner for any reason.¹² The Norris-LaGuardia Act of 1932 and the National Labor Relations Act outlawed Yellow Dog Contracts, guaranteeing that employees could engage in “protected concerted activities.”¹³ Nevertheless, all of these cases are the result of twenty first century employers modernizing Yellow Dog Contracts.

When the Seventh Circuit and the Ninth Circuit agreed with the NLRB and its reasoning in the *D.R. Horton* case that these forced agreements were illegal, the split among the circuits foreshadowed involvement from the Supreme Court, hence the 2017 decision of the Justices to grant cert was no surprise. What is a surprise is the change of position of the Office of the Solicitor General. In September of 2016, the Solicitor General’s office filed a petition for review on behalf of the NLRB arguing that agreements requiring employees to resolve employer-employee disputes through individual arbitration are NOT enforceable because the NLRA protects employees’ ability to engage in joint actions regarding the terms or conditions of their employment.¹⁴ In June of 2017, the Office of the Solicitor General changed its position, dropping its support for workers in favor of management and employers.¹⁵ The Department of Justice has filed a new amicus brief, meaning it seeks to receive permission to argue in the case; the NLRB, therefore, will file its own case: one U.S. agency lawyer arguing against another U.S. agency lawyer.

⁶ *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013).

⁷ *Patterson v. Raymours Furniture Co.*, 659 F. App’x 40 (2nd Cir. 2016); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013).

⁸ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

⁹ *Id.*

¹⁰ *Id.*

¹¹ Amicus Brief National Academy of Arbitrators, August 10, 2017.

¹² See JOEL I. SEIDMAN, *THE YELLOW DOG CONTRACT* (1932). Retrieved from <https://www.questia.com/library/61965723/the-yellow-dog-contract>.

¹³ NLRA 29 U.S.C. §§ 151-169, §§ 7 & 8(a)(1).

¹⁴ *Petition for Writ of Certiorari, NLRB v. Murphy Oil USA, Inc.*, No. 16-307 (2016), available at <http://www.scotusblog.com/wp-content/uploads/2016/10/16-307-cert-petition.pdf>.

¹⁵ <http://www.scotusblog.com/2017/06/murphy-oils-law-solicitor-generals-office-reverses-course-arbitration-cases-supports-employers>.

Multiple amicus briefs have been filed for the Murphy Oil trilogy case,¹⁶ reflecting similar arguments filed in the Circuit court cases. Labor Law Scholars, for example, filed a brief in favor of the employee appellees in the *Lewis v. Epic Systems* case heard in the Seventh Circuit arguing that, under Sections 7 & 8(a)(1) of the National Labor Relations Act, an employee has “the right to...engage in concerted activities...for the purpose of collective bargaining or other mutual aid or protection” and that is an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of [these] rights.”¹⁷ Likewise, the National Academy of Arbitrators submitted an amicus brief in favor of the employees and the NLRB in the Murphy Trilogy case arguing that “collective statutory claims presented in employment arbitration can be heard as simply, flexibly, informally, and expeditiously as these very same claims are commonly heard in labor arbitration.”¹⁸ Labor arbitrators hear group claims frequently, handling cases in which all members of a large bargaining unit form a class for the arbitrator to deal with collectively; collective arbitrations can translate into non-union settings.¹⁹ The National Academy of Arbitrators emphasizes the fact that “the premise of employer policies prohibiting individual workers from joining one another in pursuing a common claim rests on the assumption that a multiplicity of individual claims would not actually be submitted.”²⁰ When employees are forbidden to join together, they are unlikely to pursue any grievance and “employers will rarely be called to account, leaving a gap in the realization of basic employment protections.”²¹

Despite the change in the DOJ, the Administration, and the Supreme Court composition, the October 2017 oral arguments in the Murphy Oil Trilogy case revives a focus on labor law, and the fundamental laws that disallowed Yellow Dog contracts. This article will provide a survey of federal labor laws and anti-trust laws, from the Sherman Act to the Norris-LaGuardia and Fair Labor Standards Acts, along with key cases that shape the platform for the NLRB’s petition for review for the Murphy Trilogy cases including an overview of the role of the savings clause of the Federal Arbitration Act in the NLRB petition. It will explain the similarities of facts, issues and rule of law in the three cases--*Murphy Oil*, *Lewis v Epic Systems*, and *Morris v Ernst & Young*, clarifying how the NLRB, the Seventh and Ninth Circuits decided in favor of the employees based on the concept of “concerted activities” from the NLRA, Sections 7 & 8. Finally, the authors will join voices with that of the Amici Labor Law Scholars and the National Academy of Arbitrators in support of the Supreme Court deciding in favor of disallowing forced individual arbitration for employer-employee disputes in employment contracts.

Might the Supreme Court decide in favor of the employees and the NLRB in the Murphy Oil Trilogy? If so, might the decision open an opportunity for non-unionized employees to join together to bring arbitrations against employers in a less expensive setting than a formal trial court? Might this be a new way for unions to organize? If the Court, however, defends the employers in their unilateral contracts and upholds the prohibition of joint or group collective

¹⁶ Twenty one briefs have been filed as of August 2017. <http://www.scotusblog.com/case-files/cases/national-labor-relations-board-v-murphy-oil-usa-inc>.

¹⁷ National Labor Relations Act §§ 7-8(a)(1).

¹⁸ Personal email correspondence with Matthew Finkin, Attorney for Amici Labor Law Scholars, June 2017.

¹⁹ In the case of *Lewis v Epic Systems Corp*, (Seventh Circuit, 2015). Brief of Amici Labor Law Scholars in Support of Appellees and Affirmance, No. 15-2997.

²⁰ See *supra* note 19.

²¹ *Id.*

arbitration, what do these and similarly placed employees do next? As non-union employees, they will continue to be victimized by actions from their employers, preventing them to join in any “concerted activity” by nature of their individual contracts. If they were to join in a certified union, would their individual contracts be replaced by the collective agreement, so that employers would have to answer for unfair labor practices, be those involving wages, overtime, discrimination or hostile work environments?²²

HISTORICAL CONTEXT

The first U.S. Supreme Court case to disallow labor unions was *Loewe v. Lawlor*, also known as the Danbury Hatters’ case,²³ which used the Sherman Anti-Trust Act of 1890 and its emphasis on the prohibition of monopolies to argue that labor unions were a conspiracy in the restraint of trade.²⁴ Loewe & Company was a fur hat manufacturer in Danbury, Connecticut and declared itself an open shop, thereby not requiring its employees to join a union. The United Hatters of America (UHU) reacted strongly, joining forces with the American Federation of Labor (AFL) to organize a nationwide boycott persuading wholesalers, retailers and customers from buying hats from Loewe’s.²⁵ The 240 hat makers at Loewe’s wanted the UHU and the AFL as their bargaining agent. The hat manufacturer sued the unions and the individual employees for violation of the Sherman Act claiming that their boycott had interfered with its ability to sell its hats in interstate commerce. The unions and employees argued that their actions affected only intrastate commerce; they had not interfered with the transportation of hats. However, the Supreme Court found that the UHU had been acting in restraint of commerce because the Sherman Act simply prohibited any form of conspiracy of restraint of trade. Although the boycott and strike had originated only in Connecticut, the combination of the strikes nationwide was a violation of the Sherman Act.²⁶

The Sherman Act, with its focus on fighting conspiracies in restraint of trade and its emphasis on encouraging competition in commerce, is divided into two main sections: Section 1 addresses anticompetitive conduct and Section 2 prohibits monopolies:

Section 1: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

Section 2: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or

²² J.I. Case Co. v. NLRB, 321 U.S. 332 (1944).

²³ *Lowe v. Lawlor*, 208 U.S. 224 (1908).

²⁴ Sherman Antitrust Act of 1890, 29 Stat. 209 (current version at 15 U.S.C. §§ 1-7 (2012)).

²⁵ See <https://www.jud.ct.gov/lawlib/history/Hatters.htm>.

²⁶ 208 U.S. 224.

commerce among the several States, or with foreign nations, shall be deemed guilty of a felony [. . .]"²⁷

Labor unions, thus, were illegal; they were seen as “price fixers.” The ruling in the Danbury Hat case deprived labor unions and employees of an effective tactic and the fact that the individual employees were also liable for damages had an impact on union organizing. The AFL responded with a campaign to convince Congress to reform antitrust laws.

The Clayton Act of 1914 made clear that “the labor of a human being is not a commodity or an article of commerce” and therefore cannot be controlled under the auspices of the Sherman Act and its focus on anti-trust activities.²⁸ It therefore reversed the Danbury Hat case and made clear that the Commerce Clause did not apply to labor; labor was not a commodity. Nevertheless, courts continued to rule against antitrust laws until the enactment of the Norris-LaGuardia Act in 1932 which barred the federal courts from issuing injunctions against nonviolent labor disputes and made clear that employers could not interfere with workers engaging in collective activities such as joining trade unions.²⁹

Sections 2 and 3 of the Norris-LaGuardia Act declares it to be the “public policy of the United States” that the individual employee be free of “interference” or “restraint” by employers when they engage in “concerted activities for the purpose of . . . mutual aid or protection”³⁰ and that “any undertaking or promise” that is contrary to the policy declared in Section 2 “shall not be enforceable in any court of the United States.”³¹ As the Supreme Court reviews the petition in the Murphy Oil Trilogy, this law should make clear that the Court cannot enforce the employee agreements at issue.

The Norris-LaGuardia Act also outlawed yellow-dog contracts by virtue of its protection of a broad range of concerted activity engaged to improve working conditions, including collective litigation.³² The Act provides:

“No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts: . . .

(d) By all lawful means aiding any person participating or interested in any labor dispute who is . . . prosecuting, any action or suit in any court of the United States or of any State; . . .

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified.”³³

Norris-LaGuardia clearly encompasses collective enforcement of workplace rights such as those sought by the plaintiffs in the Murphy Trilogy cases.

²⁷ 15 U.S.C. § 1 (2012).

²⁸ Clayton Antitrust Act of 1914, 15 U.S.C. §§ 12-27 (2012); 29 U.S.C. §§ 52-53 (2012).

²⁹ Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (2012).

³⁰ *Id.* § 102.

³¹ *Id.* § 103.

³² *Id.* §§ 101-115.

³³ *Id.* § 104.

Subsequently, the National Labor Relations Act (NLRA), the Wagner Act of 1935, emphasized the provisions discussed above in the Norris-LaGuardia act by specifically allowing for “concerted protected activities” among employees.³⁴ Section 7 of the NLRA guarantees employees “the right to self-organization, to form, join, or asset labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”³⁵ Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer “to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7.”³⁶ Unfair labor practices have been further defined. The Murphy Oil Trilogy cases illustrate a clear violation of Sections 7 and 8 of the NLRA and present vivid examples of unfair labor practices.

In several of the Murphy Oil Trilogy cases the employers rely on the Federal Arbitration Act (FAA) which requires courts to “place arbitration contracts on equal footing with all other contracts and to enforce them according to their terms.”³⁷ However, the savings clause of the FAA allows arbitration agreements to be invalidated “upon such grounds as exist at law or in equity for the revocation of any contract.”³⁸ Given that the Norris-LaGuardia Act declares that “no court of the United States shall have jurisdiction” over any agreement between workers and employers “to do or not do” any “concerted activities” concerning working conditions, the agreement forced on the employees for individual arbitration are void and null under the FAA.

An employer that engages in violations of workers’ rights in the arena of wage, overtime or working conditions while concomitantly denying them the right to engage in “concerted activities” to improve their lives is a violation of the law and of our moral rights. Relying on eighty years of the rule of law in this country, the Supreme Court must rule with the appellees in the Murphy Oil trilogy.

“CONCERTED ACTIVITY”: NLRA

Immediately after President Roosevelt’s inauguration, Congress focused on the implementation of laws designed to stimulate the economy. One such statute was the National Industrial Recovery Act (NIRA), designed to allow employers within a single industry to cooperate fairly in order to establish certain employment standards, promote production, and stimulate purchasing power without violating antitrust laws. “In effect, the Act permitted price-fixing in exchange for industry’s willingness to maintain employment and agreed-on wage levels.”³⁹

Section 7(a) of the NIRA—the precursor of the NLRA—required the following terms:

- (1) “The employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers...in the designation of such representatives...or in

³⁴ National Labor Relations Act §§ 7-8(a)(1).

³⁵ *Id.* § 7.

³⁶ *Id.* § 8(a)(1).

³⁷ Federal Arbitration Act (hereinafter “FAA”), 9 U.S.C. §§ 1-16 (2012).

³⁸ *Id.* § 2

³⁹ KENNETH G. DAU-SCHMIDT, MARTIN H. MALIN, ROBERTO L. CORRADA, CHRISTOPHER DAVID RUIZ CAMERON & CATHERINE L. FISK, LABOR LAW IN THE CONTEMPORARY WORKPLACE 49 (2009)

- other concerted activities for the purpose of collective bargaining or other mutual aid or protection;”
- (2) “That no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organization, or assisting a labor organization of his own choosing.”⁴⁰

NIRA was signed into law on June 16, 1933, and was to remain in effect for two years. On May 27, 1935, three weeks before the act would have expired, it was found unconstitutional by the United States Supreme Court in *Schechter Poultry Corp. v. U.S.*⁴¹ However, that same year Congress passed, and President Roosevelt signed into law, the National Labor Relations Act.⁴² In doing so, the President issued a statement describing his hope for American industry, which stated in part:

“A better relationship between labor and management is the high purpose of this act. By assuring the employees the right of collective bargaining it fosters the development of the employment contract on a sound and equitable basis. By providing for an orderly procedure for determining who is entitled to represent the employees, it aims to remove one of the chief causes of wasteful economic strife. By preventing practices which tend to destroy the independence of labor it seeks, for every worker within its scope, that freedom which is justly his.”⁴³

The NLRA is designed to promote peace between management and labor, while improving the relationship between the two.⁴⁴ Section 7 of the NLRA is the heart of the law, setting forth the employee’s fundamental right to organize, to bargain collectively and to engage in other concerted activities for mutual aid and protection.⁴⁵ It effectively guarantees employees the right “to engage in ... concerted activities for the purpose of collective bargaining or other mutual aid or protection.”⁴⁶

Section 8(a) of the NLRA provides that an employer who violates an employee’s section 7 rights commits an unfair labor practice (ULP),⁴⁷ and authorizes the NLRB to take action against the employer.⁴⁸ Section 8(a)(1) states that it is an ULP for an employer to “interfere with, restrain, or

⁴⁰ National Industrial Recovery Act § 7.

⁴¹ 295 U.S. 495 (1935).

⁴² Like the NIRA, the NLRA’s constitutionality was questioned, but the U.S. Supreme Court upheld the act in *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

⁴³ See Franklin Roosevelt’s Statement on the National Labor Relations Act (The Wagner Act). Retrieved from <http://docs.fdrlibrary.marist.edu/odnlrast.html>.

⁴⁴ See *American Bread Co. v. NLRB*, 411 F.2d 147 (6th Cir. 1969) (purpose of Act is to promote peace within the labor-management relationship); see also *International Ass’n of Machinists v. NLRB*, 362 U.S. 411, 428 (1960) (intent of the Act is adjustment and compromise of competing interests between labor and management).

⁴⁵ National Labor Relations Act § 7. Section 7 also provides employees the right to refrain from joining in collective bargaining or other concerted activities unless required as a condition of employment. *Id.*

⁴⁶ *Id.* § 7; See *Morrison-Knudsen Co. v. NLRB*, 358 F.2d 411, 413 (9th Cir. 1966) (when employee complained of working conditions, the Court rejected employer’s argument that activities for “mutual aid or protection” must be related to “collective bargaining” activity).

⁴⁷ *Id.* § 8(a).

⁴⁸ *Id.* § 10.

coerce employees in the exercise of rights guaranteed by Section 7.”⁴⁹ Section 8(a) has four additional subsections—each addressing a different type of conduct.⁵⁰ The Board’s test for interference, restraint, and/or coercion is an objective one and “depends on whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.”⁵¹

The scope of protected concerted activities by employees is a fundamental aspect of the Act, which has resulted in significant scholarship and case law addressing this issue. Despite the importance of Section 7,⁵² Congress did not define “concerted activities” within the Act, leaving the NLRB and the courts to define this term and its scope. While there is no specific statutory definition, the language of the Act suggests protected concerted action under section 7 will be found when employees take group action,⁵³ whether such action involves NLRA rights or not.

For example, employers were found to have violated section 8(a) of the act when terminating employees for participation or initiation in non-NLRA employment related agency charges or complaints,⁵⁴ participation in non-NLRA employment related claims filed in state or federal court,⁵⁵ meeting with one another to discuss and prepare evidence supporting non-NLRA

⁴⁹ *Id.* § 8(a)(1).

⁵⁰ Section 8(a)(2) prohibits an employer from dominating a union. *See Id.* § 8(a)(2). Section 8(a)(3) prohibits an employer from discriminating against an employee in his or her hiring, tenure, or terms or conditions “to encourage or discourage membership in any labor organization.” *Id.* § 8(a)(3). Section 8(a)(4) protects employees from retaliation for filing a ULP charge with the NLRB or providing testimony related to such charges. *Id.* § 8(a)(4). Section 8(a)(5) prohibits an employer from bargaining in bad faith. *Id.* § 8(a)(5).

⁵¹ *Baptistas Bakery, Inc.*, 352 N.L.R.B. 72 (2008).

⁵² The United States Supreme Court has found employee’s Section 7 rights so important in the labor context that they have been labeled as fundamental. *See NLRB v. Jones & Laughlin Steel Co.*, 301 U.S. 1, 33 (1937) (right of employees to self-organize for collective bargaining and other mutual protection without interference from the employer is fundamental right).

⁵³ *See National Labor Relations Act Section 7: Protecting Employee Activity Through Implied Concert of Action*, 76 Nw. U.L. Rev. 813, 819 (1981) (section 7 literally requires at least two employees acting together to constitute protected concerted activity).

⁵⁴ *See, e.g.*, *Walls Mfg. Co.*, 137 NLRB 1317, 1319 (1962), *enfd.* 321 F.2d 753 (D.C. Cir. 1963), *cert. denied* 375 U.S. 923 (1963) (employee’s termination in retaliation for letter to a state regulatory agency complaining about unsanitary conditions violated Sec. 8(a)(1); *Socony Mobil Oil Co.*, 153 NLRB 1244, 1248 (1965), *enfd.* 357 F.2d 662 (2d Cir. 1966) (employee suspension in retaliation for alleged insubordination during a Coast Guard investigation and complaint to the Coast Guard violated Sec. 8(a)(1); *Wray Electric Contracting, Inc.*, 210 NLRB 757 (1974) (employer who terminated employee for filing OSHA claim on behalf of union held to violate Sec. 8(a)(3) and (1)); *Triangle Tool & Engineering, Inc.*, 226 NLRB 1354 (1976) (employee terminated in retaliation for union activity and seeking aid from U.S. Department of Labor was in violation of Sec. 8(a)(3) and (1)).

⁵⁵ *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295 (5th Cir. 1976) (court held “filing by employees of a labor related civil action is protected activity under Section 7” and employer violated Section 8(a)(1) when it terminated two employees based on their alleged failure to read affidavits filed in union’s state court injunction proceeding).

employment related claims⁵⁶ and raising funds and public awareness regarding non-NLRA employment related court cases.⁵⁷

Section 7 has been applied to protect employees who engage in acts involving more than one employee *and* the activity consists of legitimate complaints related to working conditions, including wages, pensions and alleged unlawful discriminatory conduct.⁵⁸ Conversations between only two people are concerted if the discussion is “looking toward group action,”⁵⁹ even if they never resulted in actual group action.⁶⁰

However, not all instances involving action by a group of employees has been found to be a violation of section 8(a). An employee’s activity that is unlawful or is unrelated to employment conditions, will not receive section 7 protection prohibiting employee termination.⁶¹ The United States Supreme Court further narrowed the scope of employer liability under section 8(a) in *NLRB v. Burnup & Sims, Inc.*,⁶² wherein it established that a violation of section 8(a) requires the employee be engaged in protected concerted activity at the time of discharge, the employer have knowledge that section 7 protects the employee’s activity, and the employer terminated the employee because the employee engaged in that protected concerted activity.⁶³

The legislative history, and relevant case law, indicates that employees engaged in concerted activity or collective bargaining will generally be afforded protection. However, it remained unclear whether concerted activity pursuant to section 7 included acts of an individual employee or whether employees must act together to gain protection from termination. Courts addressed individual activities when determining the scope of “mutual aid or protection” as identified in

⁵⁶ *Sarkes Tarzian, Inc.*, 149 NLRB 147 (1964) (several employees met with union attorney to discuss libel action against employer which was protected, concerted activity); *Spandisco Oil & Royalty Co.*, 42 NLRB 942 (1942) (three employees jointly consulted an attorney regarding FLSA claims and ultimately filed FLSA suit against employer, which was deemed concerted activity protected by the Act and discharge of employees for filing lawsuit violated the Act);

⁵⁷ *California Institute of Technology Jet Propulsion Laboratory*, 360 NLRB No. 63 (2014) (emails publicizing litigation against employer); *United Parcel Service*, 252 NLRB 1015 (1980) (employee distributed information among other employees seeking their participation in a class action lawsuit against employer for various state law claims regarding breaks, collected money from employees for retainer and acted as contact between attorney and thirteen employees named as plaintiffs), *enfd.* 677 F.2d 421 (6th Cir. 1982).

⁵⁸ *Frank Briscoe, Inc. v. NLRB*, 637 F.2d 946 (3rd Cir. 1981) (Employee filing of EEOC charge regarding alleged discriminatory practices was activity for mutual aid or protection); *Essex Int’l, Inc.*, 213 NLRB 260 (1974) (three employees complaining to management about poor work equipment were deemed to be engaged in protected concerted activity); *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1245 (3rd Cir. 1969) (two employees complaining to management regarding profit sharing plan engaged protected concerted activity), *cert. denied*, 397 U.S. 935 (1970).

⁵⁹ *Mushroom Transp. Co., Inc. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).

⁶⁰ *Id.*

⁶¹ *See, e.g., Southern S.S. Co. v. NLRB*, 316 U.S. 31 (1942) (holding that sit-down strikers who violated criminal code engaged in unlawful, unprotected activity); *Puerto Rico Food Prods. Corp. v. NLRB*, 619 F.2d 153 (1st Cir. 1980) (employee complaints unrelated to working conditions will not be protected concerted activity); *Tabernacle Community Hosp. & Health Center*, 233 NLRB 1425 (1978) (Board held that employee’s complaint regarding transfer was personal, and therefore, unprotected by section 7 of the Act).

⁶² 379 U.S. 21, 23 (1964)

⁶³ *Id.*

section 7. In doing so, courts found “individual griping and complaining does not satisfy the mutual aid requirement and will not afford an employee protection.”⁶⁴

Nonetheless, through a series of cases, the Board and federal courts began to define the breadth of the law as it relates to an individual employee acting alone and his or her protection pursuant to section 7 of the Act. Initially, there was a reluctance to find section 7 protected concerted activity or an employee acting alone who complained about working conditions.⁶⁵

However, beginning with *Interboro Contractors*,⁶⁶ the Board found an employee acting alone to enforce a collective bargaining agreement could be protected under section 7, which would become known as the *Interboro* doctrine. This case involved an employee, John Landers, who made numerous complaints to management regarding various safety concerns and pointed out that the company was in violation of the collective bargaining agreement and local city fire regulations. Landers went on to request certain equipment be provided to the employees for their safety. Landers was ultimately terminated, resulting in his claim that Interboro committed unfair labor practices in violation of section 8(a)(1) of the Act.

The Administrative Law Judge (ALJ) found that Landers’ activities were not protected under section 7 because he acted alone and for his own benefit. On review, the Board disagreed because it found he acted in concert with two other employees. Importantly, the Board went on to note that even if Landers had acted alone in his complaint to management that his conduct would be protected because the complaints were attempts to enforce the collective bargaining agreement that affected the rights of all employees.⁶⁷ The Board’s decision was upheld by the Court of Appeals,⁶⁸ including the portion of the decision that the complaints were protected concerted activity even if employee was acting only for himself in asserting his right under the collective bargaining agreement.⁶⁹

The *Interboro* decision was controversial resulting in several circuits rejecting the decision claiming the statute requires some activity involving group action.⁷⁰ The United States Supreme Court, however, resolved the issue in *City Disposal Sys., Inc. v. NLRB*,⁷¹ when it upheld

⁶⁴ See, e.g., *NLRB v. Buddies Supermarkets, Inc.*, 481 F.2d 714 (5th Cir. 1973); *Pelton Casteel, Inc. v. NLRB*, 627 F.2d 23, 28 (7th Cir. 1980) (employee’s complaints about pay and overtime were unprotected “personal griping” not concerted activity); *Inked Ribbon Corp.*, 241 N.L.R.B. 7 (1979) (individual employee claiming wage increase and other benefits for herself only was not deemed concerted activity).

⁶⁵ See, e.g., *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1963) (individual employee’s complaints to other employees that company was treating them unfairly was not concerted protected activity); *Continental Mfg. Corp.*, 155 N.L.R.B. 255 (1965) (employee who sent letter to management regarding unsanitary conditions and same employee’s complaints about unfair supervisors was not protected under section 7 of the Act).

⁶⁶ 157 N.L.R.B. 1295 (1966)

⁶⁷ *Id.* at 1298. The Board relied on its previous decision in *Bunny Brothers Construction Company*, 139 N.L.R.B. 1516 (1962), which found an individual employee seeking to enforce a collective bargaining agreement was concerted activity.

⁶⁸ *NLRB v. Interboro Contractors, Inc.* 388 F.2d 495 (2d Cir. 1967) (individual employee’s attempts to enforce provisions of collective bargaining agreement constitute protected concerted activity).

⁶⁹ *Id.* at 500.

⁷⁰ See, e.g., *ARO, Inc. v. NLRB*, 596 F.2d 713, 717 (6th Cir. 1979) (broadened definition of concerted action in section 7 “goes too far”); *Royal Dev. Co. v. NLRB*, 703 F.2d 363, 374 (9th Cir. 1983) (*Interboro* doctrine exceeds express language of section 7).

⁷¹ 465 U.S. 822 (1983).

Interboro and found an individual employee's assertion of a right contained in a collective bargaining agreement constituted concerted activity for the purposes of section 7.⁷² In this case, James Brown, an employee refused to drive an unsafe truck. Brown did not involve any other employees, but simply refused to drive the faulty vehicle. Brown was terminated as a result of his refusal and he initiated an unfair labor practice claim with the NLRB.⁷³ The matter was heard by an ALJ, the Board, and ultimately appealed to the Sixth Circuit and the United States Supreme Court. The Supreme Court, in holding Brown was entitled to protection under section 7, found that when an employee invokes the rights of a collective bargaining agreement, he does so not for himself only, but for his fellow employees who are part of the agreement as well. The Court emphasized that although the legislative history of section 7 does not expressly define concerted activity, there is no indication Congress did not intend to protect the employee who seeks to assert rights contained in a collective bargaining agreement. Accordingly, Brown's refusal to drive an unsafe vehicle was protected concerted activity.⁷⁴

Finally, an individual employee's actions were found to constitute concerted activity within section 7 even without a collective bargaining agreement. This was the issue the NLRB considered in *Alleluia Cushion Co.*,⁷⁵ involving an employee who complained individually to management about the working conditions of all employees when no collective bargaining agreement was in place. This case involved an employee, Jack Henley, who complained to management about unsafe working conditions and later complained to state safety inspectors who discovered numerous safety and health hazards.⁷⁶ The company fired Henley, who claimed his conduct was protected concerted activity. The NLRB determined his complaints constituted protected concerted activity.⁷⁷ The NLRB concluded that although Henley acted on his own, his complaints reflected safety concerns of his co-employees, and therefore, he did not need to communicate his complaints to management with his fellow employees.⁷⁸

NLRB v. MURPHY OIL USA; LEWIS V. EPIC SYSTEMS (7TH CIR. 2016); MORRIS V. ERNST & YOUNG, LLP (7TH CIR. 2016)

More and more, employers are forcing employees to sign restrictive employment agreements such as non-compete contracts and forced arbitration provisions. These restrictive contracts require employees to sign, or otherwise agree to the provisions, or else face termination. In most instances, simply continuing employment equates to assent to the provisions without the need for an employer to provide a raise or other additional consideration beyond merely allowing an employee to keep his or her job.⁷⁹

⁷² *Id.* at 831-32. The United States Supreme Court reasoned collective bargaining agreements would be useless if an individual employee covered by the agreement was unable to assert rights within the agreement against his employer.

⁷³ *Id.* at 827.

⁷⁴ *Id.* at 841.

⁷⁵ 221 N.L.R.B. 999 (1975).

⁷⁶ *Id.*

⁷⁷ *Id.* at 1001.

⁷⁸ *Id.* at 1000.

⁷⁹ Stone, Katherine V.W., *The Arbitration Epidemic. Mandatory Arbitration Deprives Workers and Consumers of Their Rights*, Economic Policy Institute, December 7, 2015, accessed August 28, 2017 at <http://www.epi.org/publication/the-arbitration-epidemic/>

In the recent Seventh Circuit case of *Lewis v. Epic Systems Corp.*, the employer sent an email to its workers detailing that they were suddenly required to bring any wage-and-hour dispute, such as misclassification and entitlement to overtime under the Fair Labor Standards Act (FLSA), via arbitration only. Additionally, the employees had to agree to waive their right to seek relief in any “class, collective, or representative proceeding.”⁸⁰ The company gave employees no choice but to accept these provisions or quit since continuing to work automatically constituted acceptance.⁸¹

The specific language of the email contained an arbitration agreement but also informed employees they waived “the right to participate in or receive money or other relief from any class, collective, or representative proceeding.”⁸² The employer titled this section a “Waiver of Class and Collective Claims” and also informed employees that if this clause was deemed unenforceable that “any claim brought on a class, collective, or representative action basis must be filed in a court of competent jurisdiction,” presumably seeking to preclude employees from proceeding as a class or otherwise collectively in arbitration.⁸³

After continuing to work for the employer, and thus accepting the new terms regarding methods for bringing wage-and-hour disputes, Lewis nonetheless brought suit in federal court under Rule 23 as a class action, claiming Epic had violated the FLSA and state law by misclassifying him along with other technical writers. He claimed the writers were thus entitled to overtime pay.⁸⁴ In seeking to have the suit dismissed, the company relied upon the new forced arbitration provision to claim the workers could only bring individual arbitration actions and, could not, in arbitration or in court, band together as a class.⁸⁵

In the similar Ninth Circuit case of *Morris v. Ernst & Young, LLP*, the employer forced employees to sign an agreement called a “concerted action waiver” whereby employees agreed to only pursue claims in arbitration and also to only file arbitration claims as individuals. The language not only required employees to bring legal claims via arbitration but also to do so only as individuals in “separate proceedings.”⁸⁶ The court noted the effect of these two combined provisions resulted in a bar against employees seeking concerted claims in either arbitration or in court.⁸⁷ As in *Lewis*, a group of plaintiffs in *Morris* sought relief under the FLSA and state law for misclassification and entitlement to overtime in court. The employer similarly moved to have the case dismissed based upon the concerted action waiver the employees had signed.⁸⁸

Both courts focused on similar legal principles in finding the limitations imposed upon the employees violated the NLRA and were thus unenforceable. The first was agreement that the

⁸⁰ *Lewis v. Epic Systems, Corp.*, 823 F.3d 1147, 1151 (7th Cir. 2016)

⁸¹ *Id.* at 1151. The court did not address whether continuation of employment was sufficient consideration to render the provisions an enforceable contract.

⁸² *Id.* At 1151

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 979 (9th Cir. 1016)

⁸⁷ *Id.*

⁸⁸ *Id.*

employees' right to pursue legal remedies together was a substantive right, rather than a mere procedural issue. The courts determined that the protection of the NLRA allowing employees to pursue legal remedies in concert was substantive rather than procedural in nature.⁸⁹ The *Morris* court stressed the substantive language in Section 7 of the NLRA which emphasizes the right of employees as to organization. Rights such as the right to engage in concerted activity are substantive in nature, and the procedural limitations the employer's restrictions placed upon that right were an infringement of one of the "central, fundamental protections of the Act," the court wrote.⁹⁰ Similarly, the court in *Lewis* determined the right to collective action "lies at the heart" of the NLRA.⁹¹

Another common conclusion was that the NLRA and the Federal Arbitration Act (FAA) were not in conflict as to require enforcement of the arbitration clauses. Both employers argued that the FAA required the court to enforce the forced, individual claim arbitration provisions as "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract" as the FAA dictates.⁹² Both courts agreed the conflict between the NLRA and the FAA the employers alleged didn't really exist. This was not a problem of two competing statutes. One didn't necessarily "trump" the other due to the "saving clause" in the FAA.⁹³ Having already determined the contracts between the employers and the employees effectively forced employees to waive a substantive right, the contract was illegal by operation of the NLRA.⁹⁴ When contracts are illegal, the "savings clause" of the FAA prohibits the enforcement of the contract when otherwise it might require the arbitration clause be given legal effect. The *Morris* court wrote the wording of the statutes and the contracts' illegality forced the "FAA's enforcement mandate to yield."⁹⁵ Similarly, the court in *Lewis* decided, after determining the contract was illegal as a violation of the NLRA, there were sufficient "grounds" for the revocation of the contract, and the FAA's saving mandate to enforce arbitration agreements no longer applied to an illegal contract.⁹⁶

Yet, forcing their employees to use arbitration as the exclusive means to seek relief for wage-and-hour disputes was not necessarily prohibited by the NLRA, according to the *Morris* court.⁹⁷ The NLRA's prohibition is directed toward limiting concerted legal claims generally and an employer/employee agreement to force arbitration over the court system is not in conflict with the NLRA.⁹⁸ Since the agreement in *Morris* attempted to specifically limit concerted claims in arbitration, the *Morris* court determined that forcing employees to only use arbitration to seek relief resulted in the violation of the NLRA.⁹⁹

⁸⁹ *Morris*, supra, at 986 and *Lewis*, supra, at 760

⁹⁰ *Morris*, supra at 986

⁹¹ *Lewis*, supra, at 1160

⁹² *Lewis*, supra, at 1156 citing to the Federal Arbitration Act, 9 U.S.C. § 2 and *Morris*, supra, at 987

⁹³ *Morris*, supra, at 987.

⁹⁴ *Morris*, supra, at 988 and *Lewis*, supra, at 1157.

⁹⁵ *Morris*, supra, at 986.

⁹⁶ *Lewis*, supra at 1157.

⁹⁷ *Morris*, supra at 984.

⁹⁸ *Id.*

⁹⁹ *Id.*

While the *Morris* court's ruling seemed to hinge upon the lack of any other available venue besides arbitration, the employer in *Lewis* kept open the possibility that employees might bring suit in court.¹⁰⁰ The language of the prohibition in *Lewis* stated that wage-and-hour disputes had to be brought individually in arbitration, but also that if an employee were to overcome this obstacle somehow and bring a suit in court, the employee could not take advantage of any procedural rules to bring a collective action.¹⁰¹ This restriction on collective action was what the *Lewis* court found to run "straight into the teeth of Section 7" of the NLRA.¹⁰²

The NLRA's Section 7 dictates that employees have the right to self-organize as labor organizations but also affords employees broader protection beyond participation in a formal, recognized union. It gives employees to the right to engage in "other concerted activity" for "mutual aid and protection."¹⁰³ In addition, Section 8 of the NLRA enforces Section 7 making it clear employers engage in an unfair labor practice by interfering with, restraining or coercing employees who might try to exercise their rights under Section 7.¹⁰⁴ Therefore, limiting the right of employees to combine together to enforce wage-and-hour disputes in any forum, whether in arbitration or in court, violates the act.¹⁰⁵

Although the contract clauses were not exactly the same in the *Lewis* and *Morris* cases, the effect was similar. In both cases, employees were effectively restricted from bringing a suit as a class, either because the employer forced employees to only litigate individually via arbitration, as in *Morris*,¹⁰⁶ or going a step further to also limit collective action specifically in court as in *Lewis*.¹⁰⁷ The NLRA does not prohibit arbitration outright, the *Lewis* court pointed out. In fact, the NLRA is "pro-arbitration" since it allows both unions and employers to engage in arbitration to resolve disputes.¹⁰⁸ The problem is that the contract between the employer and the employee seeking to force arbitration also attempted to force individual actions.¹⁰⁹ Thus, the restriction was more than just forcing a particular venue. It also caused a prospective waiver on an employee's substantive right to pursue a statutory remedy to bring suits collectively.¹¹⁰

Similar to the *Lewis* and *Morris* cases, a third case in *Murphy Oil, Inc. v. NLRB*, an employer again attempted to use restrictive contract language forcing employees to adjudicate any wage-and-hour labor disputes under the FLSA in arbitration and only as individuals.¹¹¹ The clause stated employees gave up the right "to commence or be a party to any group, class or collective action claim in ... any other forum" besides arbitration.¹¹² The Fifth Circuit upheld the NLRB's order, which followed similar analysis as the *Lewis* and *Morris* courts in declaring the forced,

¹⁰⁰ *Lewis*, supra, at 1151.

¹⁰¹ *Lewis*, supra at 1155.

¹⁰² *Id.*

¹⁰³ *Lewis*, supra at 1151.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Morris*, supra.

¹⁰⁷ *Lewis*, supra.

¹⁰⁸ *Lewis*, supra at 1158.

¹⁰⁹ *Lewis*, supra.

¹¹⁰ *Lewis*, supra, at 1160.

¹¹¹ *Murphy Oil*, supra.

¹¹² *Id.* at 1020.

individual arbitration agreement imposed upon employees was invalid as an unfair labor practice under Section 8.¹¹³

CONCLUSION

The Murphy Oil Trilogy cases arise out of the workplace, bringing to force the Norris-LaGuardia Act and its progeny, the National Labor Relations Act, both of which ensure the right of employees to join together to secure their rights and benefits. Neither of these formidable labor laws allow employers to isolate their workers, forbidding them from engaging in “concerted activities” to remedy workplace violations. Ostensibly, an employer would pursue mandated individual contracts with employees only to prevent two or more coworkers who are victims of the same unfair labor practice to pursue a common claim together. These kinds of agreements enable employers to avoid legal accountability given the unlikelihood of numerous employees bringing separate claims individually. Non-unionized employees should have the ability to join together to access collective court or arbitration proceedings to find recourse for unfair labor practices.

If, however, the Court decides in favor of the employers in the Murphy Oil Trilogy, employees must look back to earlier Court decisions that give the benefit of collective bargaining agreements over individual agreements and, thus, decide to pursue the formation of a union in order to avoid the draconian dictates of certain clauses in individual contracts. In the 1944 case, *J.I. Case Company v. National Labor Relations Board*,¹¹⁴ the Court held that:

“...since the collective trade agreement is to serve the purpose contemplated by the [National Labor Relations] Act, the individual contract cannot be effective as a waiver of any benefit to which the employee otherwise would be entitled...The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group. Its benefits and advantages are open to every employee of the represented unit, whatever the type or terms of his pre-existing contract of employment...Individual contracts cannot subtract from collective ones...”¹¹⁵

The pursuit of a fair and just workplace may seem like a Sisyphean task, but the Murphy Oil Trilogy case has opened the door for workers, federal agencies, amici of the courts, and, the U.S. Supreme Court, to illustrate that the pursuit of justice for workers around the country is not futile.

¹¹³ *Id.*

¹¹⁴ *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944).

¹¹⁵ *Id.*

BROKEN-HEARTED AND EMPTY-HANDED: AN ANALYSIS OF THE SECONDARY MARKET FOR CONCERT TICKETS

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I. Introduction

Too often, fans who want to attend a live performance by their favorite musicians are left broken-hearted and empty-handed when tickets sell out minutes after they are released; only to wind up listed on reseller websites for much more than the original price. The secondary ticket market, estimated to generate \$8 billion per year¹, forces fans to either pay high prices or miss the show. Artists are often merely bystanders, watching their fans be charged what they consider outrageous prices by individuals and organizations who keep all of that additional revenue being generated by their performances. Resellers, also known as ticket scalpers, are the winners in these transactions.

In 2016, the federal government enacted The Better Online Ticket Sales Act (BOTS Act) in an effort to level the playing field for fans trying to acquire tickets in the primary market by outlawing computerized bulk buying. While that is a worthy endeavor, it does not address the transformation in the music industry that drives changing practices and financial incentives which perpetuate the problems of limiting consumer access to tickets and subjecting them to higher than advertised prices. Clearly, the secondary ticket market is a beast that the BOTS Act alone cannot tame.

This paper will look broadly at the options available to control the secondary ticket market for concert tickets. Part II will provide an overview of the market, before turning to the growing importance of concert ticket revenue in Part III. Part IV will build on that foundation by exploring the evolution of the market. Part V will summarize the current regulation of the secondary ticket market. Artist-driven alternatives will be examined in Part VI, leading to some concluding thoughts in Part VII.

II. Overview of the Concert Ticket Market

A. *Concert Tour Planning*

The music industry includes a very diverse group of artists. Superstars embark on lengthy world tours with huge crews and elaborate productions while struggling musicians travel with their equipment in beat up vans from bar to bar. For established artists, the logistics of touring, from organizing and transporting equipment to hiring staff to developing the actual stage production, requires a lot of advance planning.

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¹ Steve Knopper, Inside Bruce Springsteen and Taylor Swift's War on Scalpers, Ticket Bots, ROLLING STONE, Sept. 11, 2017. Available at <http://www.rollingstone.com/music/news/bruce-springsteen-taylor-swifts-war-on-scalpers-bots-w501961>.

Artists and their managers select from proposals offered by promoters, negotiating the number of performances, the size of the venues, and the price of the tickets.²

It is difficult to book venues because of the competition with other shows and the need to work around sports seasons since many of the same venues are used by teams, not to mention scheduling around actual

seasons for venues that are only available during appropriate weather. It has become common practice for acts to begin booking their tours more than a year in advance. To secure preferred venues and dates, tour preparation begins so far in advance that the music they will be releasing to coincide with the tour often hasn't even been made when the tour is booked.³

There is a high level of uncertainty for even the most established artists when decisions about the tour are initially made. They may "overestimate their own popularity" or the dates of their performances may coincide with other popular events whose schedules have not yet been announced.⁴ Given these circumstances, it would be difficult to predict the future market value of a ticket.

B. Primary Ticket Sales

The term primary ticket market generally refers to the first sale of each ticket, either directly through the box office of the venue or through a third party service provider like Ticketmaster. Although it may seem like 100% of the tickets for an event would be available in the primary ticket market, in practice, that is not the case. Blocks of tickets are held back for a variety of reasons. Artists choose to hold on to some tickets so they can distribute them to family, friends, and business associates. Tickets are often reserved for "pre-sales" to special groups like fan club members. There are also frequently contractual arrangements that require blocks of tickets to be reserved for sponsors or other businesses. Some credit card companies advertise that their customers will have access to hard-to-get tickets because they have an arrangement for tickets to be held out of the primary market for the benefit of their customers.⁵ Even the venue may have seats that are counted in the total capacity but never actually available because of season ticket holders or corporate boxes.⁶

The net result of this arrangement is that the first fan in line to buy tickets the day they are released to the public is not choosing from the entire pool of tickets for the event. Data regarding the number of tickets held out of the primary market is generally not available. However, an analysis by the New York Attorney General found that "only about 46% of tickets are reserved for the

² See, e.g., N.Y. Att'y Gen., *Obstructed View: What's Blocking New Yorkers from Getting Tickets*, Jan. 2016.

³ Jem Aswad, *Q Prime's Burnstein and Mensch, Part 2: On Touring, The Future of Metal, Adele's Success and Why It's Okay to Not Sell Out an Arena*, BILLBOARD (2016).

⁴ Gregory M. Stein, *Will Ticket Scalpers Meet the Same Fate as Spinal Tap Drummers? The Sale and Resale of Concert and Sports Tickets*, 42 PEPP.L.REV. 1, 15 (2014).

⁵ See generally N.Y. Att'y Gen., *Obstructed View: What's Blocking New Yorkers from Getting Tickets*, Jan. 2016.

⁶ Jess White & Patrick Preston, *Concert Promotion Centralization and the Artist Management Response: 1990s-2010s*, 14 MEIEA J. 13, 20 (2014)

public."⁷ While most fans are aware that they are competing with other fans for access to tickets, it is unlikely that they realize that a large percentage of the pool was never available.

The competition for the tickets that are released to the public is also difficult for the average fan. Not only are other individual fans potentially lined up at box offices or sitting in front of their computers waiting for ticket sales to begin, professional resellers are also using every trick and technology to move to the head of the line and buy as many desirable tickets as possible. The use of ticket bots is one pervasive technique.

A Ticket Bot is software that automates ticket-buying on platforms such as ticketmaster.com. Automation lets the Bot (1) perform each transaction at lightning speed, and (2) perform hundreds or thousands of transactions simultaneously. As a result, in the first moments after tickets to a top show go on sale, Bots crowd out human purchasers and can snap up most of the good seats.⁸

On a single day in December 2014, two Bots were able to secure more than 15,000 tickets at 20 different venues for concerts by the band U2.⁹ Between the limited number of tickets being made available and the competition with the resellers, many fans are squeezed out of the primary ticket market and forced to try their luck with secondary ticket sales.

C. Secondary Ticket Sales

Secondary ticket sales are literally the second time a ticket is sold. A transaction is considered part of the secondary ticket market regardless of the nature of the seller or the buyer. Prices vary dramatically in the secondary market. Many transactions involve a desperate fan buying a ticket from a stranger for considerably more money than the ticket sold for in the primary market. While other secondary ticket sales are for the face value of the ticket or even a lesser amount if demand is weak as the time for the event approaches.

Although it is important to acknowledge the very real frustration that consumers express with the outrageously inflated prices in the secondary ticket market, there are also secondary market transactions that are beneficial to fans. First of all, a person who is desperate to secure a ticket to see a favorite performer may prefer paying a high price to missing the show, so in a sense, the secondary ticket market did provide a benefit to that fan. Secondly, the ability to transfer an unusable ticket can be beneficial. If you have a ticket to a concert that you cannot use because of a family emergency and you sell that ticket to a friend for what you paid for it, that transaction is part of the secondary ticket market. This is beneficial to several parties: you recoup the money you spent on the ticket, your friend has the opportunity to see the show at a reasonable price, and the performer has a larger audience.¹⁰

⁷ N.Y. Att'y Gen., *Obstructed View: What's Blocking New Yorkers from Getting Tickets*, Jan. 2016, at 11.

⁸ N.Y. Att'y Gen., *Obstructed View: What's Blocking New Yorkers from Getting Tickets*, Jan. 2016, at 8.

⁹ *Id.* at 18.

¹⁰ See Gregory M. Stein, *Will Ticket Scalpers Meet the Same Fate as Spinal Tap Drummers? The Sale and Resale of Concert and Sports Tickets*, 42 PEPP.L.REV. 1(2014).

III. Growing Importance of Concert Revenue

A. *Shift in Music Consumption*

Music industry revenue is declining, primarily due to the decline in the sale of music in physical formats. Between 2005 and 2015, overall revenue in the industry dropped from \$20 billion to \$15 billion.¹¹

Optimists might call this the digital era of music, while pessimists might suggest that the era of piracy is giving way to a generation of fans who are simply accustomed to music being free. The degree to which digital music sales will replace sales of physical copies of music remains to be seen but it is clear that there are fewer music buyers than there used to be. In 2005, approximately 122 million Americans paid for music in either a physical or digital format. By 2015, the number of U.S. music buyers had declined to 99 million.¹² There is also reason for concern about the demographic desirability of those consumers who are still purchasing music in physical formats, described by one scholar as "older music consumers, country music fans and Germans."¹³

With music sales declining, the emphasis has shifted to other revenue streams. Concert ticket revenue is growing. In fact, "North American concert revenues grew by one-third between 2011 and 2015."¹⁴ In addition to the money generated by ticket sales, having a stadium or theater full of fans creates opportunities to sell additional products or services including artist merchandise, food, and drinks.¹⁵ That ancillary revenue is substantial and certainly a desirable alternative revenue stream for the artist and any other party able to secure a portion of it. There is also an opportunity to grow ancillary revenue from food and merchandise purchases which lag behind the "levels seen at sporting events and amusement parks like Disneyland."¹⁶

B. *Financial Effect on Artists*

With their primary source of revenue, music sales, under assault, artists have to adjust how they earn a living. They no longer tour to encourage sales of an album or CD. Now they release new music to promote the sale of concert tickets. It is estimated that the most successful acts now earn approximately 70% of their income from touring.¹⁷

¹¹ Hannah Karp, *Music Industry Sees Growth in Concert Revenue*, THE WALL STREET JOURNAL, Sept.16, 2016. Available at <https://www.wsj.com/articles/music-industry-sees-growth-in-concert-revenue-1474250642>.

¹² *Id.*

¹³ Lee Marshall, *The 360 Deal and the 'New' Music Industry*, 16 EUR. J. CULTURAL STUD. 77 (2012) (Demographic comment was within the context of arguing that recorded music retains cultural importance).

¹⁴ Hannah Karp, *Music Industry Sees Growth in Concert Revenue*, THE WALL STREET JOURNAL, Sept.16, 2016 available at <https://www.wsj.com/articles/music-industry-sees-growth-in-concert-revenue-1474250642>.

¹⁵ Gregory M. Stein, *Will Ticket Scalpers Meet the Same Fate as Spinal Tap Drummers? The Sale and Resale of Concert and Sports Tickets*, 42 PEPP.L.REV. 1, 6 (2014)(Describing the general category before noting that some concert tickets can actually be loss leaders in some cases, for example Jimmy Buffet who "routinely demands and receives...105% of net ticket prices...justified by the extremely high alcohol sales generated by...loyal fans...").

¹⁶ Hannah Karp, *Music Industry Sees Growth in Concert Revenue*, THE WALL STREET JOURNAL, Sept.16, 2016, available at <https://www.wsj.com/articles/music-industry-sees-growth-in-concert-revenue-1474250642>.

¹⁷ Jiarui Liu, *Copyright Complements and Piracy-Induced Deadweight Loss*, 90 IND. L.J. 1011, 1028 (2015).

When touring functioned as a promotional activity, ticket prices were generally "below a profit maximizing level" because those losses were recouped through the additional music sales generated by concert-attending fans.¹⁸

New artists who have not yet established themselves are in a very difficult position. They cannot rely on music sales nor do they draw big enough crowds to make their tours extremely financially successful. In a discussion of the secondary ticket market, it is easy to overlook the shows that do not sell out but there are many of them. It is estimated that more than 40% of the tickets to the "average concert" go unsold.¹⁹ With the change in the financial structure of the industry, fewer new acts will be able to earn a living.

C. Financial Effect on Record Companies

The traditional model for record companies was to sign a large number of promising new artists, provide both financial support to allow the act to record their music, and then have their team of experienced industry professionals market the album or CD.²⁰ When it was successful, that product, the recorded music in a tangible format, generated enough profits to make record companies profitable and recording artists wealthy. The number of sales of the product also allowed the record company to easily measure the success of their stable of artists and adjust it accordingly.

With the decline in music sales, record companies are actively diversifying their revenue streams by pursuing contractual arrangements that allow them to receive other types of revenue earned by the artists they sign. The 360 deals that are becoming the industry standard grant the record company a percentage of the revenue earned from publishing,²¹ merchandising, and touring in addition to the traditional recording rights.²²

In the future, there may not be any record companies because those businesses "have stopped calling themselves record labels and have started referring to themselves as 'music companies'." For those who might wonder what a music company is in comparison to a record company, Roger Story from EMI referred to his company as an "artist-focused global rights management business."²³ For artists, this new focus will not be cheap.

D. Financial Effect on Concert Promoters

¹⁸ *Id.* at 1029.

¹⁹ Biz Carson, Meet the Startup that Kept Scalpers from Buying Up all the Tickets to Adele's Sold-Out Show, *Business Insider*, Dec. 20, 2015, available at <http://www.businessinsider.com/songkick-helps-adele-sell-tickets-2015-12> (citing comments by Ian Hogarth, the CEO of Songkick which is one of the largest independent ticket companies in the world, operating in partnership with Spotify.)

²⁰ Jiarui Liu, *Copyright Complements and Piracy-Induced Deadweight Loss*, 90 *IND. L.J.* 1011, 1030 (2015)(describing the basic functions of record labels as "production, promotion and distribution of recorded music).

²¹ In this context, publishing refers to royalties earned for writing songs. However, there have reports of contracts including a percentage of books written by artists.

²² Lee Marshall, *The 360 Deal and the 'New' Music Industry*, 16 *EUR. J. CULTURAL STUD.* 77, 84 (2012).

²³ *Id.* at 83.

Concert promoters may seem like the winners in the realignment of the industry triggered by digital music distribution. The challenge is that all of the other parties in the music business need to establish new, stable revenue streams. Their existing partners, the performing artists, want a bigger cut of the concert revenue to replace the income they no longer earn from record sales. Record companies, who traditionally enjoyed a symbiotic relationship with concert promoters, now want a cut of the concert revenue, too. At this point, they are well positioned but facing the prospect of competing with every other player in their industry for the revenue they depend upon.

IV. Evolution of the Secondary Ticket Market

A. *Roadside to Online*

In the days before computers revolutionized the music business, reselling a concert ticket required a person to log a lot of miles. Scalpers had to buy tickets in the primary market, just like everyone else. That meant waiting in line at the box office or visiting a third-party ticket agent. Once the tickets were in hand, the scalper had to find and physically connect with buyers. That meant that the night of the concert the scalper was likely to be along the side of road as potential customers arrived at the event. People who wanted to see the show expected that tickets would be available and scalpers depended upon people showing up and buying them. It was expensive for fans but could be lucrative for scalpers who took the "legal and business gamble of actually buying the tickets – laying out the money and risking being unable to resell them."²⁴ It is also important to note that buying or selling a ticket actually involved a physical ticket that could be handed from the scalper to buyer, transferring ownership with no other formalities and leaving no record of the transaction. If the scalper or buyer lost the paper ticket, there was no way to replace it.

Old-fashioned ticket scalping was a very labor intensive business which limited the impact any particular entity could have on the market as a whole. Technology dramatically changed that. As buying and selling moved online, reselling tickets became a growth industry. The computer powered resale market began in earnest with the creation of StubHub (now owned by Ebay), bringing online ticket resales to the masses.²⁵

B. *Unauthorized to Collaborative*

Currently, the most prominent online ticket reseller is StubHub which offers "one of the world's largest ticket marketplaces" where people have access to tickets to "more than 10 million live sports, music, theater and other events in more than 40 countries... through desktop and mobile devices."²⁶ StubHub does not buy tickets but rather provides a platform for those who wish to buy or sell tickets, earning a profit by charging the seller a fee equal to 10% of the sales price and potentially charging the buyer a fee as well.²⁷

²⁴ Gregory M. Stein, *Will Ticket Scalpers Meet the Same Fate as Spinal Tap Drummers? The Sale and Resale of Concert and Sports Tickets*, 42 PEPP.L.REV. 1, 11 (2014).

²⁵ Dinah Eng, *StubHub: Anatomy of a game-changing idea*, FORTUNE (Jul. 23, 2012) available at <http://archive.fortune.com/2012/07/20/smallbusiness/stubhub-spreecast-fluhr.fortune/index.htm>.

²⁶ EBay, Annual Report (Form 10-K) at 5 (Feb. 6, 2017).

²⁷ StubHub Selling Basics available at <https://stubhub.custhelp.com>.

The phrase if you can't beat 'em join 'em comes to mind as ticketing giants like Live Nation (parent of Ticketmaster) join the resale market with their own platform TM+. In addition to creating its own resale sites, Ticketmaster acquired existing resellers Get Me In! and SeatWave.²⁸ Artists with existing relationships with Live Nation are encouraged to use their resale option exclusively. Through this type of an arrangement theoretically both parties can shut out other resellers and profit from resold tickets. For some artists, this approach might be attractive.²⁹ It is also creating a highly competitive resale market that creates pressure for StubHub to experiment with lower fees and greater pricing transparency in order to maintain marketshare.³⁰ Between aggressive competition from smaller resellers and the entry of primary sellers into the market, StubHub is losing marketshare.³¹ None of the revenue from the sales on StubHub flows back to the artist or promotor of the shows. The person reselling the ticket pockets the difference between the sales price and face value, with StubHub getting a percentage of each sale.

Although some artists are battling ticket scalpers to try to keep prices low for fans, others have chosen to actively participate in the secondary market. After 100 of the most desirable tickets for a Neil Diamond concert showed up on a resell site less than one minute after primary tickets sales began, there were numerous reports of artists working with their primary ticket seller to divert tickets to the secondary markets to be sold at inflated prices. Artists including Bon Jovi, Celine Dion, and Billy Joel with Elton John were all engaged in the practice.³²

V. Current Regulation of the Secondary Ticket Market

The secondary ticket market has been the subject of intense legal and ethical debate from musicians and fans over the years. On the Federal level of ticket scalping regulation, it gives the impression that there is leniency and acceptance of the practice. Meanwhile, laws on the state level vary greatly. Hawaii is the only state that has made any practice of reselling tickets illegal, aside from boxing, while several states do not have any state ticket scalping laws³³. Many believe that reselling tickets is a practice that can be put to an end simply by having stricter laws put in place. Others believe that it has nothing to do with laws at all and instead feel the blame for the rise of the secondary ticket market resides firmly on the shoulders of artists³⁴. Throughout this paper we will discuss the varying ways to help better regulate this market and what the best course of action should be for the future of the music industry.

²⁸ James Hurley, *Entrepreneur Rolls Dice to Leave Ticket Touts Crowded out by Fans*, THE TIMES, April 11, 2016.

²⁹ See Randall Roberts & August Brown, *Taylor Swift's Ticketmaster 'Verified Fan' Initiative Sparks Controversy*, LOS ANGELES TIMES, Aug. 31, 2017, available at <http://www.latimes.com/entertainment/music/la-et-ms-ticketmaster-taylor-swift-20170830-story.html> (David Brooks, Executive Editor of Amplify magazine notes in reference to Taylor Swift's upcoming tour "You can just put tickets on sale and they'd get bought immediately by bots and scalpers, and fans would pay the markups and StubHub would make more money than Taylor Swift.").

³⁰ Glenn Peoples, *Ticketmaster vs. Stubhub: Who's Winning the Resale Battle?*, BILLBOARD (Oct. 20, 2014) available at <http://www.billboard.com/articles/business/6289185/ticketmaster-vs-stubhub-winning-resale-battle>.

³¹ Ethan Smith, *StubHub Gets Out of 'All-In' Pricing; After losing business, ticket reseller reverts to tacking on fees at checkout*, WALL ST. J., Aug. 21, 2015 at 31.

³² Ethan Smith, *Concert Tickets Get Set Aside, Marked Up by Artists, Managers*, WALL ST. J., Mar. 11, 2009 at B1.

³³ See Eric Schroeder et al., *A Brief Overview on Ticket Scalping Laws, Secondary Ticket Markets, and the StubHub Effect*, ENT. & SPORTS LAW., NOV. 2012 at 1.

³⁴ Tad Simons, *The New Age of Ticket Scalping*, TWIN CITIES BUSINESS, 2017.

A. Diversity of State Laws

Across the country, laws pertaining to ticket scalping vary greatly from state-to-state. There are 15 states that currently do not have any legislation in place to control the secondary ticket market.³⁵ Among the state that do regulate it, the trend is "toward leniency and acceptance of the practice." The approach to regulation varies dramatically from simply licensing resellers to limiting the amount of the price increase to outright prohibition of reselling tickets. It is interesting to note that states including California and Florida allow reselling to the degree that it is authorized by the original seller.³⁶ With artists planning extensive, multi-city national or international tours, the patchwork of local laws is not a particularly effective tool to control the secondary market. This effect is exacerbated by the market moving online where state or even national borders have little relevance.

B. Better Online Ticket Sales Act of 2016

In 2016, the federal government adopted the Better Online Ticket Sales Act (BOTS Act) that "makes it illegal to circumvent a security measure...on an Internet website or online service that is used by the ticket issuer to enforce posted event ticket purchasing limits or to maintain the integrity of posted online ticket purchasing order rules."³⁷ At the time the law was passed, Ticketmaster estimated that approximately 60 percent of the most desirable tickets were being bought by bots for resale purposes³⁸. It may at lease slow down some of the scalpers who have been found buying more than 1,000 tickets in under a minute for some of the more popular shows.³⁹ As with most measures designed to combat scalping, the challenge is to have effective and consistent enforcement. The BOTS Act empowers both the Federal Trade Commission and State Attorneys General to investigate consumer complaints.⁴⁰

It is also important to note that thirteen states had adopted a rule similar to the BOTS Act prior to the adoption of the federal rule. The experience in those states suggest that limited and ineffective enforcement prevented them from having the desired effect on the secondary market.⁴¹

VI. Artist-Driven Alternatives to Regulation of the Secondary Ticket Market

³⁵ Myles Kaufman, *THE CURIOUS CASE OF U.S. TICKET RESALE LAWS SEATGEEK* (2017).

³⁶ See Eric Schroeder et al., *A Brief Overview on Ticket Scalping Laws, Secondary Ticket Markets, and the StubHub Effect*, 30 ENTERTAINMENT AND SPORTS LAWYER 1–32, 1-32 (2012) for a state by state overview of ticket resales regulation.

³⁷ Lesley Fair, Fed. Trade Comm'n, *BOTS Act: That's the Ticket!*, Apr. 7, 2017, available at <https://www.ftc.gov/news-events/blogs/business-blog/2017/04/bots-act-thats-ticket>.

³⁸ Ben Sisario, *Congress Moves to Curb Ticket Scalping, Banning Bots Used Online*, NEW YORK TIMES, Dec. 8, 2016.

³⁹ *Id.*

⁴⁰ Lesley Fair, Fed. Trade Comm'n, *BOTS Act: That's the Ticket!*, Apr. 7, 2017, available at <https://www.ftc.gov/news-events/blogs/business-blog/2017/04/bots-act-thats-ticket>.

⁴¹ See generally Robert J. McFadden, Note, *The BOTS Act: A Small Step for Fankind When a Giant Leap is Needed*, 55 WASH. L.J. 427 (2016).

A. Adoption of Market Pricing

Economists suggest that ticket scalping exists because artists do not understand the laws of supply and demand. Musicians are not meeting the demand of their fans because they are either under-supply the number of seats or underpricing their tickets so they can quickly sell out shows.

1. Increasing the Supply of Tickets

One artist who has adopted the strategy of increasing the supply of tickets is Garth Brooks. For his 2015 tour, Brooks performed on average of 4 shows at each stop along his tour, which resulted in virtually no tickets showing up on the secondary market.⁴² That means that fans paid the ticket price set by the artist and the venue. But Garth Brooks is more than just an established artist. He established himself nearly thirty years ago and has had 36 top ten hits so his approach is not going to be viable for most other artists.

Even other superstars may not reasonably be expected to adopt this approach. Consider for example, artists like Adele and Beyoncé who have outrageous demand for their shows. Adele's most recent world tour started February 29th, 2016 and will end July 2nd, 2017. The tour consisted of four legs spanning all over the world, hitting just over 50 cities, and had an average of two shows per city⁴³. Tickets to her concerts sold out within minutes of becoming available and it is estimated that 10 million people tried to buy tickets to the North American leg of her tour when only 750,000 seats were available⁴⁴. Sure, a third or fourth show per city would have helped to alleviate some of the demand but Adele's world tour as it is will last just over a year and a half, if an additional two shows per city were added it would last approximately 3 years. Adele and Beyoncé are both artists who are married with small children, and to expect them to be on the road for 3 years to help meet the demand to see their concerts is simply unrealistic. It could come at the cost of the artist's mental or physical health, or take a toll on his or her personal life.⁴⁵

Despite the economic appeal of increasing supply, there are practical realities that limit an artist's ability to adopt that approach. A performer "can perform only so many times per year, and each venue can hold only so many people."⁴⁶ As previously noted, concert tours are planned more than a year in advance when the level of demand is extremely uncertain so booking multiple shows in the same city is a big risk for any artist. Adding additional shows after the level of demand becomes apparent may not be possible given the competition with sporting events and other concerts for dates at the limited number of venues that are the proper size to host a particular show.

2. Increasing the Price of Tickets

⁴² Tad Simons, *The New Age of Ticket Scalping*, TWIN CITIES BUSINESS, 2017.

⁴³ Adele Live 2016, WIKIPEDIA (2017).

⁴⁴ Juliano Dario, *4 Unbelievable Statistics from Adele's Sold Out 2016 US Tour*, MUSIC TIMES (2015).

⁴⁵ Adele and Beyonce are used as examples because of the success of their recent tours. Any artist, male or female, who is a parent or simply values their personal time and home life, would raise the same concerns.

⁴⁶ Gregory M. Stein, *Will Ticket Scalpers Meet the Same Fate as Spinal Tap Drummers? The Sale and Resale of Concert and Sports Tickets*, 42 PEPP.L.REV. 1, 13 (2014).

Some artists have selectively raised prices by packaging the most desirable seats into "VIP Packages" that include more than just a concert ticket. For example, Miley Cyrus offered a \$995 package that included an individual photo op, exclusive gift bag, and parking, along with other elements.⁴⁷ By offering ticket packages at that high of a price point, there was no additional value that could be captured by a reseller nor could resellers mimic the offer because they lack access to the artist.

Some artists are also unwilling to raise their prices even if the market would support the higher prices. In an interview with Rolling Stone, country music star Eric Church commented that "... it's not fair. I've been told to raise my prices. But there's guys out there that want to come to a show and bring their family...[who] are working a blue-collar job, they were there for us in bars and clubs, so I should raise to \$100 because that's what the scalpers think? I refuse to believe that."⁴⁸ Musicians, like other professionals, have the right to set their own prices. Choosing to set the price below a market clearing level does not harm consumers, in fact, the only person who suffers a financial harm is the artist who potentially foregoes additional earnings.⁴⁹

B. Artist Self-Help Measures

Frustrated by what they view as resellers exploiting the musician's hard work to earn a profit at the expense of the musician's fans, some artists have taken an active role in policing the secondary market. Country music star Eric Church has been particularly vocal about his displeasure with ticket scalpers noting that they "buy thousands of tickets across the U.S., not just mine, and they end up making a fortune. They use fake credit cards, fake IDs. All of this is fraud."⁵⁰ On his 2016 *Holdin' My Own Tour*, Church's management were actively looking for scalpers, checking sales reports for suspicious transactions like large out of state orders, and comparing purchasers to a list of known scalpers that they created and maintain. Using this approach they were able to cancel 25,000 tickets held by resellers.⁵¹ After the tickets were cancelled, they were released for sale again using only venue box offices and Church's own web site.⁵²

This was not the first-time Eric Church has worked to get tickets into the hands of his fans. In previous years, Church has bought tickets from resale markets himself to give back to fans, which is the same method Chance the Rapper used recently. He bought 2,000 resale tickets to his Chicago

⁴⁷ Jess White & Patrick Preston, *Concert Promotion Centralization and the Artist Management Response: 1990s-2010s*, 14 MEIEA J. 13, 26 (2014)

⁴⁸ Stephen Betts, *Eric Church Ups War Against Scalpers, Cancels 25,000 Tickets*, ROLLING STONE Feb. 21, 2017.

⁴⁹ Gregory M. Stein, *Will Ticket Scalpers Meet the Same Fate as Spinal Tap Drummers? The Sale and Resale of Concert and Sports Tickets*, 42 PEPP. L. REV. 1, 13 (2014) (Noting "only the list price for the ticket accrues to the artist and promoter, with the resale profit flowing to the initial purchaser of the event ticket along with any intermediaries.").

⁵⁰ Stephen Betts, *Eric Church Ups War Against Scalpers, Cancels 25,000 Tickets*, ROLLING STONE Feb. 21, 2017 (quoting a prior interview published in Rolling Stone in 2014).

⁵¹ Steve Knopper, *Inside Bruce Springsteen and Taylor Swift's War on Scalpers, Ticket Bots*, ROLLING STONE, Sept. 11, 2017. Available at <http://www.rollingstone.com/music/news/bruce-springsteen-taylor-swifts-war-on-scalpers-bots-w501961>.

⁵² Stephen Betts, *Eric Church Ups War Against Scalpers, Cancels 25,000 Tickets*, ROLLING STONE, Feb. 21, 2017.

show, many going for around \$200, and sold them back to fans for face-value⁵³. Although this gesture of good will probably reinforces their relationship with their fans, as a practical matter, this is not a solution to the problem but rather an indication of the high level of frustration about scalping among artists. It is also interesting to note that when he bought the tickets back, the scalpers earned a profit on them.

For a 2010 show in San Francisco, Bob Dylan adopted an unusual approach to keeping tickets out of the hands of scalpers. The show, which had only been announced the week before, was scheduled to begin at 8:30pm at the Warfield Theatre. Three hours before the show began, each fan was allowed to buy one ticket for \$60 in cash and was required to immediately enter the venue after making the purchase.⁵⁴ This traditional approach to ticket sales worked for that artist and that 2,300 seat venue but is probably not a model that could be used effectively under different circumstances.

C. Verified Fan Programs

More than 50 artists have partnered with Ticketmaster to use their "Verified Fan" process to battle scalpers. The service, using a proprietary algorithm, vets each potential purchaser by comparing their email address with known ticket scalpers and examining their prior ticket purchases, among other things. Consumers who make it through the vetting process are placed in a smaller pool of verified fans who are sent a code that gives them the opportunity to purchase tickets.⁵⁵ The details of the arrangements vary by artist and are based in the contractual relationship between the parties.

Ed Sheeran used Ticketmaster's Verified Fan Program to conduct a "presale" for his Divide World Tour. Fans who registered in advance, were scrutinized and then sent a code allowing them to purchase tickets beginning on March 13, 2017. This process allowed 350,000 tickets to be sold to verified fans. On March 17, 2017, all of the remaining tickets were released for sale to the general public. As soon as that happened, tickets began to appear on the secondary market so Sheeran's management went through the purchase data, identifying potential scalper purchases and canceled 50,000 tickets. Those tickets were then put up for sale a second time, offered only to those fans who had pre-registered.⁵⁶ This two part process, combining Verified Fan with Sheeran's management's investigation of the sales data, seems to have been effective in getting more tickets at face value into the hands of legitimate fans.

Bruce Springsteen also recently used Ticketmaster's Verified Fan system to sell tickets for "Springsteen on Broadway", a series of 79 performances in a small theater. The day after the tickets were released to the verified fans, approximately 3% of the tickets were listed on reseller websites. This compared favorably with ticket sales on Springsteen's 2016 World Tour where an estimated

⁵³ Eamonn Forde, *Analysis: what's the real cost of secondary ticketing?*, MUSIC ALLY (2016).

⁵⁴ Jess White & Patrick Preston, *Concert Promotion Centralization and the Artist Management Response: 1990s-2010s*, 14 MEIA J. 13, 27 (2014).

⁵⁵ Steve Knopper, *Inside Bruce Springsteen and Taylor Swift's War on Scalpers, Ticket Bots*, ROLLING STONE, Sept. 11, 2017. Available at <http://www.rollingstone.com/music/news/bruce-springsteen-taylor-swifts-war-on-scalpers-bots-w501961>.

⁵⁶ Dave Brooks, *Ed Sheeran Launches Two-Pronged Assault on Ticket Scalpers, to Mixed Results*, BILLBOARD (2017).

7-20% of tickets turned up on reseller websites.⁵⁷ Given the small venue, the number of people who pre-registered to purchase tickets still exceeded the number of tickets available. Consequently, Ticketmaster randomly selected verified fans to receive the codes allowing them to purchase tickets.⁵⁸

Taylor Swift is also using a version of Ticketmaster's Verified Fan program for her Reputation Tour. Even though tour dates have not been announced yet, fans are already being encouraged to pre-register. As announced, the vetting process used to create a pool of verified fans is identical to the system used for both the Ed Sheeran and Bruce Springsteen tours. However, she has agreed to use a fundamentally different method to determine which of the fans from the verified pool will be given codes to actually purchase tickets.⁵⁹ It is important to note that demand for her concert tickets is estimated to be "five to ten times the amount of available seats."⁶⁰ The random selection used for Springsteen has been replaced with a point system that rewards fans for particular types of activities. Based on the number of points they earn, they can move to the front of the line within the verified pool.⁶¹

The point system rewards fans for "watching the singer's music video, signing up for her email list, or by purchasing her album or merchandise." In fact, a fans can earn additional points for each copy of her album they buy up to a limit of thirteen copies. Points can also be earned for buying merchandise like a t-shirt for \$50 or a snake signet ring for \$60.⁶² Some observers have complained that this approach is not only meant to keep scalpers from getting tickets but also intended to increase revenue by stimulating additional purchases by fans desperate to get tickets.⁶³ There are also points to be earned for sharing Swift related posts on social media. The marketing value of having an army of fans talking about a new album or tour is obvious. Given Swift's popularity, her fans may have been doing those things anyway. However, in order to award points for them to the correct verified fan, the activities have to be tracked potentially creating data security and privacy concerns, particularly for artists who attract a lot of underage fans.

⁵⁷ Steve Knopper, Inside Bruce Springsteen and Taylor Swift's War on Scalpers, Ticket Bots, ROLLING STONE, Sept. 11, 2017. Available at <http://www.rollingstone.com/music/news/bruce-springsteen-taylor-swifts-war-on-scalpers-bots-w501961>.

⁵⁸ Randall Roberts & August Brown, *Taylor Swift's Ticketmaster 'Verified Fan' Initiative Sparks Controversy*, LOS ANGELES TIMES, Aug. 31, 2017. Available at <http://www.latimes.com/entertainment/music/la-et-ms-ticketmaster-taylor-swift-20170830-story.html>.

⁵⁹ Steve Knopper, Inside Bruce Springsteen and Taylor Swift's War on Scalpers, Ticket Bots, ROLLING STONE, Sept. 11, 2017. Available at <http://www.rollingstone.com/music/news/bruce-springsteen-taylor-swifts-war-on-scalpers-bots-w501961>.

⁶⁰ Randall Roberts & August Brown, *Taylor Swift's Ticketmaster 'Verified Fan' Initiative Sparks Controversy*, LOS ANGELES TIMES, Aug. 31, 2017. Available at <http://www.latimes.com/entertainment/music/la-et-ms-ticketmaster-taylor-swift-20170830-story.html>.

⁶¹ Steve Knopper, Inside Bruce Springsteen and Taylor Swift's War on Scalpers, Ticket Bots, ROLLING STONE, Sept. 11, 2017. Available at <http://www.rollingstone.com/music/news/bruce-springsteen-taylor-swifts-war-on-scalpers-bots-w501961>.

⁶² Jacob Shamsian, *Taylor Swift Fans are Furious She is Asking Them to Buy Merchandize for a Better Chance of Buying Concert Tickets*, BUSINESS INSIDER, Aug. 28, 2017. Available at <http://www.businessinsider.com/taylor-swift-reputation-tour-tickets-fans-upset-2017-8>.

⁶³ Steve Knopper, Inside Bruce Springsteen and Taylor Swift's War on Scalpers, Ticket Bots, ROLLING STONE, Sept. 11, 2017. Available at <http://www.rollingstone.com/music/news/bruce-springsteen-taylor-swifts-war-on-scalpers-bots-w501961>.

D. Paperless Tickets

One approach to thwarting the secondary ticket market is to make it impossible for tickets to be transferred by making tickets “paperless”. This process requires the person who bought the ticket to present their identification and the credit card used for the purchase at the door in order to enter the concert venue. It is a ticketing strategy that is similar to the way airline tickets work. The ticket itself may be electronic or printed but it is still non-transferable and requires the presentation of specific identification.⁶⁴ If every ticket was made paperless, it would be incredibly difficult for resellers to sell tickets at all, much less at inflated prices. In a perfect world, this simple solution would create an even playing field for fans everywhere.

However, the secondary ticket market is not simply made up of scalpers trying to make a fast buck by reselling tickets for outrageous prices. The market also includes fans who purchase tickets to a concert, fully intending to go, and who are no longer able to attend as planned. Making all tickets non-transferable or “paperless” means that these fans, are now stuck with tickets they can no longer use, and they have no way of getting the money back they used to purchase them.⁶⁵ It also makes it difficult for people to purchase tickets as gifts for other people unless they also attend the concert. Young people who may depend upon a parent's credit card and perhaps even lack proper photo identification could be shut out entirely. From a practical standpoint, it is also less feasible at larger venues because checking identification is both time consuming and labor intensive.⁶⁶

One way to preserve some amount of transferability without completely opening up the process to ticker brokers is to allow the primary seller to issue tickets that can only be resold on the platform controlled by the primary ticket seller. In other words, if you buy a ticket from Ticketmaster, the only place it can be sold is on Ticketmaster's resale website TicketsNow. It is not clear if consumers would benefit from that arrangement since they would no longer be at the mercy of the ticket scalpers but would be forced to work only with Ticketmaster.⁶⁷ It would, however, give Ticketmaster a competitive advantage relative to companies like StubHub.

Another possible “paperless” ticketing strategy has been introduced in Britain. Since 2014, an app called Dice, created by former record executive Phil Hutcheon, has been used to sell more than one million tickets for concerts by artists including Adele and Justin Bieber. Dice avoids physical tickets altogether, instead putting an electronic ticket on a concert-goers cell phone. To reduce the possibility of scalpers selling phones with the tickets on them, there are also random ID checks. This two-step identification method has been 99% successful at eliminating reselling by scalpers. There are also no booking fees so the company does not earn money on the sales of the tickets at all. The Dice business model is dependent on sponsorship of events by consumer brands which they project will be more profitable than ticket fees.⁶⁸

⁶⁴ N.Y. Att'y Gen., *Obstructed View: What's Blocking New Yorkers from Getting Tickets*, Jan. 2016, at 36.

⁶⁵ Adam Vaccaro, *From Concert Goers to Big Business Concerns, Inside the Fight Over Paperless Tickets*, THE BOSTON GLOBE, 2015.

⁶⁶ Steve Knopper, *Inside Bruce Springsteen and Taylor Swift's War on Scalpers, Ticket Bots*, ROLLING STONE, Sept. 11, 2017. Available at <http://www.rollingstone.com/music/news/bruce-springsteen-taylor-swifts-war-on-scalpers-bots-w501961>.

⁶⁷ N.Y. Att'y Gen., *Obstructed View: What's Blocking New Yorkers from Getting Tickets*, Jan. 2016, at 37.

⁶⁸ James Hurley, *Entrepreneur Rolls Dice to Leave Ticket Touts Crowded out by Fans*, THE TIMES, April 11, 2016.

The Dice financial model has not been validated by the market, nor has the company proven that they can maintain strong relationships with high profile artists. Assuming the business is viable, this approach will prevent consumers from transferring their tickets when their plans change, even if no money changes hands. It is not clear how fans will react to not even being able to give away tickets they paid for but it seems likely to be unpopular. If it overcomes those issues, the company still has to compete with Live Nation and AEG. That is a daunting task.

Overall, paperless tickets may also have a negative impact on the artist by slowing or lowering ticket sales if fewer people are willing to commit to a purchase in advance or if artists have to perform for smaller crowds when the tickets that were purchased go unused. Artists have been willing to forgo the additional revenue that could be earned in the secondary ticket market but their concern about scalping may not be strong enough for them to persevere in the face of significant a negative impact on their touring experience.

VII. Conclusions

Technology has made ticket scalping infinitely more efficient and profitable but the underlying problem, an imbalance between supply and demand coupled incentives to underprice tickets, has not changed. It has in fact proven remarkably resist to a plethora of different regulatory and market based solutions.

An approach that uses targeted regulation while letting the market work is theoretically appealing. At the beginning of this research project, the authors thought that perhaps the answer is to cap the resale price to allow the market to continue to work but provide some level of protection for consumers. The appeal of that approach declined we learned that for more than 80 years, price caps were used by the State of New York to protect consumers. The formulation of the cap varied over time, beginning as a specific dollar amount, then transitioning to a specific percentage. But the cap proved to be difficult to enforce. By 1999, "ticket brokering had grown into a large underground economy typified by law-breaking, secret ticket holds, bribe paying, and a general state of corruption at all levels."⁶⁹

One promising approach that is to require complete transparency with regard to how many tickets are actually being made available for sale, what the face value of each ticket is, whether or not the entity attempting to sell it currently has possession of it, and the identity of the seller. That would not prevent ticket scalpers from charging outrageous prices but it would give consumers the information to decide for themselves if they want to purchase tickets under those conditions. The aggregate decisions of consumers could provide a strong incentive to modify some of the most abusive practices. Ultimately, consumers have not had the data but they have always had the power to simply not buy the tickets. That hasn't worked so far.

Perhaps the market will fix itself. It is also possible that the current emphasis on concert ticket revenue may fade if the transition from the sale of physical format music to digital music matures in a way that allows artists and music companies to regain economic strength from those sales. In the U.S. in 2010, there were approximately "300 million more album purchases than concert ticket

⁶⁹ N.Y. Att'y Gen., *Obstructed View: What's Blocking New Yorkers from Getting Tickets*, Jan. 2016, at 7.

purchases" when physical and digital format data is combined.⁷⁰ Given the downward pressure on prices and the opportunities created by the ancillary revenue streams in the concert ticket market, it seems extremely unlikely. Even if the economics would support music companies shifting their focus back to music sales, those companies (and their shareholders) are not going to give up the new concert ticket revenue streams.

In the end, the secondary ticket market can only last as long as the primary ticket market is robust. There are no guarantees that the current growth or even stability of the concert ticket revenue will continue. There is a growing concern that the music industry as currently organized is no longer creating stars. If recorded music sales are promotional tools for concert ticket sales, the group of artists being "promoted" is getting smaller and older. In 2008, more than 79,000 releases sold fewer than 100 copies while 225 artists managed to sell more than 10,000 copies.⁷¹ The small group of successful touring artists include a large number of "heritage" acts who have enjoyed decades of success. Their tours are among the most popular and generally the most profitable but Keith Richards can't live forever and neither can Bono so the industry cannot bank its future on revenue earned by bands like the Rolling Stones or U2.⁷²

⁷⁰ Lee Marshall, *The 360 Deal and the 'New' Music Industry*, 16 EUR. J. CULTURAL STUD. 77, 90 (2012).

⁷¹ Lee Marshall, *The 360 Deal and the 'New' Music Industry*, 16 EUR. J. CULTURAL STUD. 77, 94 (2012).

⁷² *Id.* at 93.

DISPLAYING THE VALUE OF IN-HOUSE LAWYERS TO MANAGEMENT-LEVEL TEAMS

Evan A. Peterson*

Managers often hold perspectives that downgrade the significance of in-house legal counsel in the corporate setting.¹ These attitudes, in addition to disregarding the link between law and competitive advantage,² reflect a neglect and gross miscalculation of the emerging challenges that legal developments will place upon organizations in the approaching years. Data protection and cybersecurity issues encompass chief concerns in the areas of risk management, compliance, and business litigation.³ The potential for harm to global trade, innovation, and economic growth posed by cybercrime will force legal counsel, technology experts, and corporate executives to work collaboratively on building proactive approaches to risk management and cyber security.⁴ Legal safeguards, especially in the area of intellectual property, will become critical to the generation of organizational value.⁵ Organizations will need to develop new techniques for fostering collaboration between managers and lawyers to address these mounting developments and trends. Because managers will routinely execute a growing number of business decisions in the years ahead requiring an appreciation of legal strategy initiatives,⁶ organizations will face an escalating need to reexamine and adjust managerial attitudes toward the law within the corporate setting.

I. Study Background

I conducted a 3-round Delphi study to address the general problem concerning the severe limitations placed on the organizational ability to derive strategic value from the law due to the lack of integration between legal strategy and business strategy in the corporate setting. The specific problem that I addressed in this study is that managers hold unreceptive viewpoints toward the strategic value of law within the corporate setting.⁷ Although in-house general counsel working across business industries in the United States stand in a position to develop techniques for altering unreceptive managerial viewpoints toward the law, a lack of consensus exists among

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¹ Robert C. Bird, *Law, Strategy, and Competitive Advantage*, 44 CONN. L. REV. 62 (2011); Robert C. Bird & David Orozco, *Finding the Right Corporate Legal Strategy*, <http://sloanreview.mit.edu/article/finding-the-right-corporate-legal-strategy/> (last visited Sept. 3, 2017); Justin W. Evans & Anthony L. Gabel, *Legal Competitive Advantage and Legal Entrepreneurship: A Preliminary International Framework*, 39 N. C. J. INT'L L. & COMM. REG. 334 (2014).

² CONSTANCE E. BAGLEY, *MANAGERS AND THE LEGAL ENVIRONMENT: STRATEGIES FOR THE 21ST CENTURY* (2015); Constance E. Bagley, Mark Roellig, & Gianmarco Massameno, *Who Let the Lawyers Out? Reconstructing the Role of the Chief Legal Officer and the Corporate Client in a Globalizing World*, 18 UNIV. PENN. J. BUS. L. 420 (2016); David Orozco, *Strategic Legal Bullying*, 13 N.Y.U. J. L. & BUS. 137 (2016).

³ DLA PIPER, *Top 10 Litigation, Risk Management, and Compliance Trends for 2016*, <https://www.acc.com/chapters/chic/upload/RNS-Powerpoint-Presentation-ACC.pdf> (last visited Sept. 3, 2017).

⁴ MCAFEE (June, 2014) *Net Losses: Estimating the Global Cost of Cybercrime*, <http://www.mcafee.com/us/resources/reports/tp-economic-impact-cybercrime2.pdf>; Scott J. Shackelford, *Business and Cyber Peace: We Need You!* 59 BUS. HORIZONS 539 (2016).

⁵ Elena Holodny, *The 'Fourth Industrial Revolution' Will be Great for Lawyers*, <http://www.businessinsider.com/fourth-industrial-revolution-great-for-lawyers-2016-3> (last visited Sept. 3, 2017).

⁶ Bird & Orozco, *supra* note 1; Evans & Gabel, *supra* note 1; GEORGE J. SIEDEL & HELENA HAAPIO, *PROACTIVE LAW FOR MANAGERS: A HIDDEN SOURCE OF COMPETITIVE ADVANTAGE* (2016).

⁷ Evans & Gabel, *supra* note 1.

them with regard to techniques that will alter unreceptive managerial viewpoints toward the strategic value of law within the corporate setting.⁸

The purpose of my study was to build this consensus.⁹ Data collection took place between March 13, 2017, and June 5, 2017. During the first round, I distributed an electronic questionnaire containing 6 broad, open-ended questions to a study panel comprised of in-house general counsel working across business industries in the United States. The second-round questionnaire consisted of theme statements derived from panelists' responses to the first round questionnaire. Panelists rated each statement on the second round questionnaire against 2 separate 5-point Likert scales: desirability and feasibility. Any statement where the collective frequency of panelists' top 2 responses (rating of 4 or 5) was 70% or higher on both the desirability and feasibility scale passed to the third round.¹⁰ The third-round questionnaire consisted solely of theme statements carried over from Round 2. In Round 3, panelists rated each remaining statement against 2 other scales: importance and confidence. The statements where the collective frequency of panelists' top 2 responses (rating of 4 or 5) was 70% or higher on both the importance and confidence scales formed a consensus on techniques that will alter unreceptive managerial viewpoints toward the law within the corporate setting.

The final list of 25 theme statements generated by the study panel in Round 3 encompassed the following categories: (a) managerial attitudes toward lawyers and the law; (b) relationships between lawyers and non-lawyer managers; (c) the role of leadership in in-house legal practice; (d) the role and functions of in-house general counsel, and (e) law, legal strategy, and competitive advantage. The discussion in the present article will focus on the third major category: the role of leadership in in-house legal practice.

II. Literature Review

A. *The Delphi Method*

The Delphi research design is an iterative process for developing a consensus among a panel of experts through the distribution of questionnaires and feedback.¹¹ Delphi study takes place through a series of iterations (rounds), beginning ordinarily with the distribution of broad, open-ended questions in the first round and concluding with the development of consensus in the final round.¹²

⁸ Gerlinde Berger-Walliser, *The Past and Future of Proactive Law: An Overview of the Development of the Proactive Law Movement*. Retrieved from https://www.researchgate.net/profile/Gerlinde_Berger-Walliser/publication/273440662_The_Past_and_Future_of_Proactive_Law_An_Overview_of_the_Proactive_Law_Movement/ (last visited Sept. 3, 2017); Steven L. Lovett, *The Employee-Lawyer: A Candid Reflection on the True Roles and Responsibilities of In-House Counsel*, 34 J. L. & COMM. 113 (2015).

⁹ I conducted this Delphi study for my doctoral dissertation in partial fulfillment of the requirements for a Ph.D. in Management program. This article encompasses the literature and results from one of the five key themes in the study: the role of leadership in in-house legal practice.

¹⁰ Setting the level of consensus at 70% set a relatively high bar indicating that a substantial majority of the panelists leaned toward consensus.

¹¹ Arash Habibi, Azam Sarafrazi, & Sedigheh Izadyar, *Delphi Technique Theoretical Framework in Qualitative Research*, 3 INT'L J. ENG'G & SCI. 8, 8 (2014); Heiko A. von der Gracht, *Consensus Measurement in Delphi Studies: Review and Implications for Future Quality Assurance*, 79 TECH. FORECASTING & SOC. CHANGE 1525, 1525 (2012).

¹² Gayle Kerr, Don E. Schultz, & Ian Lings, *Someone Should do something: Replication and an Agenda for Collective Action*, 45 J. ADVERT. 4, 7 (2016).

The Delphi method is geared toward the formation of consensus among a group of experts in circumstances where a deficiency of existing scholarship exists relative to a given research topic.¹³ The technique was pioneered by the RAND Corporation in the 1950s as a means to generate forecasts in connection with military technological innovation.¹⁴

Four principal characteristics characterize the Delphi design: (a) participant selection is grounded on predefined qualifications; (b) participants communicate solely with the study coordinator and stay anonymous to other participants; (c) information is gathered and redistributed to study participants by the study coordinator through a series of rounds, and (d) the responses of individual participants are combined by the study coordinator into a collective group response.¹⁵ Rigor is central to the Delphi method, wherein researchers commonly use rating scales to evaluate panelists' responses along 4 key dimensions: desirability, feasibility, importance, and confidence. These 4 dimensions represent the information required for the suitable review of an issue under the Delphi method.¹⁶ The Delphi method offers numerous benefits, including the gathering of varied experts from isolated geographical locations, the minimization of biases stemming from face-to-face interaction, the abolition of prolonged face-to-face meetings, and supporting greater inclusion of individuals from diverse groups in academic research.¹⁷

Although the four principal characteristics of the design are common to all Delphi studies, numerous types of Delphi studies exist within the academic literature. In a classical Delphi study, researchers ascertain the degree of consensus among a panel of experts on a particular subject or issue.¹⁸ In a decision Delphi, the researcher asks panelists to formulate and bolster their decisions.¹⁹ In a modified Delphi, the panel responds to a series of pre-selected items drawn from the literature by the researcher.²⁰ In studies that use policy Delphi, researchers attempt to cultivate the strongest potential viewpoints in opposition to the resolution of a key policy issue.²¹ In a real-time Delphi study, panelists use computer technology located within the same room to reach a real-time consensus.²²

Additional distinctions that separate Delphi studies include number of rounds, variations in panel size, and the measurement of consensus. Although the typical Delphi study contains either 2 or 3 rounds of data collection, researchers may incorporate additional rounds as necessary to achieve

¹³ Ali R. Afshari, *Selection of Construction Project Manager by Using Delphi and Fuzzy Linguistic Decision Making*, 28 J. INTELLIGENT & FUZZY SYS. 2827, 2829 (2015).

¹⁴ HAROLD A. LINSTONE & MURRAY TUROFF, *THE DELPHI METHOD: TECHNIQUES AND APPLICATIONS* (1975).

¹⁵ Casey G. Cegielski, David M. Bourrie, Benjamin T. Hazen, *Evaluating Adoption of Emerging IT for Corporate IT Strategy: Developing a Model Using a Qualitative Method*, 30 INFO. SYS. MGMT. 235, 238 (2013).

¹⁶ Linstone & Turoff, *supra* note 14.

¹⁷ Shane R. Brady, *Utilizing and Adapting the Delphi Method for Use in Qualitative Research*, 14 INT'L J. QUALITATIVE METHODS, 1, 2 (2015); Cegielski, Bourrie, & Hazen, *supra* note 15, at 238; Lily Lai, Andrew Flower, Michael Moore, & George Lewith, *Developing Clinical Practice Guidelines for Chinese Herbal Treatment of Polycystic Ovary Syndrome: A Mixed-Methods Modified Delphi Study*, 23 COMPLEMENTARY THERAPIES MED. 430, 431 (2015).

¹⁸ Felicity Hasson & Sinead Keeney, *Enhancing Rigour in the Delphi Technique Research*, 78 TECH. FORECASTING & SOC. CHANGE, 1695, 1697 (2011).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

consensus.²³ Opinions vary with respect to the minimum number of participants required for a Delphi panel. Panel size may differ based on the resources available to the researcher and the topic covered by the study. With respect to measuring consensus in a Delphi study, researchers have used percentage agreement, stipulated number of rounds, coefficient of variation, post-group consensus, subjective analysis, and percentage agreement.²⁴

B. *Leadership in the Legal Profession*

A growing level of scholarship connects the necessity of collaborative relationships between lawyers and managers and the leadership skills and competencies required for success in modern in-house corporate legal practice. This section contains a discussion of current scholarship on the rising need for in-house counsel to possess effective leadership skills, followed by a discussion on how the cultivation of such skills remains largely overlooked in formal legal education. The literature in this section emphasizes the challenges that will hinder lawyers' efforts to lead organizational change efforts within the organization, supporting the need to identify techniques that will alter unreceptive managerial viewpoints toward the strategic value of law within the corporate setting.

1. *Necessity of Leadership in In-House Legal Practice*

Leadership is indispensable component of modern legal practice. Nearly every lawyer will, at some point, assume a significant leadership role in the workplace or the community.²⁵ In-house legal departments often promote lawyers to positions that emphasize leadership.²⁶ The core competencies necessary for success in modern in-house legal practice in the coming years will include business acumen, problem-solving, legal knowledge, project management, leadership, emotional intelligence, flexibility and adaptability, working with people, and relationship building and collaboration.²⁷ The 'working with people' competency identified by Mottershead and Magliozzi encompassed interpersonal communication, team building, team contribution, and engagement. It is noteworthy that knowledge of the law constituted only one core competency within the larger set of competencies necessary for successful legal practice. Cochran and Perrone emphasized the importance of similar skills.²⁸ Attorneys who wish to succeed in contemporary in-house legal practice will need to internalize and exhibit a diverse array of behaviors, skills, and competencies.

2. *Deficiency of Leadership Training in Legal Education*

²³ Ivan R. Diamond, Robert C. Grant, Brian M. Feldman, Paul B. Pencharz, Simon C. Ling, Aideen M. Moore, & Paul W. Wales, *Defining Consensus: A Systematic Review Recommends Methodologic Criteria for Reporting of Delphi Studies*, 67 J. CLINICAL EPIDEMIOLOGY 401, 403 (2014) (Out of 100 Delphi studies, 48% occurred in 2 rounds and 42% occurred in 3 rounds).

²⁴ von der Gracht, *supra* note 11.

²⁵ Deborah L. Rhode, *What Lawyers Lack: Leadership*, 9 UNIV. ST. THOMAS L. J. 472 (2011).

²⁶ Karen Cochran, *Leadership and Law: An In-House Counsel's Perspective*, 32 DEL. LAWYER 24 (2014); Jillian Trezza, *Army Lessons for Lawyer-Leaders*, 32 REV. LITIG. 240 (2013).

²⁷ Terri Mottershead & Sandee Magliozzi, *Can Competencies Drive Change in the Legal Profession?* 11 UNIV. ST. THOMAS L. J. 51, 78 (2013).

²⁸ Cochran, *supra* note 26.

Despite the rising importance of leadership in the legal profession, attorneys at times fail to exhibit the same behaviors, skills, and competencies as their managerial counterparts. Many lawyers often lack the necessary preparation, ability, and comfort to engage in effective leadership practices within the business setting.²⁹ While in-house attorneys are expected to work effectively across departments, offices, and geographic regions, they may lack education or formal training on how to work as part of an executive or management level team.³⁰ Attorneys who assume the role of in-house counsel may labor extensively to undertake the responsibilities that, although inherent to the position, are external to traditional legal practice.³¹ Despite an extensive amount of existing literature on business leadership, scholars have paid little attention to the unique leadership challenges in-house counsel will face in the corporate environment.³² An emphasis on competition has historically supplanted an emphasis on leadership and collaboration in the law school setting.³³

Some scholars have studied the link between the skill deficiencies exhibited by newer generations of legal practitioners and the learning environments that often characterize contemporary legal education. Traditional legal study, which includes an emphasis on linear thinking and competition, represents a natural obstacle to teamwork.³⁴ The interpersonal traits created by such a method of study, which may include an absence of self-awareness, inflexibility, or the need for individual accomplishment, hinder successful interdisciplinary collaboration. The work by other scholars further supports these assertions.³⁵ Smith and Marrow indicated that attorneys in leadership positions in major law firms acknowledged five central areas in which they experienced difficulties:³⁶

- Managing firm growth through the development of new markets and practice areas.
- Cultivating strategic leadership skills, improving teamwork, and developing employee buy-in to long-term vision.
- Promoting client satisfaction and client retention.
- Managing internal talent, improving firm culture, and engaging in succession planning.
- Building consensus, implementing strategic planning and repositioning firm resources.

Over the last few years, momentum toward leadership development in the legal field has started to progress. Leadership now occupies a greater role in programs geared toward law students with diverse career interests and aspirations, such as clinical programs, business and law school joint

²⁹ Janet Weinstein, Linda Morton, Howard Taras & Vivian Reznik, *Teaching Teamwork to Law Students*, 63 J. L. EDUC. 36 (2013); Jillian Trezza, *Army Lessons for Lawyer-Leaders*, 32 REV. LITIG. 240 (2013).

³⁰ Cochran, *supra* note 26; Weinstein et al., *supra* note 29.

³¹ Lovett, *supra* note 8.

³² Cochran, *supra* note 26; Deborah L. Rhode, *Developing Leadership*, 52 SANTA CLARA L. REV. 691 (2012).

³³ Janet Weinstein, Linda Morton, Howard Taras & Vivian Reznik, *Teaching Teamwork to Law Students*, 63 J. L. EDUC. 36 (2013).

³⁴ *Id.*

³⁵ Susan Douglas, *Incorporating Emotional Intelligence in Legal Education: A Theoretical Perspective*, 9 J. BUS. EDUC. & SCHOL. TEACH. 56 (2015); Nancy J. Knauer, *Learning Communities: A New Model for Legal Education*, 7 ELON LAW REVIEW, 193 (2015); Michael L. Perlin & Alison J. Lynch, *Legal Education in a Time of Change: Challenges and Opportunities: How Teaching about Therapeutic Jurisprudence can be a Tool of Social Justice, and Lead Law Students to Personally and Socially Rewarding Careers: Sexuality and Disability as a Case Example*, 16 NEV. L. J. 209 (2015).

³⁶ Roland Smith & Paul B. Marrow, *The Changing Nature of Leadership in Law Firms*, <https://pdfs.semanticscholar.org/817e/d2e152c0381103cd88b3a83b2260c388d870.pdf> (last visited Sept. 14, 2017).

degree programs, and legal skills programs.³⁷ It is noteworthy, however, that only 8% of ABA-accredited law schools in the United States offer courses catered specifically to in-house legal practice.³⁸ The emerging challenges now facing the legal profession will mandate an increased emphasis on leadership skills.³⁹ Although major law firms are spearheading change in this area, all lawyers, especially in-house counsel, must respond to the need for increased leadership capabilities.⁴⁰

The increased need for leadership proficiencies is chiefly evident for lawyers employed in the position of in-house general counsel. To thrive as successful leaders in general counsel positions, lawyers must cultivate new techniques for solving complex problems and working in interdisciplinary teams.⁴¹ As noted by Rhode, the successful resolution of existing leadership challenges will require strategies along two separate dimensions: (a) methods for identifying and addressing lawyers' leadership weaknesses, and (b) practices for developing and cultivating leadership objectives in an effective manner.⁴² Leadership development will become increasingly crucial for individuals working in the position of in-house general counsel.⁴³

In summary, two important features were evident from the literature about the role of leadership in in-house legal practice: (a) effective leadership skills will constitute an indispensable tool for addressing the diverse challenges of modern in-house corporate legal practice, and (b) despite recent progress, many in-house attorneys often lack the leadership preparation, abilities, and comfort necessary to meet these challenges. The resolution of these leadership challenges will call for new techniques geared toward the development and cultivation of leadership skills.

III. Research Design and Methodology

A. Panelist Selection

The selection of suitable experts to serve as study participants is a critical component of the Delphi design.⁴⁴ Delphi researchers have selected study participants based on a range of qualifications, including professional publications, education, professional qualifications, years of work experience, project involvement, and licensures.⁴⁵ Participants in this study needed to meet 4 eligibility criteria: (a) possess a juris doctor degree from an ABA-accredited law school located in the United States; (b) possess a license to practice law in at least 1 state; (c) possess at least 5 years

³⁷ Mottershead & Magliozzi, *supra* note 27; Trezza, *supra* note 29.

³⁸ Lovett, *supra* note 8.

³⁹ Trezza, *supra* note 29.

⁴⁰ *Id.*

⁴¹ Cochran, *supra* note 26.

⁴² Rhode, *supra* note 32.

⁴³ Bird & Orozco, *supra* note 1.

⁴⁴ Sinead Keeney, Felicity Hasson, & Hugh P. McKenna, *A Critical Review of the Delphi Technique as a Research Methodology for Nursing*, 38 INT'L J. NURS. STUD. 195, 196 (2001) (Rather than selecting participants using representative random samples, Delphi researchers select participants based on their expertise with the issue(s) involved in the study).

⁴⁵ Jasvir S. Bahl, James Dollman, & Kade Davison, *The Development of a Subjective Assessment Framework for Individuals Presenting for Clinical Exercise Services: A Delphi Study*, 19 J. SCI. & MED. SPORT. 872 (2016); Sinem Mollaoglu, Anthony Sparkling, & Sean Thomas, *An Inquiry to Move an Underutilized Best Practice Forward: Barriers to Partnering in the Architecture, Engineering, and Construction Industry*, 46 PROJ. MGMT. J. 69 (2015).

of business industry experience, and (d) currently serve in the role of in-house general counsel for an organization headquartered in the United States. I identified participants for this study using the professional networking site LinkedIn. Thirty-nine in-house general counsel who satisfied the study eligibility criteria agreed to participate in the study. Of the 39 individuals who agreed to participate in the study, 19 participated in all 3 rounds of the study.

B. Data Collection and Data Analysis

1. The First Round

I developed the first round questionnaire based on a review of the existing literature, a field test of the questionnaire, and other peer feedback. To address the theme of the role of leadership in in-house legal practice, and to develop techniques for altering unreceptive managerial viewpoints toward the strategic value of law within the corporate setting, I asked panelists to provide recommendations in response to the following open-ended question in Round 1: What behaviors will in-house lawyers need to display to be viewed as valued participants on management-level teams? The instructions asked panelists to provide a minimum of 3 – 5 recommendations in response to the question, along with a short description for each recommendation. The study panelists generated 112 recommendations in response to the open-ended question.

I used thematic content analysis to analyze and code participants’ first round responses according to key themes. I employed constant comparison to search for commonly used words/phrases and group similar items into tentative categories. I adjusted the codes and categories each time I received another response to the first round questionnaire. The recommendations provided by the panelists in response to the open-ended question led to the creation of ten theme statements spanning the following sub-categories: proactive problem solving, adaptability, knowledge of law and business strategy, calm and decisive under pressure, empathy, engagement, communication, integrity and accountability, approachability, professionalism. Table 1 contains an overview of the relevant Round 1 results.

Table 1

First Round Coding Results

Code category/description	Frequency
Proactive problem solving	14
Adaptability	5
Knowledge of law and business strategy	16
Calm and decisive under pressure	13
Empathy	22
Engagement	10
Communication	12
Integrity and accountability	13
Approachability	2

Professionalism	5
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2. The Second Round

The second-round questionnaire included the 8 statements derived from panelists' responses to the first round questionnaire. Panelists rated each statement on the second round questionnaire against 2 separate 5-point Likert scales: desirability and feasibility. The scale measuring desirability ranged from (1) highly undesirable to (5) highly desirable, whereas the scale measuring feasibility ranged from (1) definitely infeasible to (5) definitely feasible. The instructions asked panelists to explain their reasoning if they applied a rating of 1 or 2 to a statement on either the desirability or the feasibility scale. The second round questionnaire included a list of references and definitions to provide panelists with clarity as to the meaning of each item on the desirability and feasibility scales respectively (see Appendix A). Any statement where the collective frequency of panelists' top 2 responses (rating of 4 or 5) was 70% or higher on both the desirability and feasibility scale would pass on to the third round. Setting the level of consensus at 70% set a comparatively high bar indicating that a substantial majority leaned toward consensus. As indicated in Table 2, 6 of the 8 statements satisfied the 70% threshold and passed to Round 3. The panelists in Round 2 also provided a diverse assortment of optional comments and explanations of their reasoning (see Appendix B).

Table 2

Round 2 Ratings

Statement	Desirability rating %	Feasibility rating %
In-house counsel displaying their value as participants on management level teams <i>by proactively finding solutions to company problems.</i>	91%	65%
In-house counsel displaying their value as participants on management level teams <i>by exhibiting adaptability in the face of change.</i>	100%	78%
In-house counsel displaying their value as participants on management level teams <i>by possessing extensive knowledge of the legal and business issues affecting the company.</i>	100%	91%
In-house counsel displaying their value as participants on management level teams <i>by exercising calm judgment under pressure.</i>	96%	87%
In-house counsel displaying their value as participants on management level teams <i>by supporting the views, perspectives, and concerns of others.</i>	78%	61%
In-house counsel displaying their value as participants on management level teams <i>by actively engaging in business processes.</i>	100%	74%
In-house counsel displaying their value as participants on management level teams <i>by exhibiting strong communication skills.</i>	96%	87%
In-house counsel displaying their value as participants on management level teams <i>by exhibiting accountability and integrity.</i>	96%	91%
In-house counsel displaying their value as participants on management level teams <i>by maintaining a friendly and approachable demeanor.</i>	96%	91%

In-house counsel displaying their value as participants on management level teams <i>by bringing professionalism to their work and conduct w/others.</i>	91%	91%
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3. The Third Round

The third-round questionnaire included the 6 statements that carried over from Round 2. The panelists rated each statement against the other 2 scales: importance and confidence. The scale measuring importance ranged from (1) most unimportant to (5) very important, whereas the scale measuring confidence ranged from (1) unreliable to (5) certain. Comparable to Round 2, the third-round questionnaire included a list of references and definitions to provide panelists with clarity as to the meaning of each item on the importance and confidence scales respectively (see Appendix A). The instructions once again asked panelists to explain their reasoning if they applied a rating of 1 or 2 to a statement on either the importance or the confidence scale. As indicated in Table 3, 5 of the 6 statements satisfied the 70% threshold for both importance and confidence. Similar to Round 2, the panelists in Round 3 provided a diverse assortment of optional comments and explanations of their reasoning (see Appendix B).

Table 3

Round 3 Ratings

Statement	Importance rating %	Confidence rating %
In-house counsel displaying their value as participants on management level teams <i>by exhibiting accountability and integrity.</i>	95%	100%
In-house counsel displaying their value as participants on management level teams <i>by possessing extensive knowledge of the legal and business issues affecting the company.</i>	95%	79%
In-house counsel displaying their value as participants on management level teams <i>by bringing professionalism to their work and conduct w/others.</i>	79%	68%
In-house counsel displaying their value as participants on management level teams <i>by exhibiting adaptability in the face of change.</i>	84%	63%
In-house counsel displaying their value as participants on management level teams <i>by actively engaging in business processes.</i>	84%	79%
In-house counsel displaying their value as participants on management level teams <i>by maintaining a friendly and approachable demeanor.</i>	79%	68%
In-house counsel displaying their value as participants on management level teams <i>by exercising calm judgment under pressure.</i>	89%	79%
In-house counsel displaying their value as participants on management level teams <i>by exhibiting strong communication skills.</i>	95%	89%

C. Exploring the Results

The key findings of this study, depicted by the theme statements contained in Table 3, represent a consensus by the study panel on behaviors in-house lawyers will need to display to be viewed as valued participants on management-level teams. The displays of these behaviors by in-house lawyers, in turn, represent a subset of techniques for altering unreceptive managerial viewpoints toward the strategic value of law within the corporate setting. The findings suggest that in-house

lawyers should display strong communication skills, accountability and integrity, and calm judgment under pressure ahead of efforts to bring professionalism to their work or to maintain an approachable demeanor. A review of non consensus items (items failing to reach the 70% consensus threshold on at least one scale) must fall alongside the final consensus items, as both sets of items highlight the areas where organizations should direct limited time and resources in conjunction with behaviors that will help in-house lawyers to be viewed as valued participants on management-level teams.

1. Proactive Problem Solving

The collective ratings supplied by the panelists in Round 2 indicated a high level of agreement for desirability but a low level of agreement for feasibility in connection with in-house counsel displaying their value as participants on management level teams by proactively finding solutions to company problems.⁴⁶ Unfortunately the explanations of reasoning and optional comments provided by the panelists fail to provide any substantial clarity to the low feasibility rating. One panelist did note that the statement seemed to confuse the role of in-house counsel. This comment may serve as a reminder that although modern in-house legal practice will require general counsel to possess competencies in leadership, emotional intelligence, relationship building, and other competencies, some general counsel continue to see legal knowledge and legal acumen as their sole areas of responsibility. Another panelist noted that the legal department cannot solve all organizational problems. If other panelists interpreted the statement regarding in-house counsel displaying their value by proactively finding solutions to company problems to mean that legal had sole responsibility for resolving organizational difficulties, rather than shared responsibility with other departments, this may serve as a potential explanation for the low feasibility ratings.

2. Adaptability

The collective ratings supplied by the panelists in Rounds 2 and 3 indicated high ratings for desirability, feasibility, and importance but low ratings for confidence in connection with in-house counsel displaying their value as participants on management level teams by exhibiting adaptability in the face of change. Despite high ratings in three of the four areas, the comments and explanations supplied by the panelists illustrate the need for in-house counsel to approach the issue of adaptability with caution. One panelist commented that adaptability, though useful, cannot come at the expense of increasing potential legal vulnerabilities of the organization. Another panelist questioned the usefulness of adaptability as a means for in-house counsel to display their value on management level teams due to the potential difficulties in finding appropriate opportunities to demonstrate adaptability. A third panelist noted that the skill lies in reducing risk creatively rather than overstating risk for effect or downplaying risk to support management's agenda. These comments reflect and illustrate the pressures placed upon in-house counsel to constantly support executive decisions, pressures that may lead in-house lawyers to disregard critical pieces of information and thereby undermine risk management strategies.⁴⁷

⁴⁶ High level of agreement indicates the collective ratings supplied by the panel met or exceeded the 70% measure of consensus established for the Delphi study. Low level of agreement indicates that the collective ratings supplied by the panel did not meet or exceed the 70% measure of consensus established for the Delphi study.

⁴⁷ Laura A. Kaster, *Improving Lawyer Judgment by Reducing the Impact of "Client-Think,"* 67 DISPUTE RES. J. 56, 56 (2012).

3. *Knowledge of Law and Business Strategy*

The collective ratings supplied by the panelists in Rounds 2 and 3 indicated high levels of agreement with the desirability, feasibility, importance, and confidence of in-house counsel displaying their value as participants on management level teams by possessing extensive knowledge of the legal and business issues affecting the company. These findings support research by other scholars emphasizing the importance of in-house counsel possessing both legal knowledge and business knowledge.⁴⁸ As one panelist indicated, a genuine understanding of what the organization does will allow the in-house lawyer to better tailor his or her efforts to assist the organization in achieving its objectives.

4. *Calmness under Pressure*

The collective ratings supplied by the panelists in Rounds 2 and 3 indicated high ratings for desirability, feasibility, importance, and confidence of in-house counsel displaying their value as participants on management level teams by exercising calm judgment under pressure. Despite the high ratings, however, the comments provided by several of the panelists emphasize the diversity in viewpoints related to such an approach. One panelist noted that calmness under pressure cannot be demonstrated on a consistent basis. Other panelists noted that the feasibility of such a technique is highly contingent on the personality of the in-house counsel. Another panelist cautioned that while there is value to a calm demeanor, in-house counsel cannot come across as unemotional.

5. *Empathy*

The collective ratings supplied by the panelists in Round 2 indicated a high level of agreement for desirability but a low level of agreement for feasibility in connection with in-house counsel displaying their value as participants on management level teams by supporting the views, perspectives, and concerns of others. This finding highlights an area of potential resistance confounding the efforts described by Bagley and Roellig and Lovett respectively surrounding efforts by general counsel to encourage managers to assume more participatory, hands-on roles in legal affairs affecting their organizations.⁴⁹ One panelist commented that it is not the job of the in-house lawyer to support viewpoints but rather to provide legal guidance. This comment serves as a reminder that not all in-house lawyers, even those serving in the role of general counsel, may believe that their roles and responsibilities go beyond the delivery of legal advice. Another panelist noted that managers should not expect in-house counsel to suppress their own judgment and independent thoughts.

6. *Engagement*

The collective ratings supplied by the panelists in Rounds 2 and 3 indicated high levels of agreement with the desirability, feasibility, importance, and confidence of in-house counsel

⁴⁸ Helena Haapio, *Business Success and Problem Prevention through Proactive Contracting: A Proactive Approach*, 49 SCAND. STUD. L. 149, 180 (2015); Mottershead & Magliozzi, *supra* note 27.

⁴⁹ Constance E. Bagley & Mark D. Roellig, *The Transformation of General Counsel: Setting the Strategic Legal Agenda* (2013, January 8), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2201246; Lovett, *supra* note 8.

displaying their value as participants on management level teams by actively engaging in business processes. One panelist noted that feasibility depends on the receptivity of the business team to the involvement by in-house counsel. This comment denotes an important consideration that managers may view the presence of in-house counsel with annoyance, suspicion, or trepidation. By the same token, members of the legal department may view extensive involvement in business processes as falling outside their primary areas of responsibility.

7. *Communication*

The collective ratings supplied by the panelists in Rounds 2 and 3 indicated high levels of agreement with the desirability, feasibility, importance, and confidence of efforts by in-house counsel to display their value as participants on management level teams by exhibiting strong communication skills. These findings are consistent with the literature. The exercise of good communication skills is a critical leadership attribute in a legal context.⁵⁰ The prevention and mitigation of conflict between lawyers and managers will require the integration of the knowledge and abilities of each group through communication and collaboration.⁵¹

8. *Integrity and Accountability*

The collective ratings supplied by the panelists in Rounds 2 and 3 indicated high levels of agreement with the desirability, feasibility, importance, and confidence of efforts by in-house counsel to display their value as participants on management level teams by exhibiting accountability and integrity. These findings are consistent with research by Das, Pepper, and Remus respectively, who indicated that the professional and fiduciary duties that company lawyers owe to the organization require the exercise of integrity and professional judgment.⁵² Despite the high ratings, the comments suggest that in-house counsel must approach participation on management level teams with caution. Mistrust of the legal profession, or interpersonal conflicts stemming from differences in training and education, may lead some managers to view the participation of attorneys as a form of meddling in managerial affairs. Other comments suggest that in-house counsel may face difficulties in consistently meeting expectations in this area. The findings also highlight the tension and potential for conflict stemming from corporate lawyers' dual obligations to the legal profession and to the company.

9. *Approachability*

The collective ratings supplied by the panelists in Rounds 2 and 3 indicated high ratings for desirability, feasibility, and importance but low ratings for confidence in connection with in-house counsel displaying their value as participants on management level teams by maintaining a friendly and approachable demeanor. Similar to calmness under pressure, the comments provided by the panel with respect to approachability highlight a variety of important considerations. Several

⁵⁰ MAUREEN BRODERICK, *THE ART OF MANAGING PROFESSIONAL SERVICES: INSIGHTS FROM LEADERS OF THE WORLD'S TOP FIRMS* (2010).

⁵¹ Haapio, *supra* note 48.

⁵² Dana Remus, *Hemispheres Apart: A Profession Connected*, 82 *FORDHAM L. REV.* 2665 (2014); Kush Das, *Un-Privileged Industry: Assessing the Detriments of an Independent Compliance Office in Health Care Fraud Litigation*, 27 *GEO. J. L. ETHICS*, 485 (2014); Stephen Pepper, *3 Dichotomies in Lawyers' Ethics (with Particular Attention to the Corporation as Client)*, 28 *GEO. J. L. ETHICS*, 1069 (2015).

panelists noted that while it is important for others to view in-house counsel as approachable, approachability cannot come at the cost of in-house counsel sacrificing his or her obligations to serve the best interests of the corporation. This comment highlights an important aspect of organizational conflict with respect to tensions between managers and company lawyers, wherein in-house lawyers will routinely face pressures to support the decisions or activities of their non lawyer colleagues.⁵³ In contrast, another panelist indicated that there is no harm in approachability. Yet another panelist expressed doubt as to whether approachability and demeanor can sway managerial views toward the legal department. A potential takeaway is that although such behaviors may lead to a more pleasant working environment, they may lack the force necessary to alter the factors that typically drive interpersonal conflict between lawyers and managers.

10. *Professionalism*

The collective ratings supplied by the panelists in Rounds 2 and 3 indicated high ratings for desirability, feasibility, and importance but low ratings for confidence in connection with in-house counsel displaying their value as participants on management level teams by bringing professionalism to their work and conduct. Only one panelist provided a comment in response to this statement, indicating that professionalism is a basic requirement of the job. This comment may reflect the possible viewpoint that emphasizing expectations that managers may already have regarding conduct of the legal department may function as an inferior means of changing those same managerial perspectives toward legal strategy.

IV. Significance of the Study

The findings in this study have potential implications for leadership development, behavior, and change management throughout multiple levels of the organization. Integrating the techniques identified in this study into the development of coaching practices, team building sessions, or other collaborative exercises may lead to: (a) decreased managerial burnout, absenteeism, and turnover due to organizational conflict with in-house counsel; (b) reduced anxiety stemming from organizational conflict between managers and in-house counsel; and, (c) decreased workplace resistance between managers and in-house counsel. Because managers' viewpoints toward in-house counsel may include perceptions that attorneys have excessive authority over decisions affecting the employer-employee relationship,⁵⁴ the exercise of certain behaviors by in-house may help to diminish managerial stress and anxiety by illuminating the roles and responsibilities of in-house counsel regarding authority over decisions affecting the employer-employee relationship. The alleviation of these managerial concerns may help reduce organizational conflict between managers and in-house counsel. The improvements to employee satisfaction generated by clarifications in the roles and responsibilities of in-house counsel may help to cut managerial burnout, absenteeism, and turnover due to organizational conflict with in-house counsel.

V. Conclusion

⁵³ Eli Wald, *In-House Risk* (U Denver Legal Studies Research Paper No. 15-51), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2667157##

⁵⁴ Lovett, *supra* note 8, at 131.

The specific problem that I addressed in this study is that managers hold unreceptive viewpoints toward the strategic value of law within the corporate setting. Although in-house general counsel working across business industries in the United States are in a position to develop techniques for altering unreceptive managerial viewpoints toward the law, a lack of consensus exists among them with respect to techniques that will alter unreceptive managerial viewpoints toward the strategic value of law within the corporate setting. To address the role of leadership in in-house legal practice, and to develop techniques for altering unreceptive managerial viewpoints toward the strategic value of law within the corporate setting, the first question in Round 1 solicited panelists' recommendations in response to the following open-ended statement: What behaviors will in-house lawyers need to display to be viewed as valued participants on management-level teams? The final list of theme statements generated by the study panel in Round 3 encompassed the following: (a) exhibiting accountability and integrity; (b) possessing extensive knowledge of the legal and business issues affecting the company; (c) bringing professionalism to their work and conduct w/others; (d) exhibiting adaptability in the face of change; (e) actively engaging in business processes; (f) maintaining a friendly and approachable demeanor; (g) exercising calm judgment under pressure, and (h) exhibiting strong communication skills.

The key findings of this study represent a consensus by the study panel on behaviors in-house counsel will need to display to be viewed as valued participants on management-level teams. These behaviors, in turn, represent a subset of techniques for altering unreceptive managerial viewpoints toward the strategic value of law within the corporate setting. The findings suggest that in-house lawyers should display strong communication skills, accountability and integrity, and calm judgment under pressure ahead of efforts to bring professionalism to their work or to maintain an approachable demeanor,

APPENDIX A

Desirability Scale:

- (1) – Highly Undesirable: Will have major negative effect
- (2) – Undesirable: Will have a negative effect with little or no positive effect
- (3) – Neither Desirable nor Undesirable: Will have equal positive and negative effects

- (4) – Desirable: Will have a positive effect with minimum negative effects
- (5) – Highly Desirable: Will have a positive effect and little or no negative effect

Feasibility Scale:

- (1) – Definitely Infeasible: Cannot be implemented (unworkable)
- (2) – Probably Infeasible: Some indication this cannot be implemented
- (3) – May or May Not be Feasible: Contradictory evidence this can be implemented
- (4) – Probably Feasible: Some indication this can be implemented
- (5) – Definitely Feasible: Can be implemented

Importance Scale:

- (1) – Most Unimportant: No relevance to the issue
- (2) – Unimportant: Insignificantly relevant to the issue
- (3) – Moderately Important: May be relevant to the issue
- (4) – Important: Relevant to the issue
- (5) – Very Important: Most relevant to the issue

Confidence Scale:

- (1) – Unreliable: Great risk of being wrong
- (2) – Risky: Substantial risk of being wrong
- (3) – Not Determinable: Information needed to evaluate risk is unavailable
- (4) – Reliable: Some risk of being wrong
- (5) – Certain: Low risk of being wrong

APPENDIX B

Round 2 – Explanations of Reasoning

Explanations of Reasoning

Statement	Explanation of Reasoning Generated by Panelist
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In-house counsel displaying their value as participants on management level teams by exercising calm judgment under pressure.	Not something that can be routinely demonstrated in a consistent basis. To me, this seems like much more of an intangible attribute developed over time
In-house counsel displaying their value as participants on management level teams by supporting the views, perspectives, and concerns of others.	Not our job to support views but provide legal guidance
In-house counsel displaying their value as participants on management level teams by proactively finding solutions to company problems.	Seems to confuse the role of in-house counsel.

Round 2 – Optional Comments

Statement	Optional Comment Generated by Panelist
In-house counsel displaying their value as participants on management level teams by actively engaging in business processes.	Feasibility based on how receptive the business team is to legal involvement in business issues.
In-house counsel displaying their value as participants on management level teams by actively engaging in business processes.	Assuming, of course, that counsel has a place in the business processes and that participation isn't only for that sake.
In-house counsel displaying their value as participants on management level teams by actively engaging in business processes.	Very dependent on type of services/products company provides and skills and experience of counsel.
In-house counsel displaying their value as participants on management level teams by actively engaging in business processes.	This depends on the company/leaders; and whether they are open to input. There should be no impediments to finding a way to add value in operations or infrastructure outside of strictly law, but not all managers will accept a lawyers help.
In-house counsel displaying their value as participants on management level teams by exhibiting adaptability in the face of change.	Adaptability is good but not to the detriment of the company becoming legally vulnerable.
In-house counsel displaying their value as participants on management level teams by exhibiting adaptability in the face of change.	Difficult to find opportunities to demonstrate adaptability, definitely can't plan for it.
In-house counsel displaying their value as participants on management level teams by exhibiting adaptability in the face of change.	Not a 5 because adaptability in approach should not be mistaken for variability in risk requirements.
In-house counsel displaying their value as participants on management level teams by exhibiting accountability and integrity.	Very difficult to develop on a consistent basis; more something developed naturally over time.

In-house counsel displaying their value as participants on management level teams by exhibiting accountability and integrity.	Also nonnegotiable as a value proposition
In-house counsel displaying their value as participants on management level teams by exercising calm judgment under pressure.	Very subjective in terms of feasibility – entirely depends on the personality of the counsel.
In-house counsel displaying their value as participants on management level teams by exercising calm judgment under pressure.	Clearly the goal but first off lawyers are human and will not meet all expectations every time; second the quality of the lawyer will vary.
In-house counsel displaying their value as participants on management level teams by exhibiting strong communication skills.	Similar to the (21), this is a very individualized capability.
In-house counsel displaying their value as participants on management level teams by exhibiting strong communication skills.	Not all lawyers have strong communication skills or people skills.
In-house counsel displaying their value as participants on management level teams by exhibiting strong communication skills.	Should be a part of the value proposition though there will always be some variability in skill level even with training of lawyers.
In-house counsel displaying their value as participants on management level teams by possessing extensive knowledge of the legal and business issues affecting the company.	Extensive knowledge results from extensive time spent working in/for the company; feasibility based on work ethic.
In-house counsel displaying their value as participants on management level teams by possessing extensive knowledge of the legal and business issues affecting the company.	See response for #20
In-house counsel displaying their value as participants on management level teams by maintaining a friendly and approachable demeanor.	As in above, very individualist qualities of the counsel.
In-house counsel displaying their value as participants on management level teams by maintaining a friendly and approachable demeanor.	I think this is important but sometimes legal does have to be the bad guy.
In-house counsel displaying their value as participants on management level teams by maintaining a friendly and approachable demeanor.	Should be feasible but I can't speak for all lawyers
In-house counsel displaying their value as participants on management level teams by maintaining a friendly and approachable demeanor.	Attorneys need to be approachable and friendly but his alone is not likely to sway opinions of managers on the value of the department. I once had a CEO tell me that I was too well liked in the organization. In her opinion, people needed to fear the General Counsel – and the fact that I was approachable and likeable made her think I wasn't doing my job.

In-house counsel displaying their value as participants on management level teams by supporting the views, perspectives, and concerns of others.	Can be a positive, provided in-house counsel is not expected to suppress its own judgment and independent thoughts.
In-house counsel displaying their value as participants on management level teams by supporting the views, perspectives, and concerns of others.	Clearly part of the values not a 5 because not all lawyers are capable of doing so
In-house counsel displaying their value as participants on management level teams by proactively finding solutions to company problems.	Clearly core value except not all problems can be solved in the legal department nor should the value metrics be did you solve our problems when change in the culture or management themselves is needed.
In-house counsel displaying their value as participants on management level teams by bringing professionalism to their work and conduct w/others.	Core value
In-house counsel displaying their value as participants on management level teams by bringing professionalism to their work and conduct w/others.	“Professionalism” has a negative impact when dealing with low level employees. They have been trained to dislike lawyers. With these employees, a more “laid back” approach is better.

Round 3 – Explanations of Reasoning

Statement	Explanation of Reasoning Generated by Panelist
In-house counsel displaying their value as participants on management level teams by exhibiting adaptability in the face of change.	Does not seem like it will resolve the issue or any facet of it.
In-house counsel displaying their value as participants on management level teams by actively engaging in business processes.	Depends on the nature of the business and the skills and experience/competence of attorney
In-house counsel displaying their value as participants on management level teams by maintaining a friendly and approachable demeanor.	Doubtful it will resolve the issue or any facet of it.

Round 3 – Optional Comments

Statement	Optional Comment Generated by Panelist
In-house counsel displaying their value as participants on management level teams by exhibiting accountability and integrity.	Will work for most management but some will see lawyer as meddling
In-house counsel displaying their value as participants on management level teams by possessing extensive knowledge of the legal and business issues affecting the company.	Equally part of the value proposition for the lawyer. No one will take you seriously if you do not know what is happening or care enough to educate yourself. There is a difference between knowledge and expertise. Sales contracts are similar across industries

	to a lawyer but not to the client. It is a 2-way street. Understanding what you sell or what your client does always you to better tailor ways to help them.
In-house counsel displaying their value as participants on management level teams by bringing professionalism to their work and conduct w/others.	Key part of basic requirement for job.
In-house counsel displaying their value as participants on management level teams by exhibiting adaptability in the face of change.	Adaptability is a positive; however malleability is not. Your determination of risk is constant your ability to help the organization reduce a risk by creativity is the skill. Neither overstating risk for effect, or ignoring risk to benefit a manger’s agenda helps the company or the legal dept. in the long run.
In-house counsel displaying their value as participants on management level teams by actively engaging in business processes.	Precision, economy and relevance of advice and counsel will help ensure reception.
In-house counsel displaying their value as participants on management level teams by actively engaging in business processes.	Of need for lawyer to be successful but also adds value for company
In-house counsel displaying their value as participants on management level teams by maintaining a friendly and approachable demeanor.	No risk in being civil
In-house counsel displaying their value as participants on management level teams by maintaining a friendly and approachable demeanor.	Friendly counsel is fine. I want competent, professional counsel. If that is Mr. Spock, so be it.
In-house counsel displaying their value as participants on management level teams by maintaining a friendly and approachable demeanor.	We are a service department you need to act like it. However friendly and approachable is not the same thing as pliable and unwilling to risk being unpopular. We are not here to be liked per se, so much as trusted and valuable. Being approachable and competent is the requirement.
In-house counsel displaying their value as participants on management level teams by exercising calm judgment under pressure.	I want competent, professional counsel. If that is Mr. Spock, so be it!
In-house counsel displaying their value as participants on management level teams by exercising calm judgment under pressure.	Calmness is valuable but it is not the same as unemotional. Involvement and engagement do require some level of emotional investment. However, no one is benefitted from a lack of control.
In-house counsel displaying their value as participants on management level teams by exhibiting strong communication skills.	My scores equate “strong” with “excellent.” “Strong” could just mean forceful. There is a time and place for forcefulness but it shouldn’t be every encounter.
In-house counsel displaying their value as participants on management level teams by exhibiting strong communication skills.	Not everyone is a great trainer or public speaker but being able to communicate both orally and in writing are prerequisites

Teaching Divorce Law in the Business Law Curriculum: An Examination of the Pedagogy, a Substantive Law Primer, and a Case Study

By

David Read**

- I. Introduction
- II. Why Teach Business Divorce Law in a Business Law Course
- III. Literature Review of Divorce Law Scholarship in Legal Studies of Business
- IV. LA Dodgers and the McCourt's Divorce as an Example of the Intersection of Divorce and Business Law
- V. Overview of Divorce Law in the United States
 - a. Jurisdiction: Where you Divorce Matters
 - b. Equitable Distribution States
 - c. Community Property States
 - d. Identifying and Dividing the Assets and Debts of the Marital Estate
 - e. Discovery Marital Assets
 - f. Marital v. Separate Property
 - g. Division of Real Estate
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 - i. Social Security Benefits After Divorce
 - j. Dividing a Spouse's Stock Options
 - k. Division of Personal Property
 - l. Division of Debts
- VI. Valuing and Dividing Business Interests in Divorce
 - a. Identifying Business Interests
 - b. Valuing Business Interests
 - c. Choosing the Proper Business Valuation Method
- VII. Other Considerations: Alimony, Custody, Child Support
 - a. Alimony
 - b. Custody
 - c. Child Support
- VIII. Conclusion

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Appendix 1: Case Study: Teaching Principles of Divorce Law to Business Students Within 50 minutes and Teacher's Note on Divorce Case Study

Introduction

Legal scholarship in business schools sits among a diverse intellectual environment; divorce law can find a place to call home within the business school curriculum.¹ This paper advances the argument that business law students should explore divorce law because of the likely impact a divorce has on business management, ownership, or business-related behavior.² While scholars of legal studies in business argue over factors affecting the importance of business law,³ a core purpose of instruction in business law education is to equip “students to *recognize legal issues* and *manage legal risks* in business decision-making by providing them with fundamental knowledge of relevant legal principles.”⁴ Divorce is a legal risk that can “permeate [almost] every aspect of business activity.”⁵ It behooves business partners to understand the impact of their business partner’s divorce, if not their own divorce, on their business interests.

Additionally, this paper seeks to advance pedagogical principle of active learning.⁶ The Association to Advance Collegiate Schools of Business (AACSB) criteria for pedagogy require students to “engage in experiential and active learning designed to improve skills and the application of knowledge in practice.”⁷ This paper provides a case study that allows students an introductory, but concise, opportunity to explore issues arising out of a divorce that can impact their business interests.⁸ Business owners, partners, employees, and managers, among other stakeholders, can benefit from understanding the landscape of divorce law on their business interests; a number of examples will follow. Active learning can be enhanced

¹ John R. Allison, *The Role of Legal Scholarship in the Business School*, 10 J. LEGAL STUD. EDUC. 2, 131-136 (1992). See also, John R. Allison, *The Role of Law in the Business School Curriculum*, 9 J. LEGAL STUD. EDUC. 2, 239-264 (1991).

² John R. Allison, *The Role of Legal Scholarship in the Business School*, 10 J. LEGAL STUD. EDUC. 2, 134 (1992). (“Legal scholarship falls squarely within the overall research mission of the business school. The mission of business school research is to understand and improve markets, business organizations, business-related behavior, business tools, and the external environment within which business must operate. Of the various external factors relevant to business, law arguably is the most pervasive and has the greatest impact.”)

³ George J. Siedel, *Six Forces and the Legal Environment of Business: The Relative Value of Business Law Among Business School Core Courses*, 37 AM. BUS. L.J. 717, 732 (2000).

⁴ John R. Allison, *The Role of Law in the Business School Curriculum*, 9 J. LEGAL STUD. EDUC. 2, 240 (1991).

⁵ John R. Allison, *The Role of Law in the Business School Curriculum*, 9 J. LEGAL STUD. EDUC. 2, 240 (1991).

⁶ BENJAMIN BLOOM (EDITOR), *TAXONOMY OF EDUCATIONAL OBJECTIVES* (1956) (The pedagogy model addressed by Bloom and his collaborators consisted of six major categories: Knowledge, Comprehension, Application, Analysis, Synthesis, and Evaluation. After the category of knowledge, the authors present the categories as “skills and abilities,” with the understanding that knowledge or theory was the precondition necessary for putting the skills and abilities into practice.

⁷ The Association to Advance Collegiate Schools of Business (AACSB) accreditation pedagogy standards require that students “engage in experiential and active learning designed to improve skills and the application of knowledge in practice” (*Eligibility Procedures and Accreditation Standards for Business Accreditation*, AACSB INTERNATIONAL – THE ASSOC. TO ADVANCE COLLEGIATE SCHOOLS OF BUSINESS, <http://www.aacsb.edu/~media/AACSB/Docs/Accreditation/Standards/2013-bus-standards-update.ashx>.)

⁸ See BARBARA GROSS DAVIS, *TOOLS FOR TEACHING* (2009) (Davis provides examples of questions corresponding to the six categories of Bloom’s Taxonomy. In particular, chapter 12, “Asking Questions”, explores how to ask questions to stir active learning. Chapter 24 “Case Studies” provides a discussion on how to use a case study to encourage active learning.

when students study high-profile divorces; they are not only reading about a fiery break-up, or psychodrama, but they are reading about a highly technical, nuanced area of law and procedure that impacts the parties' business interests and almost all areas of their life.⁹ Finally, this article expands upon a 1987 article on divorce law published in the *Journal of Legal Studies Education* by Edward Gac. Since Gac's 1987 article, legal studies in scholarship in business has largely been silent on the connection of business law and divorce law.¹⁰

Like business disputes, students must understand that divorces can lead to complex, nuanced, expensive and heavily litigated breakups that can harm, or even destroy the marital estate and a spouse's business interests. Divorces can be challenging because emotions are charged, loyalties conflict, and lives and finances are intermingled. Business law students, or anyone married or thinking of getting married, should be aware of divorce law principles and the pitfalls that belie the divorce process.

Marriage and family life is no longer static in the United States. Almost half of adults are single and two of five children are born to unwed parents; family life has been transformed by divorce, remarriage, delayed marriage, and changing gender roles and legalization of same-sex marriage.¹¹ As a matter of law, how does this transformation of family life impact undergraduate and graduate students? Students can benefit from an engaged-learning opportunity to think critically on legal issues they face in the realm of family law. In particular, business students should be exposed to the legal significance and consequences of divorce law, especially as they contemplate a life in the legal and regulatory environment of business and as they begin to make plans on how to accumulate wealth.¹²

One of the largest, most complex aspects of divorce is the distribution of assets and debts, including those associated with business ownership; a determination of custody and parent-time is also a multi-faceted and costly aspect of divorce. We live in a society where divorce is common and divorce laws can play a substantial role in all of our lives. Business students who understand the basics of divorce laws better understand the inherent risks of marriage and the reality of divorce vis-à-vis their financial portfolio. The harsh realities can be seen in most divorces, but some divorces demonstrate more keenly the cost and

⁹ Jordan H. Leibman, *Legal Studies in Business Should be Taught by Academicians Trained in Law*, 10 J. LEGAL STUD. EDUC. 2, 137-139 (1992). ("More often than not, students and teachers in the business school learn of late-breaking legal events from the business press or the six o'clock news. These reports prepared by journalists tend to be refreshingly free of technical jargon, but I would submit that teachers with legal training will identify and categorize the issues that have been raised and make connections to precedents far more completely and accurately than those trained in other disciplines.")

¹⁰ Edward J. Gac, *Can We Afford to Omit the Teaching of Community Property in Basic Business Law Course*, 5 J. LEGAL STUD. EDUC. 1, 100-114 (1987).

¹¹ U.S. Census Bureau, *America's Families and Living Arrangements: 2012*, tbl.A1, <http://www.census.gov/hhes/families/data/cps2012.html> (50.7% of adults were married in 2012); Brady E. Hamilton, Joyce A. Martin & Stephanie J. Ventura, *Ctrs. for Disease Control, Births: Preliminary Data for 2010*, National Vital Statistics Reports 4 (Nov. 17, 2011), http://www.cdc.gov/nchs/data/nvsr/nvsr60/nvsr60_02.pdf (41% of births in 2009 were to unmarried women).

¹² The Association to Advance Collegiate Schools of Business (AACSB) accreditation pedagogy standards require that students "engage in experiential and active learning designed to improve skills and the application of knowledge in practice" (*Eligibility Procedures and Accreditation Standards for Business Accreditation*, AACSB INTERNATIONAL – THE ASSOC. TO ADVANCE COLLEGIATE SCHOOLS OF BUSINESS, <http://www.aacsb.edu/~media/AACSB/Docs/Accreditation/Standards/2013-bus-standards-update.ashx>.)

complexity of dividing marital assets, to say nothing of the emotional cost of divorce.¹³ Students are better prepared for life by acquiring knowledge of divorce law.¹⁴

To some extent, proper planning at various stages of a divorce action can help business owners and their attorneys successfully negotiate the difficult transition of divorce. Even despite such planning, divorce can be unpredictable if the parties take their divorce case to trial. Such was the case in the divorce of famed and former LA Dodger owners, the McCourts. This paper draws upon the theory that better known cases in the media help stir interest in the subject. Scholars of business law pedagogy currently argue that cases involving the famous bolster the teaching environment in business law curriculum.¹⁵ Other scholars from non-legal disciplines have advanced support for teaching from pop-culture or literature.¹⁶

Section II explores the relevance of teaching divorce law within a business law course in a business school. Section III of the article explores the relevant scholarly literature, including business law textbooks and the scholarship within legal studies education. Section IV examines the McCourts' divorce in order to explore issues arising in a divorce between business owners. Section V, the largest section of the article, explores the substantive areas of divorce law through the United States. This fifth section serves as a primer for instructors in the area of divorce law and can also be read by students to aid them in spotting issues in the fact pattern. Section VI and VII explore the substantive area of business valuations in divorce and other considerations such as alimony, custody, and child support. The final section concludes the paper. Finally, Appendix I provides instruction on one way to introduce divorce law principles to business law students in 50 minutes. A fact pattern and teacher's note are provided.

II. Why Teach Divorce Law in a Business Law Class

This paper does not ignore the reality of the fierce competition for space within the business law curriculum. Divorce is extremely likely to impact undergraduate students whether through their own experience, or that of a friend or business partner, or a close family member.¹⁷ Divorce attorneys are expensive and it is important to understand that attorney fees reduce the value of the overall marital estate.

¹³ Symposium, *Collaborative Family Law: The Big Picture*, 4 PEPP. DISP. RESOL. L.J. 401, 432-33 (2004) (indicating that the emotions people experience during a divorce range from “fear, sadness, [and] anger” to “relief” and “happiness”).

¹⁴ See, e.g., Robert Frank, *Are C.E.O.s That Talented, or Just Lucky?*, N.Y. TIMES (Feb 7, 2015), http://www.nytimes.com/2015/02/08/business/are-ceos-that-talented-or-just-lucky.html?_r=0 (this article addresses oil billionaire Harold G. Hamm's divorce, which is an example of a large and complex divorce. His estimated net worth at the time of his divorce was \$18 billion.).

¹⁵ Karen Morris and Marianne Jennings, Symposium, *Follies of the Famous Bolster Business Law Lessons*, Master Teacher Finalist Symposium, 2016 ALSB Conference; See also, Wendy Hind, *Contracts and the Pina Colada Song: Using Pop-Culture to Engage Business Law Students*, Pacific Southwest Academy of Legal Studies in Business, 2017 Conference, Palm Springs.

¹⁶ Roger Caswell, *A Musical Journey Through John Steinbeck's The Pearl: Emotion, Engagement, and Comprehension*, 49 JOURNAL OF ADOLESCENT & ADULT LITERACY 1, 62-67 (2005); Daniel Ian Rubin, *Mindcrime and Doublethink: Using Music to Teach Dystopian Literature*, 101 THE ENGLISH JOURNAL 1, (2011); Cheryl Bluestone, *Feature Films as Teaching Tool*, 48 COLLEGE TEACHING 4 (2000).

¹⁷ *Marriage and Divorce*, NATIONAL CENTER FOR HEALTH STATISTICS, <http://www.cdc.gov/nchs/fastats/marriage-divorce.htm> (last visited on July 20, 2016).

Divorce raises critical legal issues that will impact students or business owners, or their business partners, who marry, divorce, or have children. Most adults in the United States are married.¹⁸ Almost half of marriages end in divorce; however, divorce rates vary due to a number of reasons (e.g. age, duration of marriage, race, gender, wealth), but the reality is that close to 50% of marriages end in divorce.¹⁹ Some argue that the divorce rate is closer to 41% because people who are divorcing are not the same as those who are marrying.²⁰ Whether 41% or 50%, the divorce rate is significant enough to justify providing students some instruction on the substantive issues of a divorce proceeding. As of 2007, an estimated 3.7 million businesses were owned by a husband and a wife.²¹ Married couples who own business arguably face more problems than couples who do not own a business together. Additionally, it is reported that couples 50 and older are twice as likely to go through a divorce than in 1990.²² Older couples typically have acquired more assets and thus more to lose; older couples also face the impact divorce has on retirement income. Take one example alone: how is one's retirement account handled in a divorce? Retirement can be a substantial part of one's marital estate. As of 2014, Americans held more than \$9 trillion in retirement savings accounts.²³ Most states award half the retirement account to each party, dividing it from the date of marriage to the date of divorce, with some complicated exceptions.²⁴ The point is that marriage and divorce have consequences on an individual's estate. As will be explored in this article, division of retirement, like so many issues arising in a divorce, is not intuitive and requires some critical examination of facts and law.

Not only are the legal aspects of divorce critical to understand in light of the statistics on divorce, other socio-economic studies may serve students in their decision-making. Social scientists have made a number of findings that may be of interest to students. For example, students may benefit from learning there is a link between college education and a lasting marriage,²⁵ that there is link between purchasing an expensive engagement ring and the increased likelihood of divorce,²⁶ that the link between the length of time dating

¹⁸ JOHN A. MCKINSEY AND DEBRA BURKE, *CARPERS' UNDERSTANDING THE LAW* Ch.14 (7th ed. 2014) (highlights the percentage of adults married in 1970 was at 72% and 5% in 2012).

¹⁹ *Marriage and Divorce*, NATIONAL CENTER FOR HEALTH STATISTICS, <http://www.cdc.gov/nchs/fastats/marriage-divorce.htm> (last visited on December 20, 2017).

²⁰ Dan Hurley, *Divorce Rate: It's Not as High as You Think*, N.Y. TIMES (April 19, 2005), http://www.nytimes.com/2005/04/19/health/divorce-rate-its-not-as-high-as-you-think.html?_r=0

²¹ Bryan Borzykowski, *When Couples Divorce But Still Run a Business Together*, N.Y. TIMES (Dec 5, 2015), <http://www.nytimes.com/2012/12/06/business/smallbusiness/when-couples-divorce-but-still-run-the-business-together.html> (citing the 2007 Census Bureau estimate found at https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=SBO_2007_00CSCB01&prodType=table).

²² Abby Ellin, *After Full Lives Together, More Older Couples Are Divorcing*, N.Y. TIMES (Oct 30, 2015), http://www.nytimes.com/2015/10/31/your-money/after-full-lives-together-more-older-couples-are-divorcing.html?_r=0

²³ Stewart Sterk and Melanie Leslie, Sterk, *Accidental Inheritance: Retirement Accounts and the Hidden Law of Succession*, 89 NYU L. REV. 390 (2014).

²⁴ Dylan A. Wilde, *Obtaining an Equitable Distribution of Retirement Plans in a Divorce Proceeding*, 49 S.D. L. REV. 141 (2003-2004).

²⁵ Wendy Wang, *The Link Between a College Education and a Lasting Marriage*, PEWRESEARCH CENTER, <http://www.pewresearch.org/fact-tank/2015/12/04/education-and-marriage/> (last visited December 1, 2017).

²⁶ Andrew M. Francis and Hugo M. Mialon, *'A Diamond is Forever' and Other Fairy Tales: The Relationship between Wedding Expenses and Marriage Duration*. 53 ECONOMIC INQUIRY, 4, 1919–1930 (2015).

before marrying decreases the likelihood of divorcing,²⁷ that wealthier couples are less likely to end up divorced,²⁸ that married couples who never go to church are twice as likely to divorce,²⁹ that if one's partner's good looks (physical appearance) or wealth are an important factor in the decision to marry, that marriage is more likely to end in divorce than if one did not care about good looks or wealth,³⁰ or that lasting relationships correspond to a couples' ability to reciprocate actions or feelings of kindness and generosity and contempt for one's partner is the strongest predictor that a marriage will not last.³¹ Finally, the older a couple is when making their first big commitment such as cohabitation or marriage, the more likely they will have success in their marriage.³²

Behavioral economists seek to predict the likelihood of divorce, and believe they can predict divorce somewhat accurately by obtaining answers to two questions.³³ In another economic study, the researchers find that divorce hits retirees the hardest, but especially women.³⁴ In the same study, it specifically finds that later a woman divorces, the longer she will be working full-time later in life. In a separate study, researchers explored that gender equality and shared-chore load at home does not protect against divorce.³⁵

Other legal issues can arise out of a divorce that justify 50 minutes of the business law curriculum for exploration. It is important to understand that a married couple can sue each other in a separate civil action from the divorce action, to say nothing of pursuing criminal charges.³⁶ Married couples have legal exposure from their spouse under tort theories such as defamation and invasion of privacy, amongst other causes of action.³⁷ For example, Tom Cruise filed a \$50 million defamation suit over the claim that he

²⁷ Scott Hansen, COURTSHIP DURATION AS A CORRELATE OF MARITAL SATISFACTION AND STABILITY (San Diego, 2006). See also, Alice Robb, *Shirley Temple Only Dated Her Husband for 12 Days*, New Republic (Feb 12, 2014) <https://newrepublic.com/article/116571/unless-youre-shirley-temple-longer-courtship-means-happier-marriage>

²⁸ Andrew M. Francis and Hugo M. Mialon, 'A Diamond is Forever' and Other Fairy Tales: The Relationship between Wedding Expenses and Marriage Duration. 53 ECONOMIC INQUIRY, 4, 1919–1930 (2015).

²⁹ *Id.*

³⁰ *Id.*

³¹ Emily Smith, *Masters of Love: Science Says Lasting Relationships Come Down to –you guessed it—kindness and generosity*, THE ATLANTIC (Jun 12, 2104), <http://www.theatlantic.com/health/archive/2014/06/happily-ever-after/372573/>. See also, TY TASHIRO, THE SCIENCE OF HAPPILY EVER AFTER (2014).

³² Arielle Kuperberg, *Age at Coresidence, Premarital Cohabitation, and Marriage Dissolution: 1985-2009*, 76 J. OF MAR. & FAM. 2, 352-369. See also, Lauren Fox, *The Science of Cohabitation: A step Toward Marriage, Not a Rebellion*, THE ATLANTIC (March 20, 2014), <http://www.theatlantic.com/health/archive/2014/03/the-science-of-cohabitation-a-step-toward-marriage-not-a-rebellion/284512/>.

³³ Leora Friedberg and Steven Stern, *Marriage, Divorce, and Asymmetric Information*, 55 INTER. ECON. REV. 4, 1155-1199 (2014). See also, Erin Brodwin, *Economists Used 2 Questions to Accurately Predict Divorce*, BUSINESS INSIDER (Oct 25, 2016), http://www.businessinsider.com/questions-relationship-last-2016-10?utm_content=buffer7eef3&utm_medium=social&utm_source=facebook.com&utm_campaign=buffer

³⁴ Claudia Olivetti & Dana Rotz, *Changes in Marriage and Divorce as Drivers of Employment and Retirement of Older Women*, in WOMEN WORKING LONGER: INCREASED EMPLOYMENT AT OLDER AGES (2016).

³⁵ Thomas Hansen and Britt Slagsvold, *Gender Equality at Home*, LIKESTILLING HJEMME (2012).

<https://www.hioa.no/eng/About-HiOA/Centre-for-Welfare-and-Labour-Research/NOVA/Publikasjonar/Rapporter/2012/Gender-equality-at-home>

³⁶ Cynthia S. Schiffer, *The Allowance of Independent Tort Causes of Actions in Divorce Proceedings in Light of Schlueter v. Schlueter*, 51 BAYLOR L. REV. 1063 (1999).

³⁷ Kristyn J. Krohse, *Note: No Longer Following the Rule of Thumb – What to Do With Domestic Torts and Divorce Claims*, U. ILL. L. REV ONLINE (1997).

abandoned his daughter.³⁸ Additionally, Johnny Depp's divorce from Amber Heard raises the issue of physical abuse and the role of criminal proceedings in divorce.³⁹ Heard is reported to have donated all of the seven million dollar settlement she received to the ACLU and the Children's Hospital of Los Angeles.⁴⁰ A woman from Texas sued her husband for invasion of privacy after the husband used a background check website to investigate whether she was unfaithful to the marriage.⁴¹ These lawsuits are expensive and time-consuming. Individuals who are divorcing are not the only ones impacted; rather, a number of businesses should be aware of the risks such as making a false statement about a divorcing party, which may give rise to a defamation claim such as in the Tom Cruise case.

III. Literature Review of Divorce Law Scholarship in Legal Studies Education

Business law textbooks do an excellent job of exposing students to the legal and regulatory environment in which businesses operate.⁴² Fewer business law textbooks provide instruction on issues of law that

³⁸ Christie D'Zurilla, *Tom Cruise Files \$50M Defamation Suit Over Suri Abandonment Claim*, LA TIMES (October 24, 2012), <http://articles.latimes.com/2012/oct/24/entertainment/la-et-mg-tom-cruise-sues-life-and-style-defamation-suri-20121024> (this lawsuit was not against Cruises' ex-wife, Katie Holmes, but the lawsuit will certainly require discovery of Ms. Holmes).

³⁹ Christina Cauterucci, *Amber Heard's Donation of Her Entire Divorce Settlement is a Huge Power Move*, SLATE (August 19, 2016), http://www.slate.com/blogs/xx_factor/2016/08/19/amber_heard_s_donation_of_her_divorce_settlement_is_a_huge_power_move.html

⁴⁰ Christina Cauterucci, *Amber Heard's Donation of Her Entire Divorce Settlement is a Huge Power Move*, SLATE, (August 19, 2016), http://www.slate.com/blogs/xx_factor/2016/08/19/amber_heard_s_donation_of_her_divorce_settlement_is_a_huge_power_move.html

⁴¹ Alex Cooper, *Woman Sues Background Check Site After Husband Uses Site to Catch Her Cheating*, CONS. DAILY POST (Sep 17, 2016), <https://conservativedailypost.com/woman-sues-background-check-site-for-revealing-her-affair/> (this article contains a copy of the complaint and a summary of the facts surrounding the case.).

⁴² The following textbooks are used primarily in schools of business and are written by professor or practitioners who teach in a school of business. Only three of the following textbooks address some element of family law. NANCY K. KUBASEK, *DYNAMIC BUSINESS LAW* 1149-1164 (3rd ED. McGraw Hill 2014); Gordon W. Brown & Paul A. Sukys, *Business Law with UCC Applications* 678-698 (13th ED. McGraw Hill 2013); JANE MALLOR ET AL., *BUSINESS LAW* 689-708 (15th ED. MCGRAW-HILL/IRWIN 2012); NANCY KUBASEK ET AL., *DYNAMIC BUSINESS LAW: SUMMARIZED CASES* 1071-1088 (MCGRAW-HILL/IRWIN 2012); JOHN E. ADAMSON, *LAW FOR BUSINESS AND PERSONAL USE* 356-371 (18th ED. THOMSON/SOUTH-WESTERN 2009); HENRY CHEESEMAN, *BUSINESS LAW: LEGAL ENVIRONMENT, ONLINE COMMERCE, BUSINESS ETHICS, AND INTERNATIONAL ISSUES* 876-893 (8th ED. PEARSON HIGHER ED 2013); MARGARET E. VROMAN, *BUSINESS LAW BASICS* 189-193 (KENDALL HUNT 2009); A. JAMES BARNES, TERRY M. DWORKIN & ERIC RICHARDS, *LAW FOR BUSINESS* 682-703 (12th ED. MCGRAW-HILL/IRWIN 2015); KENNETH CLARKSON, ROGER MILLER & FRANK CROSS, *BUSINESS LAW: TEXT AND CASES: LEGAL, ETHICAL, GLOBAL, AND CORPORATE ENVIRONMENT* 1018-1038 (12TH ED. CENGAGE LEARNING 2012); DAVID TWOMEY & MARIANNE JENNINGS, *ANDERSON'S BUSINESS LAW AND THE LEGAL ENVIRONMENT, STANDARD VOLUME* 1169-1185 (22ND ED. CENGAGE LEARNING 2013); MICHAEL BIXBY ET AL., *THE LEGAL ENVIRONMENT OF BUSINESS* 492-495 (5TH ED. 2011); ANTHONY LIUZZO, *ESSENTIALS OF BUSINESS LAW* 448-463 (8TH ED. MCGRAW-HILL HIGHER EDUC. 2012); DON MAYER ET AL., *ADVANCED BUSINESS LAW AND THE LEGAL ENVIRONMENT* 627-647 (1ST ED. FLATWORLD 2013); JEFFREY BEATTY & SUSAN SAMUELSON, *CENGAGE ADVANTAGE BOOKS: INTRODUCTION TO BUSINESS LAW* 556-571 (4TH ED. CENGAGE LEARNING 2012); ROGER MILLER, *BUSINESS LAW TODAY, STANDARD: TEXT & SUMMARIZED CASES* 956-973 (10TH ED. CENGAGE LEARNING 2012); ROGER MILLER & GAYLORD JENTZ, *BUSINESS LAW TODAY, STANDARD EDITION* 1074-1088 (8TH ED. W. LEGAL STUDIES IN BUS. 2007); RICHARD MANN & BARRY ROBERTS, *SMITH AND ROBERSON'S BUSINESS LAW* 1077-1097 (15TH ED. CENGAGE LEARNING 2008); HENRY R. CHEESEMAN, *ESSENTIALS OF BUSINESS AND ONLINE COMMERCE LAW* 594-600 (PRENTICE HALL 2005); KEITH ABBOTT, NORMAN PENDLEBURY & KEVIN WARDMAN, *BUSINESS LAW* 307-314 (9TH ED. CENGAGE LEARNING 2013); ROGER MILLER, *BUSINESS LAW: TEXT AND CASES - THE FIRST COURSE* (CENGAGE LEARNING

impact their personal lives or estates.⁴³ Of the 44 business law textbooks reviewed, three textbooks examined some component of divorce law (or marriage) in relative depth while the other textbooks fail to mention marriage or divorce.⁴⁴ Legal scholars in business have highlighted the dearth of pedagogy scholarship in certain areas of law.⁴⁵ The scholarship in legal studies of business is slim on issues of marriage and divorce; this article seeks to fill that gap.

Less than a handful of scholarly articles address marital and divorce issues in legal studies of business.⁴⁶ The primary article on divorce was published 30 years ago in 1987 by Edward Gac in the *Journal of Legal*

2014); HENRY R. CHEESEMAN, *THE LEGAL ENVIRONMENT OF BUSINESS AND ONLINE COMMERCE* (7TH ED. PRENTICE HALL 2012); NANCY K. KUBASEK, BARTLEY A BRENNAN & M. NEIL BROWNE, *THE LEGAL ENVIRONMENT OF BUSINESS* (6TH ED. PEARSON HIGHER ED 2014); O. LEE REED ET AL., *THE LEGAL AND REGULATORY ENVIRONMENT OF BUSINESS* (16TH ED. MCGRAW-HILL HIGHER EDUC. 2012); DAVID KELLY ET AL., *BUSINESS LAW* (TAYLOR & FRANCIS 2011); DANIEL V. DAVIDSON, BRENDA E. KNOWLES & LYNN M. FORSYTHE, *BUSINESS LAW: PRINCIPLES AND CASES IN THE LEGAL ENVIRONMENT* (SOUTH-WESTERN PUB 2011); DAWN BENNETT-ALEXANDER & LINDA HARRISON, *THE LEGAL, ETHICAL, AND REGULATORY ENVIRONMENT OF BUSINESS IN A DIVERSE SOCIETY* (MCGRAW-HILL/IRWIN 2011); TONY MCADAMS, *LAW, BUSINESS AND SOCIETY* (10TH ED. MCGRAW-HILL/IRWIN 2011); SEAN MELVIN, *THE LEGAL ENVIRONMENT OF BUSINESS: A MANAGERIAL APPROACH: THEORY TO PRACTICE* (MCGRAW-HILL/IRWIN 2010); DON MAYER ET AL., *THE LEGAL ENVIRONMENT OF BUSINESS* (1ST ED. FLATWORLD 2012); DON MAYER ET AL., *FOUNDATIONS OF BUSINESS LAW AND THE LEGAL ENVIRONMENT* (1ST ED. FLATWORLD 2012); CONSTANCE E. BAGLEY, *MANAGERS AND THE LEGAL ENVIRONMENT: STRATEGIES FOR THE 21ST CENTURY* (7TH ED. CENGAGE LEARNING 2012); JEFFREY BEATTY, SUSAN SAMUELSON & DEAN A. BREDESON, *LEGAL ENVIRONMENT* (5TH ED. CENGAGE LEARNING 2012); ROGER E. MEINERS, AL H. RINGLEB & FRANCES EDWARDS, *THE LEGAL ENVIRONMENT OF BUSINESS* (11TH ED. CENGAGE LEARNING 2011); ROGER MILLER & FRANK CROSS, *THE LEGAL ENVIRONMENT TODAY: BUSINESS IN ITS ETHICAL, REGULATORY, E-COMMERCE, AND GLOBAL SETTING* (7TH ED. CENGAGE LEARNING 2012); ROGER MILLER, FRANK CROSS & , *ESSENTIALS OF THE LEGAL ENVIRONMENT* (4TH ED. CENGAGE LEARNING 2010); MARIANNE JENNINGS, *BUSINESS: ITS LEGAL, ETHICAL, AND GLOBAL ENVIRONMENT* (9TH ED. CENGAGE LEARNING 2010); JOHN ADAMSON, *21ST CENTURY BUSINESS: BUSINESS LAW* (2ND ED. CENGAGE LEARNING 2010); JON RUSH & MICHAEL OTTLEY, *BUSINESS LAW: PRINCIPLES AND CASES IN THE LEGAL ENVIRONMENT* (1ST ED. CENGAGE LEARNING 2006); MARIANNE JENNINGS, *CENGAGE ADVANTAGE BOOKS: FOUNDATIONS OF THE LEGAL ENVIRONMENT OF BUSINESS* (2ND ED. CENGAGE LEARNING 2012); FREDERICK JONES & CRISTEN DUTCHER, *BUSINESS ETHICS: DEVELOPING ANALYTICAL AND CRITICAL THINKING SKILLS* (4TH ED. KENDALL HUNT 2012); NANCY KUBASEK ET AL., *DYNAMIC BUSINESS LAW: THE ESSENTIALS* (2ND ED. MCGRAW-HILL/IRWIN 2012); JASON M. GORDON, *BUSINESS LAW: AN INTRODUCTION* (1ST ED. BUSINESS PROFESSOR, INC. 2016).

⁴³ David Read and William Bailey, *A Primer on Teaching the Law of Wills, Probate, and Basic Estate Planning Documents to Business Law Students*, 7 S.J. BUS. & ETHICS 1, 11-34, footnote 9 (2015).

⁴⁴ JOHN A. MCKINSEY AND DEBRA BURKE, *CARPERS' UNDERSTANDING THE LAW* Ch.14 (7th ed. 2014). *See also*, JOHN E. ADAMSON AND AMANDA MORRISON, *LAW FOR BUSINESS AND PERSONAL USE*, 206-221 (19th ed. 2011) (chapter 12 addresses contractual aspects of marriage and divorce); HENRY CHEESEMAN, *BUSINESS LAW: LEGAL ENVIRONMENT, ONLINE COMMERCE, BUSINESS ETHICS, AND INTERNATIONAL ISSUES*, 894-907 (9th ed. 2015).

⁴⁵ Robert J. Landry, III, *Ethical Considerations in Filing Personal Bankruptcy: A Hypothetical Case Study*" 29 J. LEGAL STUD. EDUC. 59-93(2012) (Landry highlights the lack of scholarship in the Journal of Legal Studies in Education and the American Business Law Journal in certain areas of legal studies scholarship). *See also*, Edward J. Gac, *Can We Afford to Omit the Teaching of Community Property in Basic Business Law Course*, 5 J. LEGAL STUD. EDUC. 1, 100-114 (1987).

⁴⁶ Edward J. Gac, *Can We Afford to Omit the Teaching of Community Property in Basic Business Law Course*, 5 J. LEGAL STUD. EDUC. 1, 100-114 (1987) (this article addresses community property legal environment, which is the governing law in a minority of states); David Read and Timothy Dudley, *"Put a Ring on It": A Pedagogical Exploration of Engagement Ring Law in the United States*, 4 R. MT. LAW J. 1, 56-74 (this article addresses the issue of engagement rings and what happens to the ring (who owns it?) if a person breaks off the engagement).

Studies Education.⁴⁷ The article is entitled *Can We Afford to Omit the Teaching of Community Property in Basic Business Law Course* and it addresses the community property legal environment, which governs divorce law in a minority of states. Gac's article does not explore *equitable distribution* principles and law, which govern the majority of states in divorce actions. However, Gac argues that business law curriculum in 1987 was not "doing enough in the area of marital rights"⁴⁸ while duly acknowledging the limited time and restraints on professors teaching a business law curriculum.⁴⁹ This paper answers Gac's call, now more of a distant rumble, for more scholarship on marital rights by exploring how marital rights impact business owners interests in a divorce or a divorcing couples' financial portfolio.

It is readily acknowledged that it is no easy task to decide what materials to use in a business law class due to limitation on time.⁵⁰ With real limitations on time in any course, it is inevitable that worthy subject matter will be cut. Marriage and divorce are real-world problems; although this article does not seek to provide solutions to these problems, it helps students "share a language of discourse with important decision makers in the real world, such as judges and legislators."⁵¹ This article argues that what ought to be included into every business law class is a discussion raising legal aspects of marriage and divorce. A large number of legal principles of divorce law can be explored in a 50 minute class. One way to introduce business law students to issues arising in a divorce is by examining a fact pattern of a divorcing couple. The fact pattern provided below gives a student an opportunity to issue-spot, but it also fosters an environment where students can discuss the issues in class. In addition to identifying legal issues in the fact pattern, students can be invited to explore the public policy arguments supporting the various rules of law in divorce proceedings. For example, one question that can be posed to students is whether alimony should be awarded to healthy, able-bodied, educated spouses who can work? One way to encourage students to spot issues is to explore the facts arising out of a celebrity's divorce such as the McCourt's divorce. The following section explores the marriage and divorce of the former L.A. Dodgers; it is an engaging, complex legal story.

IV. LA Dodgers and the McCourt's Divorce as an Example of the Intersection of Divorce and Business Law

Jamie Luskin and Frank McCourt both loved baseball growing up and both had aspirations of owning a major league baseball team.⁵² They fell in love as undergraduates while at Georgetown University. After college and graduate school they married and moved to Boston, Massachusetts where Mr. McCourt

⁴⁷ Edward J. Gac, *Can We Afford to Omit the Teaching of Community Property in Basic Business Law Course*, 5 J. LEGAL STUD. EDUC. 1, 100-114 (1987) (this article addresses community property legal environment, which is the governing law in a minority of states).

⁴⁸ *Id.* at 101.

⁴⁹ *Id.*

⁵⁰ Carol J. Miller and Susan J. Crain, *Legal Environment v. Business Law Courses: A Distinction Without a Difference?*, 28 J. LEGAL STUD. EDUC. 149-206 (2011) (This article explores undergraduate law-based course requirements in schools of business in order to discuss the reliability of interchangeably using the course titles, Legal and Regulatory Environment in Business or simply Business Law.).

⁵¹ Robert C. Bird, *Special Report: Legal Scholarship in Business Schools*, 53 AM. BUS. L.J. 9, 28 (2016) (citing Jordan H. Liebman, *The 1990 ABLA Research Committee Report: A First Step in the Search for an Organizing Principle*, 9 J. LEGAL STUD. EDUC. 265, 290-91 (1991)). "[Legal scholars] share a language of discourse with important decision makers in the real world, such as judges and legislators. Standard legal scholarship often self-consciously seeks to prescribe real world solutions to real problems."

⁵² Carla Hall, *A baseball love story veers off the base paths*, LA TIMES (Aug 23, 2010), <http://articles.latimes.com/2010/aug/23/sports/la-sp-mccourt-marriage-20100824/3>

founded The McCourt Company in 1977. They developed commercial real estate and acquired parking lots in the Boston area.⁵³ Mr. McCourt managed the company and Mrs. McCourt served as general counsel. By 2004, Mrs. McCourt and Mr. McCourt had acquired enough wealth when owning a baseball team was no longer a fantasy. After a failed bid to purchase the Boston Red Sox, the McCourts moved to Los Angeles, California in 2004 and purchased the Dodgers for \$430 million.⁵⁴ They bought two houses on Malibu Beach for an estimated \$46 million and began to live a glam life in LA.⁵⁵

In 2005, while Mr. McCourt saw himself as the sole owner of the ball team,⁵⁶ Mrs. McCourt became president of the Dodgers and eventually the chief-executive, making her the most senior-ranking female officer in all of baseball.⁵⁷ In 2004, while Mr. McCourt and Mrs. McCourt were amicably married, they signed three post-nuptial agreements.⁵⁸ In 2009, when the parties filed for divorce, the post-nuptial agreements were in dispute. Judge Scott M. Gordon, of the Superior Court of California, presided over a two-week evidentiary hearing to determine whether the agreement was binding and enforceable. The community property dispute would determine whether the Dodgers and other assets were the sole property of Mr. McCourt or co-owned by the couple.⁵⁹ The Court issued a 100-page decision on the post-nuptial agreements holding the three agreements were not valid and thus not enforceable because “there was no mutual assent or meeting of the minds between Petitioner and Respondent when they executed the agreement on March 31, 2004.”⁶⁰ Mrs. McCourt agreed to forgo any claim to ownership of the Dodgers for an agreed-upon payout of \$130 million.⁶¹ However, when Mr. McCourt sold the Dodgers in 2012 for \$2.1 billion, Mrs. McCourt sought to set aside the parties’ agreement in the divorce case arguing that Mr. McCourt had fraudulently misrepresented the value of the Dodger assets.⁶² Ms. McCourt not only lost her

⁵³ *Id.*

⁵⁴ Helene Elliott and Bill Shaikin, *Dodgers Owner Frank McCourt, Wife Jamie Separate*, LA TIMES, (Oct 15, 2009) <http://articles.latimes.com/2009/oct/15/sports/sp-mccourts15>; *See also*, Nick Cafardo, *McCourt Far From Blue: Failed Bid Nothing to Be Upset About*, BOSTON GLOBE (June 12, 2004), http://archive.boston.com/sports/baseball/redsox/articles/2004/06/12/mccourt_far_from_blue?pg=full

⁵⁵ Carla Hall, *A baseball love story veers off the base paths*, LA TIMES (Aug 23, 2010), <http://articles.latimes.com/2010/aug/23/sports/la-sp-mccourt-marriage-20100824/3>

⁵⁶ Helene Elliott and Bill Shaikin, *Dodgers Owner Frank McCourt, Wife Jamie Separate*, LA TIMES (Oct 15, 2009) <http://articles.latimes.com/2009/oct/15/sports/sp-mccourts15> (McCourt’s attorney stated, “Frank McCourt is the owner of the team. He has always been the owner of the team,” Grossman said.)

⁵⁷ *Id.*

⁵⁸ STATEMENT OF DECISION, *In re the Marriage of Jamie McCourt v. Frank McCourt, Statement of Decision Re: Validity of Post-Marital Agreements* (Dec 7, 2010) (Case No. BD514309). The Statement of Decision can be found at http://tmz.vo.llnwd.net/o28/newsdesk/tmz_documents/1207_mccourt.pdf.

⁵⁹ STATEMENT OF DECISION, *In re the Marriage of Jamie McCourt v. Frank McCourt, Statement of Decision Re: Validity of Post-Marital Agreements* (Dec 7, 2010) (Case No. BD514309). The Statement of Decision can be found at http://tmz.vo.llnwd.net/o28/newsdesk/tmz_documents/1207_mccourt.pdf. *See also*, Howard Bloom, *The Sad Sack Los Angeles Dodgers and Frank McCourt*, SPORTS BUSINESS NEWS (Oct 18, 2011), <http://sportsbiznews.blogspot.com/2011/10/sad-sack-los-angeles-dodgers-and-frank.html>

⁶⁰ STATEMENT OF DECISION, *In re the Marriage of Jamie McCourt v. Frank McCourt, Statement of Decision Re: Validity of Post-Marital Agreements*, p. 3, (Dec 7, 2010) (Case No. BD514309).

⁶¹ Bill Shaikin, *Frank and Jamie McCourt Reach Settlement Involving Dodgers*, LA TIMES (Oct 17, 2011), <http://articles.latimes.com/2011/oct/17/sports/la-sp-1017-mccourt-divorce-settlement-20111017>; *See also* Alden Gonzalez, *McCourts Reach Divorce Settlement*, DODGERS NEWS (June 17, 2011), <http://m.dodgers.mlb.com/news/article/20623800/>

⁶² Steve Dilbeck, *Jamie McCourt on Lessons Learned From Divorce, the Dodgers and Pink Slips*, LA TIMES (Jan. 13, 2016), <http://www.latimes.com/sports/dodgers/dodgersnow/la-sp-dn-dodgers-jamie-mccourt-lessons-20160113-story>; *See also*, Steve Dilbeck, *Jamie McCourt Loses Appeal, Will Remain \$900 million short of a 50-50 Split*, LA TIMES (Feb. 26, 2015), <http://www.latimes.com/sports/dodgers/dodgersnow/la-sp-dn-dodgers-jamie-mccourt-divorce-loses-appeal-20150226-story.html>

appeal seeking an additional \$900 million, she was ordered to pay Mr. McCourt's attorney fees in the sum of \$1.9 million.⁶³ The ruling of the three-judge appeals panel upheld the lower court's decision holding in favor of Mr. McCourt. The appeals court's opinion reads, in part: "Jamie simply chose the security of a guaranteed \$131 million payment, plus more than \$50 million in real and personal property, over the uncertainty and risk presented by the valuation and sale of the Dodger assets."⁶⁴

The McCourt divorce highlights a number of legal issues a divorcing couple face when owning a business or having acquired marital assets. What property does the divorcing couple own? Is it marital or separate property (and what is the legal significance of this distinction)? What is the value of the property? How do pre-nuptial or postnuptial agreements impact the divorce proceedings? Does the divorcing couple have to sell the Dodgers? If not, how does one party pay out the other for their portion of the value of the Dodgers? What happens if one party misrepresents the value of an asset when dividing marital property? What is alimony and how does a court determine who receives or pays alimony and how much is paid or received? Who pays for attorney fees in a divorce action? The McCourts paid out more than \$25 million in attorney fees on their divorce and post-divorce legal proceedings.⁶⁵ Divorce is complex and poses major challenges for business owners. Understanding the law of divorce will aid a business student to navigate divorce and business planning.

V. Overview of Divorce Law in the United States

a. Jurisdiction: Where you Divorce Matters

Divorce, and family law in general, falls under the jurisdiction of the states.⁶⁶ Where one files for divorce makes a big difference. The difference is found in whether the state follows equitable distribution or community property rules.⁶⁷ Most states use a set of "equitable distribution" rules to divide the marital estate. They serve more as a guide than a rule. On the other hand, a minority of states apply "community property" rules when they divide a divorcing couple's assets. The community property states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin (Alaska also allows a full or partial community property election).⁶⁸ A secondary, but important question is what happens when a couple acquires property in a community property state and later moves to an equitable distribution state?⁶⁹ This question provides an opportunity to address choice of law with students.

⁶³ Steve Dilbeck, *Jamie McCourt Loses Appeal, Will Remain \$900 million short of a 50-50 Split*, LA TIMES (Feb. 26, 2015), <http://www.latimes.com/sports/dodgers/dodgersnow/la-sp-dn-dodgers-jamie-mccourt-divorce-loses-appeal-20150226-story.html>

⁶⁴ *Id.*

⁶⁵ Steve Dilbeck, *Jamie McCourt Loses Appeal, Will Remain \$900 million short of a 50-50 Split*, LA TIMES (Feb. 26, 2015), <http://www.latimes.com/sports/dodgers/dodgersnow/la-sp-dn-dodgers-jamie-mccourt-divorce-loses-appeal-20150226-story.html>

⁶⁶ J. THOMAS OLDHAM, *DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY*, L. J. PRESS, 2-10 (2015).

⁶⁷ J. Thomas Oldham, *Separate Property Businesses That Increase in Value During Marriage*, 1990 WIS. L. REV. 585, 585-586 (June 1990) (This article uses the term "equitable distribution" to refer to "separate property.>").

⁶⁸ Nathan R. Long, *Community Characterization of the Increased Value of Separately Owned Businesses*, 32 IDAHO L. REV. 731, 760-67 (1996).

⁶⁹ Karen E. Boxx, *Community Property Across State Lines*, 19 FED. PROB. & PROP. 9 (Jan.-Feb. 2005) (reviewing conflict of laws issues that arise when couples acquire property in a community property state and later move to a separate property jurisdiction).

b. Equitable Distribution States

Equitable distribution rules are more concerned with what is “fair and just” as opposed to who holds legal title to property.⁷⁰ Equitable does not mean equal under equitable distribution principles.⁷¹ The rules are loose and vest great discretion in a Court to divide assets between a married couple in a fair and equitable manner, in light of the couple’s circumstances.⁷² Most states follow equitable distribution principles.⁷³ Judges in equitable distribution states generally consider a number of different factors when they divide a couple’s assets. Typically, they consider the ability of each spouse to support him or herself after the divorce.⁷⁴ In particular, if a spouse has forgone career opportunities to raise children, that spouse may receive a greater share of the marital assets. Another example of the power of equitable distribution is the impact of the duration of a marriage. If the couple’s marriage only survived a short time, the court may prove reluctant to give one spouse money earned by the other. One consideration is whether the asset or business interest is separate property.⁷⁵ If the property is separate (pre-marital property or a gift) a court will likely deem it non-marital and therefore not subject to division upon divorce.

Equitable distribution courts will consider the age, general health, and vocational training of each spouse when determining an alimony award. Some courts consider the amount of alimony and child support paid by a spouse in deciding if an award of additional marital property is warranted. In short, equitable distribution will not necessarily cut the marital estate in half; it could be more or less than a 50% distribution of debts and assets, unlike community property states.

c. Community Property States

Fewer states have promulgated “community property” rules that govern the division of a divorcing couple’s estate.⁷⁶ In these states, judges divide the couple’s joint assets in half. In many ways, this makes for a quick and clean division of marital property. Judges do not attempt to divide assets fairly, so they

⁷⁰ Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York’s Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621 (1991-1992). Other questions arise in equitable distribution states such as whether the goodwill of a professional spouse’s practice constitute an asset to be apportioned between the spouse’s upon dissolution of the marriage? *See also*, Carmen Valle Patel, *Treating Professional Goodwill as marital Property in Equitable Distribution States*, 58 N.Y.U.L. REV 554 (June 1983).

⁷¹ Mark A. Snover & James D. Moriarty, *Equal Is Not Necessarily Equitable When Distributing Marital Property*, 89 MICH. B.J. 32 (July 2010).

⁷² L.J. GOLDEN, INTRODUCTION TO EQUITABLE DISTRIBUTION, IN EQUITABLE DISTRIBUTION OF PROPERTY (McGraw-Hill 1983); *See also*, BRETT TURNER, EQUITABLE DISTRIBUTION OF PROPERTY § 5:43 (3rd ed., 2009)

⁷³ J. THOMAS OLDHAM. DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY. L. J. PRESS (2015).

⁷⁴ J. THOMAS OLDHAM. DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY, L. J. PRESS, 5-1 and 6-1 (2015).

⁷⁵ J. Thomas Oldham, *Separate Property Businesses That Increase in Value During Marriage*, 1990 WIS. L. REV. 585, 592-93 (1990).

⁷⁶ Elizabeth Barker Brandt, *Community Property Treatment of the Increase in Value of Separately Owned Business*, 27 ID. L. REV. 195, 197 (1990)

generally do not consider the employment prospects, age or health of either party.⁷⁷ What judges do is more formulaic wherein the spouses are deemed to equally own all income and assets earned or acquired during the marriage. This means that both the husband and wife are deemed to equally own all money earned by either one of them during the marriage, even if only one spouse is employed. In addition, all property acquired during the marriage with “community” funds is deemed to be owned equally by both the wife and husband, regardless of who purchased it. In a community property state, equal ownership also applies to debts.⁷⁸ This means both spouses are equally liable for debts. In most cases, this includes unpaid balances on credit cards, home mortgages and car loan balances.

Judges in community property states consider a party’s age and employment prospects when they award alimony and child support.⁷⁹ In a community property state, a spouse who stayed home to care for the children may receive generous alimony and child support payments. Some community property states often have strict formulas to determined alimony.⁸⁰

Community property states characterize income generated during marriage by separate assets in one of two ways. The first approach is the minority rule known as the traditional Civil Rule. The Civil Rule states that all income generated during marriage no matter its source becomes community property.⁸¹ Louisiana, Wisconsin, Texas, and Idaho follow the Civil Rule.⁸² The second approach is the American Rule. It states that income generated during marriage by separate property remains separate property. Arizona, California, New Mexico, Washington, and Nevada follow the American Rule.⁸³

A third way to divorce is to establish a common law marriage. Both community property and equitable distribution states may have common law marriages. Common law marriage is an implied-in-fact marriage.⁸⁴ Although the parties have not established a valid marriage under the law (marriage license,⁸⁵ ceremony,⁸⁶ consummation,⁸⁷ marriage certificate), the parties can still be deemed as married for purposes of property distribution.⁸⁸ In order to establish a common law marriage, the parties must show they were

⁷⁷ J. THOMAS OLDHAM, DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY, 3.03(5), L. J. PRESS (2015).

⁷⁸ J. THOMAS OLDHAM, DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY, 3.03(5), L. J. PRESS (2015).

⁷⁹ J. THOMAS OLDHAM, DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY, 3.03(5), L. J. PRESS (2015).

⁸⁰ Lori W. Nelson and Taryn N. Evans, *Alimony Guidelines – An Idea Whose Time Has Come*, 28 UT. BAR MAG. 4 (2015). A copy of the article can be found online at https://www.utahbar.org/wp-content/uploads/2015/07/2015_edition_4_july_aug.pdf.

⁸¹ Nathan R. Long, *Community Characterization of the Increased Value of Separately Owned Businesses*, 32 IDAHO L. REV. 731, 733 (1996).

⁸² J. Mark Weiss, *Community Property Interests in Separate Property Businesses in Washington*, 40 GONZ. L. REV. 205, 207 (2004 – 2005).

⁸³ J. Mark Weiss, *Community Property Interests in Separate Property Businesses in Washington*, 40 GONZ. L. REV. 205, 207 (2004 – 2005).

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⁸⁵ J. THOMAS OLDHAM, DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY, 2.03(1)(a), L. J. PRESS (2015).

⁸⁶ J. THOMAS OLDHAM, DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY, 2.03(1)(b), L. J. PRESS (2015)

⁸⁷ J. THOMAS OLDHAM, DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY, 2.03(1)(c), L. J. PRESS, (2015).

⁸⁸ J. THOMAS OLDHAM, DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY, L. J. PRESS, (2015) (Chapter one explores disputes between unmarried people. Chapter two explores common law marriage.).

living together as cohabitants,⁸⁹ held out to the public they were husband and wife,⁹⁰ and essentially demonstrate the married couple agreed to be married.⁹¹ A party usually must establish a common law marriage before an equitable division of assets can occur.⁹²

d. Identifying and Dividing the Assets and Debts of the Marital Estate

One of the most complicated and costly tasks in a divorce is identifying the separate and marital assets.⁹³ This complication can prove more difficult when a spouse seeks to raid accounts or hide assets.⁹⁴ Lawsuits are expensive largely because of what is required by the discovery process. Lawyers typically bill hourly and the hourly rates can range from \$0 to more than \$850 an hour.⁹⁵ Students should know a court can impose criminal and civil sanctions upon a party if a married couple seeks to hide or secrete marital property from discovery.⁹⁶ Students may benefit from reading a New York Times article about a wealthy businessman and his attempts, and consequences, to hide assets through a massive offshore financial system.⁹⁷

The methods employed by trial courts to identify marital property can serve as a guide for parties who seek to settle their case. The courts seek to identify the parties' property and then classify it as marital or

⁸⁹ J. THOMAS OLDHAM, *DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY*, 2.03(2)(b), L. J. PRESS (2015).

⁹⁰ J. THOMAS OLDHAM, *DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY*, 2.03(2)(c), L. J. PRESS (2015).

⁹¹ J. THOMAS OLDHAM, *DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY*, 2.03(2)(a), L. J. PRESS (2015).

⁹² Steven K. Berenson, *Should Cohabitation Matter in Family Law?*, 13 J. L. & FAM. STUD. 289 (2011) (drawing on social science research regarding cohabiting conditions, such as "living apart together" and "commuter marriages" to argue that it is not only cohabitation that should matter to courts evaluating claims to property acquired during periods of cohabitation, but many other circumstances as well); *See also*, Candace Saari Kovacic-Fleischer, *Cohabitation and the Restatement (Third) of Restitution & Unjust Enrichment*, 68 WASH. & LEE L. REV. 1407 (2011) (addressing claims of cohabitants to property that is acquired jointly and exploring the equitable bases on which courts apportion such property).

⁹³ William B. Stewart, Jr. & Alison D. Gilmartin, *Think Like a Thief: Using Tax Returns to Find Hidden Assets*, 31 FAM. ADVOC. 21 (Spring 2009) (discussing various IRS forms, such as Form 4506 which can be used to request a copy of a tax return, and questions to raise when reviewing a tax return).

⁹⁴ Brett R. Turner, *Entry and Enforcement of Preliminary Injunctions Against Dissipation of Marital Property*, 16 DIVORCE LITIG. 102 (June 2004); Brett R. Turner, *Unintentional Conduct as Dissipation of Marital Property*, 21 EQUITABLE DISTRIBUTION J. 13 (Feb. 2004); *See also*, Lee R. Russ, *Annotation, Spouse's Dissipation of Marital Assets Prior to Divorce as Factor in Divorce Court's Determination of Property Division*, 41 A.L.R. 4th 416 (1985, Supp. 2005).

⁹⁵ L.V. Anderson, *Everything You Need to Know About Angelina Jolie's Divorce Lawyer*, *Laura Wasser*, SLATE (Sept 21, 2016),

http://www.slate.com/blogs/xx_factor/2016/09/21/angelina_jolie_s_divorce_lawyer_laura_wasser_a_primer.html (Laura Wasser, the attorney representing Angelina Jolie in her divorce from Brad Pitt, charges \$850 an hour.).

⁹⁶ Carleton R. Marcyan, *Discovering Unreported Income: Ethical, Practical, and Procedural Consequences*, 33 FAM. ADVOC. 12 (Spring 2011) (discussing the reach of the attorney-client privilege under the circumstances of suspicion and proof that a client has hidden assets); *See also*, Barbara Glesner Fines, *Criminal Acts & Ethical Dilemmas: Some Client Nightmares Sneak Up on You!*, 33 FAM. ADVOC. 32 (Spring 2011) (addressing a lawyer's ethical obligations upon discovery that a client is hiding assets, as well as privilege and forfeiture rules).

⁹⁷ Nicholas Confessore, *How to Hide \$400 Million*, N.Y. TIMES (Nov 30, 2016), http://mobile.nytimes.com/2016/11/30/magazine/how-to-hide-400-million.html?_r=0&referrer=http://m.facebook.com

separate. The courts will then want a value assigned by the property to assist them in providing an equitable distribution of the property.⁹⁸ Before classifying the personal property, it must, of course, be identified. After identification and classification of separate or marital property, the fair market value must be determined. In order to establish a value, certain experts may need to be retained (i.e. a real estate appraiser, personal property appraiser, business valuation analyst).

One state appeals court spelled out a four-step process for making an equitable distribution of property:⁹⁹

1. Determine whether the property is separate or marital;
2. Determine if there are exceptional circumstances that overcome the presumption that marital property should be divided equally between the parties;
3. Assign a value to each piece of marital property (values are determined by experts);
4. The property will be divided in such a way that the other party will no longer have claim to the property, thus allowing the parties to move on with their lives;

e. Discovering Marital Assets

Property is defined as something tangible or intangible to which its owner has legal title. One way to identify property during a divorce is through the parties' financial disclosures.¹⁰⁰ Each party identifies their assets and liabilities through a court required disclosure. There are number of categories of assets and debts parties acquire during marriage such as the following:

1. Real Estate: marital residence, investment properties, land.
2. Motor Vehicles: Trucks, cars, motorcycles, boats, airplanes.
3. Household Good: furniture, jewelry, guns, clothing, refrigerators, washers, dryers, food storage, antique collections.
4. Other Personal Property: pets (not subject to a custody dispute).
5. Bank Accounts: checking, savings, saving bonds, money market accounts, certificate of deposits.
6. Investments in Closely-held Businesses: Limited Liability Companies (LLC), corporations, partnerships, sole proprietorships.
7. Investment Accounts: stocks, mutual funds, bonds, options, futures, investments in foreign exchange markets (FOREX), exchange-traded funds (ETF), gold, silver, life insurance.
8. Retirement Accounts: 401(k)s, IRAs, other defined benefit or contribution plans, deferred annuities.
9. Other Assets: tax refunds, club memberships, intellectual property, frequent flyer miles, online cash accounts (e.g. PayPal), account receivables, music or video libraries (Amazon or iTunes).

⁹⁸ Toni Hendricks, Comment, *Valuation Date in Divorces: What a Difference a Date Can Make*, 21 J. AM. ACAD. MATRIM. LAW. 747 (2008) (surveying various ways states determine valuation dates for property, such as the date of filing, the date of trial, and a variety of discretionary valuation dates).

⁹⁹ *Boyer v. Boyer*, 259 P.3d 1063 (Ut. App. Ct. 2011).

¹⁰⁰ James J. Harrington III, *Successful Strategies for Litigation and Trial of Marital Property Disputes*, 89 MICH. B.J. 20 (2010) (assessing the strategic impact of being the first to file, offering organizational strategies for tracking assets, and suggesting ways to streamline consideration of property issues).

10. Liabilities: credit cards, lines of credit, mortgages, medical and dental bills, back taxes, account payables, car loans, student loans.

Students should be aware of ways to uncover hidden assets. If the other party's financial disclosures are incomplete or vague, their personal property must be identified through formal discovery and other methods such as: interrogatories, requests for production of documents, requests for admissions, and depositions.

There are a number of methods one can use to identify marital assets. An important method is to review the federal income tax return to determine whether a party's assets show up. The schedules on Form 1040 are an excellent source of information. For example:

- Schedule B: shows interest and ordinary income from dividends
- Schedule C: shows income from sole proprietorships and single member LLCs
- Schedule D: capital gains from sale of investments
- Schedule E: discloses income from rental properties and royalties, reveals ownership in limited partnerships and S Corporations
- Tax refunds that are applied to next year

Keep in mind that not all assets can be located by reviewing the tax returns because assets not generating taxable income will not be on the tax form. Other methods to uncover hidden assets include: records search (county or city recorder's office), interviews of friends and co-workers, credit card and bank history, internet searches (social media, Google, other technological devices to track the other party's computer history).

Usually parties do not seek to hide retirement assets, but they can often be overlooked. For example, retirement accounts are not considered when someone changes jobs and forgets to transfer or rollover the firm sponsored account into a separate account. An important reason to have copies of a few years of W2s and/or paystubs is to help identify any withholdings that are/were contributed to firm sponsored retirement accounts. Students should be reminded that their household financial records should be tightly organized.

One place often overlooked is the party's insurance policies. The property insurance policy will list all property that is insured, including the following: Real estate, vehicles, jewelry, and collectibles, among other assets. Another method to uncover hidden assets is to review bank, retirement and/or investment account statements to identify unreported assets. Looking for unexplained withdrawals and/or transfers can lead to undisclosed accounts.

f. Marital v. Separate Property

If a married couple cannot reach a signed, settlement agreement on their own accord, the divorce court will make the final decision on how the parties will divide their property.¹⁰¹ A pre-marital

¹⁰¹ See e.g., Utah Code Ann. § 30-3-5 (2016).

agreement may also help resolve the distribution of property in a divorce.¹⁰² Property division includes all assets and debts—personal property, real property, and business interests, accrued vacation, holiday time, and sick leave,¹⁰³ severance,¹⁰⁴ amongst other assets. Generally, when dividing property in a divorce, the trial court “must identify the property in dispute and determine whether each item is marital or separate property.”¹⁰⁵ Case law in some states hold that each party is entitled to all of their separate property and half of the marital property, unless equity demands otherwise.¹⁰⁶

The difficulty is in discerning between separate and marital property. Various state courts have provided some guidance on the distinction. For example, separate property is all property acquired before marriage (pre-marital property¹⁰⁷), the appreciation of the pre-marital assets, or property acquired after marriage via gift or inheritance.¹⁰⁸ All other property is deemed marital and it “encompasses all of the assets of every nature possessed by the parties, whenever obtained and from whatever source derived.”¹⁰⁹ However, separate or pre-marital property may lose its “separate” nature by commingling it with marital property.¹¹⁰ An example of co-mingling is illustrated in *Bradford v. Bradford* where the husband conveyed his separate interest in a piece of real property to both him and his wife.¹¹¹ The act of the husband changing title to the real property effectively extinguished the separate nature of the real property, thus converting into marital property. Like in *Bradford*, if a spouse’s real property converts to marital property it will be subject to division if the parties divorce. It is unclear in many jurisdictions whether some assets are separate or

¹⁰² Paul S. Leinoff & Natalie S. Lemos, *The Perils of a Prenup*, 33 FAM. ADVOC. 8 (Winter 2011) (explaining briefly the Uniform Premarital Agreement Act, the process of negotiating a prenuptial agreement, the need for documentation, and the perils of financial misrepresentations).

¹⁰³ Gavin L. Phillips, *Annotation, Accrued Vacation, Holiday Time, and Sick Leave as Marital or Separate Property*, 78 A.L.R. 4th 1107 (1990, Supp. 2004).

¹⁰⁴ Emily A. Prestidge, Note, *Severance Pay - His or Hers? How Courts Approach the Classification of Severance Pay at Dissolution: Past Efforts vs. Future Compensation*, *Brill v. Brill*, 13 TEX. J. WOMEN & L. 343 (2004) (Missouri).

¹⁰⁵ *Stonehocker v. Stonehocker*, 176 P.3d 476 (Ut. App. Ct. 2008).

¹⁰⁶ *Burt v. Burt*, 799 P.2d 1166, 1172 (Utah Ct. App. 1990); *Hall v. Hall*, 858 P.2d 1018, 1022 (Utah Ct. App. 1993).

¹⁰⁷ *Haumont v. Haumont*, 793 P.2d 421, 424-425 (Utah Ct. App. 1990) (The court held that “each party retain the separate property he or she brought into the marriage.” However, the court also held that a trial court may reallocate premarital property as part of an equitable property division.).

¹⁰⁸ *Mortensen v. Mortensen*, 760 P.2d 304, 308 (Utah 1988) (holding that “trial courts making ‘equitable’ property division[s] in a divorce should,] generally award property acquired by one spouse by gift or inheritance during the marriage (or property acquired in exchange thereof) to that spouse, together with any appreciation or enhancement of its value, unless (1) the other spouse has by his or her efforts or expense contributed to the enhancement, maintenance, or protection of that property, thereby acquiring an equitable interest in it, . . . or (2) the property has been consumed or its identity lost through commingling or exchanges or where the acquiring spouse has made a gift of an interest therein to the other spouse. An exception to this rule would be where part or all of the gift or inheritance is awarded to the nondonee or nonheir spouse in lieu of alimony as was done in *Weaver v. Weaver*, supra. The remaining property should be divided equitably between the parties as in other divorce cases, but not necessarily with strict mathematical equality.”

¹⁰⁹ *Dunn v. Dunn*, 802 P.2d 1314, 1317-18 (Utah Ct. App. 1990).

¹¹⁰ *Id.*

¹¹¹ *Bradford v. Bradford*, 1999 UT App 373, 384 (the husband conveyed his interest in the home to both him and his wife as “joint tenants with full rights of survivorship and not as tenants in common.” This language has legal significance in real estate law, but also in divorce law. The language signals that the parties own it as joint marital property, which is subject to equal division if the parties divorce.

marital. For example, engagement rings have become a complicated area of law.¹¹² If parties marry, the engagement ring could be considered pre-marital, thus separate property because it was a gift prior to marriage. State law on engagement rings varies.¹¹³

The separate character or identity of the inheritance, gift, pre-marital property may be retained if kept in segregated accounts and portfolios. Although titling the property in one's own name will help, it may not be sufficient to defend against a commingling claim. Moving a pre-marital investment from one account or medium to another does not alone destroy the separate nature of the segregated account.¹¹⁴ Commingling issues raise difficult questions. For example, what happens if one spouse brings money into a marriage and that money is used as a down payment on a house? Does the spouse lose the down payment (owned before marriage)? In one case, the down payment did not need to be divided equally between the parties because "the appropriate treatment of property brought into a marriage by one party may vary from case to case."¹¹⁵ In another case, a state court of appeals upheld the trial court's ruling that the wife's stock was separate property although proceeds from the sale of the stock were occasionally used for family purposes and some of the proceeds were deposited into marital bank accounts.¹¹⁶

Property division in equitable distribution states does not require the division of property be equal. In making the distribution, courts will consider a number of factors, including "the amount and kind of property to be divided, the source of the property, the parties' health, the parties' standard of living and respective financial conditions, their needs and earning capacities, the duration of the marriage, and the relationship the property has with the amount of alimony awarded."¹¹⁷

One must be able to trace the money or asset as being separate property. It is critical to maintain clear line of ownership so as to avoid the claim of commingling. For example, if a person receives an inheritance and does not want the inheritance to take on the nature of marital property (subject to division), that person should keep the inheritance titled in their own name. However, some equitable distribution states have held that property can be distributed regardless of which party's name appears on title.¹¹⁸ If it is an inheritance in the form of cash, for example, one should keep it in a segregated bank account in their name only. In short, one must keep in mind that separate property is never out of the divorce court's reach; an equitable distribution court may award an interest in a party's separate property to their spouse in "situations where equity so demands."¹¹⁹ Pre-marital agreements can assist in demarcating separate from

¹¹² David Read and Timothy Dudley, "Put a Ring on It": A Pedagogical Exploration of Engagement Ring Law in the United States, 4 R. MT. LAW J. 1, 56-74

¹¹³ *Id.*

¹¹⁴ *Burt v. Burt*, 799 P.2d 1166, 1169 (Utah Ct. App. 1990).

¹¹⁵ *Newmeyer v. Newmeyer*, 745 P.2d 1276, 1277 (Utah 1987).

¹¹⁶ *Kimball v. Kimball*, 2009 UT App 233.

¹¹⁷ *Moon v. Moon*, 790 P.2d 52, 56 (Utah Ct. App. 1990). See also *Naranjo v. Naranjo*, 751 P.2d 1144 (Utah 1988).

¹¹⁸ ***Hoagland v. Hoagland*, 852 P.2d 1025 (1993) (citing *Hogue v. Hogue*, 831 P.2d 120, 122 "here the husband had, prior to his marriage, conveyed to the wife a ranch as a means of protecting the property from husband's creditors. The couple then married and divorced. The trial court awarded husband an undivided one-half interest in the property. On appeal, we held that the court had not abused its discretion in awarding husband a one-half interest in the ranch, in part because the trial court had found that Husband conveyed the property to protect it from creditors."**

¹¹⁹ *Mortensen v. Mortensen*, 760 P.2d 304, 308 (Utah 1988).

marital property. A pre-marital or “prenuptial” agreement is generally a valid, enforceable contract and so is a post-nuptial agreement (a signed agreement entered after marriage and before divorce).¹²⁰ Identifying, valuing, classifying, and making an equitable distribution is one of the primary objectives in divorce (more about alimony and child custody issues below).

g. Division of Real Estate

One of the largest assets or debts arising from a marriage is real property. The complication with dividing real estate in a divorce is how to do it in light of titling issues, type of real estate, forms of ownership (such as joint-tenancy and tenancy in common), among other issues.¹²¹ There are a number of options such as partition sales or buy-outs.¹²² The easiest way to identify real estate holdings is to conduct a public records search on the county or city recorder’s website. The recorder’s office will likely have information on the property owner and an estimated value of the real property for tax purposes. The estimated value reported is not likely to represent the fair market value of the property. In order to determine the fair market value of the real estate, a real estate appraiser must be retained as an expert. Other questions arise in divorce over real estate. For example, which spouse benefits from the sale and interest deductions of the house when a spouse receives a piece of real estate as part of the divorce?¹²³

h. Division of Retirement Plans

Retirement plans are large marital assets and there are two general types: the defined benefit plan (pensions) or defined contribution plans (401k).¹²⁴ Retirement plans are either private, public, or military plans.¹²⁵ Retirement and pension plans may include defined benefit plans, defined contribution plans, 401(k) plans, state and federal government retirement or pension plans,¹²⁶ private employer benefits, and

¹²⁰ *Jacobsen v. Jacobsen*, 257 P.3d 478 (Utah. App. Ct. 2011) (holding that a signed agreement entered into in anticipation of divorce was enforceable for purposes of property distribution.).

¹²¹ David W. Griffin, *It’s Nearly Always About the House: Grasping the Givens of Real Property Interests, Considerations, and Concerns*, 32 FAM. ADVOC. 8 (Spring 2010) (addressing titling issues, types of real property, forms of ownership of real property (such as joint tenancy and tenancy in common), conveyancing, foreclosures, and ways to secure future payments of equitable distribution amounts).

¹²² Melissa J. Avery, *The Marital Residence and Other Black Holes: Dealing with Real Estate in Divorce*, 53 RES GESTAE 30 (Oct. 2009) (discussing partition sales, buy-outs, and auction sales).

¹²³ Joseph W. Cunningham, *The Marital Residence: Who Benefits from the Sale and Deductions?*, 27 FAM. ADVOC. 18 (Winter 2005) (exploring tax considerations regarding sale of the marital home and deduction of interest and property taxes upon divorce).

¹²⁴ Elizabeth B. Brandt, *Valuation, Allocation, and Distribution of Retirement Plans at Divorce: Where are We?* 35 FAM. L.Q. 469, 471 (Fall 2001). See also, Dylan A. Wilde, Comment, *Obtaining an Equitable Distribution of Retirement Plans in a Divorce Proceeding*, 49 S.D. L. REV. 141 (2003)

¹²⁵ Susan J. Prather, *Characterization, Valuation, and Distribution of Pensions at Divorce*, 15 J. AM. ACAD. MATRIM. LAW. 443, 444 (1998). “Generally, pensions can be divided into three main categories: private, public, and military. Most of the characteristics of pension plans overlap, but some legislative and statutory provisions are specific for each type.”

¹²⁶ Joanne G. Conway, *Part Two: Marriage and Divorce: When, What, and Where: Anticipated Retirement Benefits under the Railroad Retirement Act of 1974: Community Property, Separate Property, or Not Property at All?*, 14 J.

some military retirement benefits.¹²⁷ Retirement and pension plans may be regulated by federal and state law and by plan policies.¹²⁸

A marital portion of the retirement funds are to be divided equally. “A marital portion” is considered to be the funds accrued either 1) from the date of marriage to the date of separation, or 2) from the date of marriage to the date of divorce. As a general rule, anything paid into any type of retirement or pension plan by either party from the date of the marriage to the date of the divorce is marital property.¹²⁹ Spouses may agree between themselves how much of a retirement account each spouse should receive. If the spouses cannot agree to how much each spouse is entitled to, the judge will make the division.

If a retirement account is to be split or transferred to the other spouse, then a special order, separate from the divorce decree, called a Qualified Domestic Relations Order, or QDRO (pronounced *kwădrō*) must be issued by the judge.¹³⁰ The person who administers the retirement or pension plan cannot usually divide an account or pay benefits to a spouse who did not contribute to the plan without a QDRO. Once a QDRO is signed by the judge and approved by the plan administrator, the plan administrator will divide the account or pay the benefits according to the QDRO, rather than the pension plan.

One ought to consider whether or not a loan has been issue from the retirement account before the parties reach a certain agreement on how to divide the retirement funds. If there is a loan, the question is who assumes it.

Divorcing parties may consider taking a distribution from their retirement accounts; some do this to pay off unsecured credit card debt. If an early distribution occurs, it triggers a taxable event as the distribution is then considered ordinary income subject to ordinary income tax. The distribution may also generate a 10% early withdrawal penalty, if not planned correctly. By issuing a QDRO to transfer a portion of a retirement account to the other spouse, and the other spouse takes a distribution, the distribution may not be subject to the 10% early withdrawal penalty (there are some exceptions); however, the distribution (not the rollover) is still subject to ordinary income tax rates.

CONTEMP. LEGAL ISSUES 129 (2004) (this article explores retirement schemes for federal employees). *See also*, Railroad Retirement Act of 1974, 88 Stat. 1305, 45 U.S.C. 231.

¹²⁷ Dalma Grandjean, *Enforcement Options: Collecting an Awarded Share of the Pension*, 28 FAM. ADVOC. 36 (Fall 2005) (explaining technical administrative procedures of the Defense Finance and Accounting Service which distributes divided military retirement pay). *See also*, Samuel W. Morris, *A Survey of Military Retirement Benefits*, 177 MIL. L. REV. 133 (2003) (covering Veterans Administration benefits, including education, funeral expenses, life insurance, and home loan guarantees, and Department of Defense pension formulas). *See also* Marshall S. Willick, *The Thrift Savings Plan*, 28 FAM. ADVOC. 40 (Fall 2005) (explaining the military’s contribution plan, which operates like a 401(k) plan, and how, at divorce, to determine whether the military member has participated).

¹²⁸ Dylan A. Wilde, Comment, *Obtaining an Equitable Distribution of Retirement Plans in a Divorce Proceeding*, 49 S.D. L. REV. 141 (2003) (offering a primer on retirement plan distributions, from terminology, through classification, valuation, division and distribution methods (such as present value, deferred distribution, and reserved jurisdiction)).

¹²⁹ *Woodward v. Woodward*, 656 P.2d 431 (Utah 1982).

¹³⁰ Helen W. Gunnar, *The ABCs of QDROs*, 93 ILL. B.J. 18 (Jan. 2005) (This article provides an introduction to QDROs).

i. Social Security Benefits After Divorce

Social Security benefits are often overlooked as a retirement benefit; however, if a couple is married for ten years or longer, when reaching age 62, the lower or non-earning spouse may be eligible to collect derivative Social Security benefits based on the former spouse's earnings records.¹³¹ The derivative benefit is equal to one-half the amount the former spouse is eligible to collect. The non-earning spouse on the verge of the ten-year period may want to consider delaying the divorce until the ten years is met.¹³²

To be eligible for Social Security benefits, a person needs to earn 40 Social Security credits. A person can earn up to four credits per year, and become eligible for retirement benefits after working 10 years. Retirement benefits are calculated using the highest 35 years of earnings. These earnings are then applied to a formula to arrive at a basic benefit at a full retirement age of 65 or older.¹³³

j. Dividing a Spouse's Stock Options

Stock options may constitute a significant portion of the divorcing couple's assets.¹³⁴ They can play a critical role in the division of property in divorce.¹³⁵ How to divide stock options in a divorce is an unsettled issue in U.S. courts.¹³⁶ Most courts view them as a form of employee compensation.¹³⁷ Divorce lawyers and judges are likely to be asked to resolve the division of stocks or options granted during marriage; if during the marriage, the challenge is endeavor to value the stock options.¹³⁸ The division of stocks creates a deeper complication in a divorce matter because of their fluctuating value, variation in vesting methods and the tax consequences of their transfer can all affect a divorcing party's portion of the settlement in a drastic way.¹³⁹ A major problem can arise when classifying the stock options as vested or unvested.¹⁴⁰ If unvested, was the unvested stock option granted before marriage, but vests after marriage? Do the options incentivize the employee or compensate the employee (for past or future services, or both)? Some issues to look for are whether the options are vested or unvested; if not vested, you must determine the vesting date—what happens if the options were awarded during marriage, but vest after the date of separation or divorce? Other questions to consider: What type of stock options are analyzing: incentive

¹³¹ Stanely W. Welsh and Franki J. Hargrave, *Social Security Benefits at Divorce: Avoiding Federal Preemption to Allow Equitable Division of Property in Divorce*, 20 J. AM. ACAD. MATRIM. LAW. 285 (2007)

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Amy Zipkin, *Stock Option Splitsville*, N.Y. TIMES (Aug. 9, 2000), <http://www.nytimes.com/2000/08/09/business/management-stock-option-splitsville.html>.

¹³⁵ *Id.*

¹³⁶ Robert J. Durst, II, *The Big Case: Issues in High Income/High Asset Cases: Stock Options: A Significant but Unsettled Issue in the Distribution of Marital Assets*, 17 J. AM. ACAD. MATRIM. LAW. 275 (2001).

¹³⁷ Charles P. Kindregan, Jr. and Patricia A. Kindregan, *Unexercised Stock Options and Marital Dissolution*, 34 SUFFOLK U. L. REV. 227 (2001).

¹³⁸ Darren K. Oglesby, *Valuing Stock Options in the Marital Context: Speculate, Agree, or Wait and See?*, 20 J. AM. ACAD. MATRIM. LAW. 39 (2006).

¹³⁹ Charles P. Kindregan, Jr. and Patricia A. Kindregan, *Unexercised Stock Options and Marital Dissolution*, 34 SUFFOLK U. L. REV. 227 (2001).

¹⁴⁰ Lynn Curtis, *Valuation of Stock Options in Dividing Marital Property Upon Dissolution*, 15 J. AM. ACAD. MATRIM. LAW. 411 (1998).

stock options or non-qualified stock options? Is the stock restricted? What are the tax consequences of the stock options?

k. Division of Personal Property

Copyrights¹⁴¹ publicity rights,¹⁴² or other intellectual property,¹⁴³ lottery winnings,¹⁴⁴ country club memberships,¹⁴⁵ reproductive material such as embryos, eggs, or sperm,¹⁴⁶ insurance benefits,¹⁴⁷ health care coverage,¹⁴⁸ pets,¹⁴⁹ and all other acquired marital property is subject to division.

l. Division of Debts

¹⁴¹ Paul Edward Geller, *Conflicts of Laws in Copyright Cases: Infringement and Ownership Issues*, 51 J. COPYRIGHT SOC'Y U.S.A. 315 (2004) (containing, within a much larger article, sections on the allocation of copyright ownership, the intersection of federal copyright laws and state marital property laws, and transfers of ownership).

¹⁴² David Westfall & David Landau, *Publicity Rights as Property Rights*, 23 *Cardozo Arts & Ent. L.J.* 71 (2005) (covering the treatment of the right of publicity as a property right at divorce).

¹⁴³ Kristen B. Prout, Note, *Intellectual Property Distribution in Divorce Settlements*, 18 *QUINNIPIAC PROB. L.J.* 160 (2004) (critiquing the reasoning of a Texas case which held that royalties from a patent acquired before the marriage should be treated like a community property income stream, and suggesting that patent royalties should be treated analogously to oil and gas royalties).

¹⁴⁴ Katie Foster, Comment, *Dividing Lottery Winnings During Dissolution of Marriage*, 18 *J. AM. ACAD. MATRIM. LAW.* 357 (2003) (explaining how a state's property law regime (community or separate), timing of winning and disbursements, and other factors affect the divisibility of lottery winnings at divorce).

¹⁴⁵ Brett R. Turner, *Country Club Memberships as Divisible Property*, 21 *EQUITABLE DISTRIBUTION J.* 109 (Oct. 2004) (discussing the historically accepted idea that country club memberships are marital property and recent dissents from that notion, since the membership is not typically a divisible asset).

¹⁴⁶ Jessica Berg, *Owning Persons: The Application of Property Theory to Embryos and Fetuses*, 40 *WAKE FOREST L. REV.* 159 (2005) (suggesting that property law offers a better conceptual framework than does procreative liberty to resolve disputes about embryos and fetuses). Jill R. Gorny, Note, *The Fate of Surplus Cryopreserved Embryos: What Is the Superior Alternative for Their Disposition*, 37 *SUFFOLK U. L. REV.* 459 (2004) (discussing the three theories courts have used in assessing the disposition of embryos - treating them variously as property, as persons, and as a unique interim category with the promise of life).

¹⁴⁷ Jani Maurer, *Use and Disposition of Life Insurance in Dissolution of Marriage*, 16 *BARRY L. REV.* 57 (2011) (examining life insurance policies with cash value as a source of marital property, life insurance to protect child support and alimony obligations, trusts that own life insurance, entitlement to insurance proceeds upon the death of a former spouse, and equitable distribution of insurance proceeds).

¹⁴⁸ Jan L. Warner & Matthew E. Steinmetz, *Will Divorce Be Kind to Your Health-Care Coverage?*, 31 *FAM. ADVOC.* 13 (Summer 2008) (explaining the people and events covered upon divorce by private health insurance, COBRA, Medicare, and Medicaid).

¹⁴⁹ Eithne Mills and Keith Akers, "Who Gets the Cats . . . You or Me?" *Analyzing Contact and Residence Issues Regarding Pets Upon Divorce or Separation*, 36 *FAM. L.Q.* 283 (2002-2003). See also, Ann Britton, *Bones of Contention: Custody of Family Pets*, 20 *J. AM. ACAD. MATRIM. LAW.* 1 (2006).

As it is with marital assets, so it is with debts. Debts need to be identified, classified as marital or separate, valued, and distributed equitably (not equally) between the parties.¹⁵⁰ One state serves as an example on how debts are to be handled if not marital debt:

- (1) Neither spouse is personally liable for the separate debts, obligations, or liabilities of the other:
 - (a) contracted or incurred before marriage;
 - (b) contracted or incurred during marriage, except family expenses as provided in Section 30-2-9;
 - (c) contracted or incurred after divorce or an order for separate maintenance under this title, except the spouse is personally liable for that portion of the expenses incurred on behalf of a minor child for reasonable and necessary medical and dental expenses, and other similar necessities as provided in a court order under Section 30-3-5, 30-4-3, or 78B-12-212, or an administrative order under Section 62A-11-326; or
 - (d) ordered by the court to be paid by the other spouse under Section 30-3-5 or 30-4-3 and not in conflict with Section 15-4-6.5 or 15-4-6.7.
- (2) The wages, earnings, property, rents, or other income of one spouse may not be reached by a creditor of the other spouse to satisfy a debt, obligation, or liability of the other spouse, as described under Subsection (1).

VI. Valuing and Dividing Business Interests in Divorce

a. Identifying Business Interests

Ownership interest in a closely-held business may be identified on the parties' tax returns. If the business income flows through to the individual tax return, this can be found on Schedule C or Schedule E of the individuals Federal Form 1040. If the business is a C Corporation, which income does not flow to the individual return, the individual return may still identify and interest or dividends received from the C Corporation, which can be found on Schedule B. The fair market value of a business interest can be determined by a business valuation expert.

Married couples often acquire business interests during marriage or they bring business interests into the marriage. The business interests must be identified, valued, and divided through some type equitable payout or offset.¹⁵¹ This process of valuing the business interests can be the most involved, complicated, and expensive part of a divorce action. Another complication is the type of business, such as a farm.¹⁵² A further complication is whether the business interests are to be divided by

¹⁵⁰ Margaret M. Mahoney, *Debts, Divorce, and Disarray in Bankruptcy*, 73 UMKC L. REV. 83 (2004) (creating an overview of the ways courts allocate marital debts upon divorce and Bankruptcy Code exceptions from discharge for property settlement and family support obligations, as well as discussing the ability of third party creditors to reach former spouses' assets).

¹⁵¹ Donna Tumminio, *Breaking Down Business Valuation: The Use of Court-Appointed Business Appraisers in Divorce Actions*, 44 FAM. CT. REV. 623 (2006).

¹⁵² John S. Slowiaczek & David A. Domina, *The Equitable Distribution of Farms*, 18 J. AM. ACAD. MATRIM. LAW. 357 (2003) (discussing ways courts identify farms, crops, and livestock as marital or separate property, including considerations of non-owner contributions to the farm and other equitable matters); Brett R. Turner, *Classification*

community property or equitable distribution analysis.¹⁵³ A business owner who is divorcing must understand what a business valuation expert will do in a divorce case and the various methods employed to value a business.¹⁵⁴ It is paramount to understand that businesses are not treated the same under law. A divorce attorney, accountant, and business valuation expert will help divorcing parties understand their own unique circumstances. However, the following is a brief introduction to valuing business interests.

b. Valuing Business Interests

The marital portion of the business will be shared equally between the divorcing parties.¹⁵⁵ However, arriving at a value of the marital portion is not a simple, nor is it an inexpensive process. Valuation of business interests or the business itself is a complicated and nuanced process.

The business valuation should begin with the following question: “What is my business worth?” or “What is my spouse’s business worth?” When one asks this question one is really asking to know either the price or the value (i.e. valuation) of the business. Many people use the terms price and value interchangeably. However, the terms are quite different. A business appraisal, or valuation, may produce a specific value necessary for division of the marital portion of the business in a divorce action (as well as other legal reasons). A price, on the other hand, is what the market might pay for the business. Most buyers and sellers of a business really want an idea of price, but that is not to be confused with what happens in a divorce because there is not typically a buyer or seller in a divorce. With that said, if neither of the parties are retaining ownership of the business, and the parties decide to sell the business, the marketplace will likely determine what the divorcing parties will get, which, in turn, will be divided between the parties.

c. Choosing the Proper Business Valuation Method

The fair market value of a business interest must be determined once business interests are identified. A business valuation expert will conduct a business valuation to make this determination. The valuation expert will determine the financial condition of the business interests. Part of this analysis includes a determination of whether any adjustments need to be made to the financial statements. Making adjustments to the financial statements provide a picture of the value of the assets and the financial

of Livestock, 22 *EQUITABLE DISTRIBUTION* J. 85 (Aug. 2005) (noting that while livestock generally are categorized according to a state’s asset classification system, the categorization of offspring of livestock that are separate property but are born during the owners’ marriage poses special problems).

¹⁵³ J. Mark Weiss, *Community Property Interests in Separate Property Businesses in Washington*, 40 *GONZ. L. REV.* 205 (2004 – 2005).

¹⁵⁴ ROBERT D. FEDER, *VALUATION STRATEGIES IN DIVORCE* (4th ed. Aspen Law & Business, 2000).

¹⁵⁵ Brett R. Turner, *Valuation of Businesses in Divorce Cases: Special Valuation Situations*, 10 *DIVORCE LITIGATION* 41 (1998) (covering business valuation in divorce situations in which the owning spouse has a partial ownership interest, and whether the ownership interest should be discounted to reflect a lack of control over business matters, a lack of marketability, a lack of voting rights, and a limited customer base, or whether the interest should be inflated to reflect larger rights of control; and discussing problems in evaluating franchises, new businesses, and failing businesses).

operating results of the business. Examples of some normalizing adjustments include recasting the income statement¹⁵⁶ and recasting the balance sheet.¹⁵⁷

Once financial data is prepared, it is time to choose the business valuation procedures. Since there are a number of well-established methods to determine business value, it is a good idea to use several of them to cross-check the results. All of these analyses have an associated cost to them, so one will need to work closely with a divorce attorney and the business valuation expert to determine the best course of action with the divorce budget available.

One should keep in mind that there are three primary valuation approaches to be considered: asset approach,¹⁵⁸ income approach¹⁵⁹ and market approach.¹⁶⁰ A business valuation expert and divorce attorney can elaborate on these different approaches as one moves forward with the business valuation.

The set of methods one chooses to determine a business value depends upon a number of factors. Here are some key points to consider:¹⁶¹

- The complexity and value of the company's asset base.
- Availability of the comparative business sale data from the market.
- Business earnings history.
- Availability of reliable business earnings projections into the future.
- Availability of data on the business cost of capital, both debt and equity.

All known business valuation methods fall under one or more of these fundamental approaches. However, business owners or students should be aware of some problems that can arise when married couples start a business together. One potential problem is the result of how a married couple may assign the ownership and management of the business when the business is first created. It makes a decisive difference if one spouse owns a controlling interest in the business because they likely have more decision-making power with the business and day-to-day decisions. This power imbalance can be frustrating to the minority-owning spouse as a divorce unfolds. However, this does not mean the non-controlling interest spouse is stripped from an equal share in the business interests.

VII. Alimony, Custody, and Child Support

¹⁵⁶ Julie Ginsburg Eller, *Phantom Discounts in Valuing Stock in Closely Held Companies: Does It Make Distribution Inequitable?*, 69 FLA. B.J. 41 (May 1995) (describing various discounts, such as "minority interest discount" and "lack of marketability discount," for the valuation of closely held corporations).

¹⁵⁷ There are number of balance sheet items that may need adjusting; however, the overall purpose of recasting the balance sheet is to make sure the value of assets and liabilities accurately represents the business earning power.

¹⁵⁸ Patrice L. Ferguson & John E. Camp, *Valuation Basics and Beyond: Tackling Areas of Controversy*, 35 FAM. L.Q. 305, 314-20 (2001) (listing the Income Approach, the Market Approach, and the Cost Approach as valid methods to use in valuing a business. See also, Willard H. Dasilva, *Business Valuation*, 25-WTR FAM. ADVOC. 3, 3 (2003).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

a. Alimony

Alimony (also called spousal support) is designed to enable the spouse receiving support to maintain the standard of living during the marriage and to prevent the recipient spouse from becoming a discharge on the state government.¹⁶² Some men argue that alimony is akin to a jail sentence;¹⁶³ however, women currently constitute approximately half of the workforce, which arguably makes the jail sentence notion out-dated.¹⁶⁴ Additionally, many women earn more than their husbands,¹⁶⁵ which means their husbands may have a claim for alimony. Nevertheless, an important consideration for women, as one researcher argues, women are more likely to be left financially exposed when a marriage dissolves because they mistakenly plan on the marriage to last forever.¹⁶⁶ However, alimony laws among the states vary widely.¹⁶⁷ There is an enormous body of case law deciphering the multitudinous marriages and how much, how long, and in what nature alimony should be awarded. Most states do not have a formula (like child support) to determine alimony.¹⁶⁸ The following states do have some type of alimony formulas: Arizona,¹⁶⁹ California,¹⁷⁰ Colorado,¹⁷¹ Florida,¹⁷² Illinois,¹⁷³ Kansas,¹⁷⁴ Maine,¹⁷⁵ Massachusetts,¹⁷⁶ New Mexico,¹⁷⁷

¹⁶² See *Noble v. Noble*, 761 P.2d 1369, 1372 (Utah 1988).

¹⁶³ See Sophia Pearson, *Jail Becomes Home for Husbands Stuck with Lifetime Alimony*, BLOOMBERG (Aug. 26, 2013), <http://www.bloomberg.com/news/2013-08-26/jail-becomes-home-for-husband-stuck-with-lifetime-alimony.html>.

¹⁶⁴ WOMEN IN THE LABOR FORCE IN 2010, U.S. DEP'T LABOR, <http://www.dol.gov/wb/factsheets/Qf-laborforce-10.htm> (last visited July 30, 2016).

¹⁶⁵ See Sophia Pearson, *Jail Becomes Home for Husbands Stuck with Lifetime Alimony*, BLOOMBERG (Aug. 26, 2013), <http://www.bloomberg.com/news/2013-08-26/jail-becomes-home-for-husband-stuck-with-lifetime-alimony.html>.

¹⁶⁶ Audrey Rose Herman, Student Comment, *Nice Guys Finish Last: New Yorkers Leave Our Assets Exposed When We Plan for Forever*, 18 BUFF. J. GENDER L. & SOC. POL'Y 175 (2010); Jane Singer, *Symposium on Divorce and Feminist Legal Theory: Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 GEO. L. J. 2423 (1994); Suzanne Reynolds, *The Relationship of Property Division and Alimony: The Division of Property to Address Need*, 56 FORDHAM L. REV. 827 (1988).

¹⁶⁷ Jennifer Levitz, *The New Art of Alimony*, WALL ST. J. (Oct. 31, 2009), <http://online.wsj.com/article/SB10001424052748703399204574505700448957522.html>.

¹⁶⁸ Some divorce attorneys advocate an alimony formula. See e.g., Lori W. Nelson and Taryn N. Evans, *Alimony Guidelines – An Idea Whose Time Has Come*, 28 UTAH BAR MAG. 4 (2015). A copy of the article can be found online at https://www.utahbar.org/wp-content/uploads/2015/07/2015_edition_4_july_aug.pdf (last visited on November 1, 2016).

¹⁶⁹ ARIZ. REV. STAT. § 25-319(B) (January 1, 2008); *Cullum v. Cullum*, 160 P.3d 231 (2007); See also, Ira Mark Ellman, *The Maturing Law of Divorce Finances: Toward Rules and Guidelines*, 33 FAM. L.Q. 801, 812 (1999).

¹⁷⁰ California Family Code section 4320, California Family Code section 10005, California Family Code section 4055 through 4069.

¹⁷¹ Colorado Revised Statute C.R.S. § 14-10-114 (The Colorado Legislature has formulated advisory guidelines for spousal/partner maintenance which may apply in cases where parties have been married at least three (3) years and have combined gross annual income of \$360,000 or less.)

¹⁷² Florida Senate Bill 250 (This new legislation providing for an alimony calculation will be effective in October of 2016), <https://www.flsenate.gov/Session/Bill/2016/0250/BillText/Filed/PDF>

¹⁷³ See 750 ILCS 5/504, §§ 504-505.

¹⁷⁴ Kan. Stat. Ann § 60-1610 (2007).

¹⁷⁵ Me. Code Tit. 19-A § 951-A (Jan. 22, 2010) (The Maine statute does not provide a formula for the amount of General Support. The Maine statute does, however, create a presumption limiting the duration of General Support.

¹⁷⁶ *Alimony Statute*, MGL, Ch. 208 § 34 (While Massachusetts does not have an alimony formula, it has instituted a maximum amount of alimony to be paid.)

¹⁷⁷ NMSA 1978 § 40-4-11.1(C)(1), (2) (1995).

New York,¹⁷⁸ Pennsylvania,¹⁷⁹ Texas,¹⁸⁰ and Virginia.¹⁸¹ The Academy of American Matrimonial Lawyers recommends states to adopt a formula and provide the suggested calculation.¹⁸² Edward M. Ginsburg, a retired Massachusetts judge, proposed an alimony formula that has been widely cited.¹⁸³ However, while a number of states have alimony formulas, they are often designed for temporary orders.

When there is no formula, some courts must consider a certain number of factors to assist in determining alimony. Those factors can be similar to the following:¹⁸⁴

- (8)(a) The court shall consider at least the following factors in determining alimony:
 - (i) the financial condition and needs of the recipient spouse;
 - (ii) the recipient's earning capacity or ability to produce income;
 - (iii) the ability of the payor spouse to provide support;
 - (iv) the length of the marriage;
 - (v) whether the recipient spouse has custody of minor children requiring support;
 - (vi) whether the recipient spouse worked in a business owned or operated by the payor spouse; and
 - (vii) whether the recipient spouse directly contributed to any increase in the payor spouse's skill by paying for education received by the payor spouse or enabling the payor spouse to attend school during the marriage.

There are a number of other considerations to be analyzed in a spousal support determination.¹⁸⁵ For some divorcing couples, one of parties will want to know if they have a claim to the value of their spouse's

¹⁷⁸ Maintenance Guidelines Law (L. 2015, c. 269,) (Ch. 269; S. 5678/A. 7645).

¹⁷⁹ Pa. Code Tit. 1910 § 16-4, 1910 § 16-6 (Apr. 19, 2008).

¹⁸⁰ Tex. Family Code Tit. 1C § 8.001 , 1C § 8.051 , 1C § 8.052 , 1C § 8.054 , 1C § 8.055 , 1C § 8.056 (Feb. 1, 2010) (The Texas alimony statutory scheme is less clear but has a formulaic element).

¹⁸¹ Virginia Code §20-107.1 , *Pendente Lite*: §20-103 , *JDR Courts* §16.1-278.17:1 (The guidelines are not binding and are adjustable by factors such as fault).

¹⁸² *Report of the American Academy of Matrimonial Lawyers on Considerations when Determining Alimony, Spousal Support or Maintenance*, ACADEMY OF MATRIMONIAL LAWYERS (Mar. 9, 2007), <http://www.aaml.org/i4a/pages/index.cfm?pageid=3739>.

¹⁸³ Edward M. Hon. *The Place of Alimony in the Scheme of Things*, 14 MASS. FAM. L. J. 107 (Jan. 1997). (Judge Ginsburg's formula suggests that alimony should be calculated as follows: The payor's income after the payment of alimony should equal the total of the payor's income and the payee's income divided by 1.8. Or, in other words, alimony equals the payor's income minus that amount.).

¹⁸⁴ See Utah Code 30-3-5.

¹⁸⁵ *Mortensen v. Mortensen*, 760 P.2d 304, 308 (Utah 1988) (holding that "Any significant disparity in the division of the remaining property should be based on an equitable rationale other than on the sole fact that one spouse is awarded his or her gifts or inheritance. The fact that one spouse has inherited or donated property, particularly if it is income-producing, may properly be considered as eliminating or reducing the need for alimony by that spouse or

educational or professional degree, say, if they are a medical doctor, engineer, dentist, or if they hold an MBA.¹⁸⁶ While some courts will not acknowledge a graduate degree as property subject to division, some courts have imposed a “student-contract” theory which can create stiffer alimony obligations if a student was supported financially by their spouse during marriage and then divorces soon after divorce.¹⁸⁷ Another oft-looked-over issue is payment of taxes on marital property,¹⁸⁸ especially if audited after divorce.¹⁸⁹ What happens if a divorcing couple owns a business together and one of them signed a non-compete agreement?¹⁹⁰ If one is contemplating divorce, or is served divorce papers, it behooves them to seek advice and legal counsel early on in the divorce about the issue of alimony. Keep in mind that alimony is tax-deductible unlike child support.

b. Custody

Children are expensive, but they can be even more expensive after a divorce. Custody refers to the rights and responsibilities a parent has regarding their child; it can be a complicated area of law. The consequences of custody are significant such as cost (child support), where the children live, whether children can move with a relocating parent to a new state for employment, where children attend school, what doctors (if any) the children will consult, among many other consequences. Each state has different laws and guidelines regarding custody. In *Troxel v. Granville*,¹⁹¹ the U.S. Supreme Court affirmed in the year 2000 that a biological parent holds a fundamental right in choosing how to raise one’s children as they see fit. However, divorce and custody complicates this fundamental right because the fundamental right is shared. Some states have adopted rebuttable presumptions about legal and physical custody, i.e. whether joint or primary custody should be considered in the best interests of the children. Each state’s law of custody is distinct. One takeaway, among others, from the variability of state laws on custody for a divorcing parent is a state’s law on custody might be important if the divorcing party desires to relocate to a news state after divorce.

c. Child Support

as a source of income for the payment of child support or alimony (where awarded) by that spouse. Such property might also be utilized to provide housing for minor children or utilized in other extraordinary situations where equity so demands.”).

¹⁸⁶ Laurence J. Cutler & Alison C. Leslie, *Reimbursement Alimony: How Much Is That Piece of Paper Worth?*, 23 MATRIM. STRATEGIST 1 (June 2005) (noting that courts proceed along one of two avenues in considering the value of an educational or professional degree earned during marriage - some value the degree or license simply as marital property, while others translate the value of the degree into reimbursement alimony).

¹⁸⁷ See *Ashby v. Ashby*, 227 P.3d 246, 248-49 (Utah 2010). See also, Kara H. North, Note: *Ashby v. Ashby: Utah’s Case for Student Support Contracts During Divorce*, 12 J. L. FAM. STUD. 523 (2010).

¹⁸⁸ Robert D. Feder & Drew Morris, *Uncle Sam’s Share of the Settlement: How Taxes Can Transform Property Distributions*, 27 FAM. ADVOC. 12 (Winter 2005).

¹⁸⁹ *Dissipation - Payment of Taxes on Marital Property; Dissipation - Sale of Stock Declining in Value; Dissipation - Termination of Medical Practice*, 20 EQUITABLE DISTRIBUTION J. 127 (Nov. 2003).

¹⁹⁰ *Employment Benefits - Covenant Not to Compete - Performed During the Marriage - Interspousal Gift - Transfer into Joint Title to Protect Separate Property from Creditors*, 22 EQUITABLE DISTRIBUTION J. 10 (Jan. 2005).

¹⁹¹ *Troxel v. Granville*, 530 U.S. 57 (2000).

Most states have a calculation for child support where a physical custody arrangement is one of the factors in determining child support. Other factors are usually gross incomes and the number of children under consideration. For example, one state’s child support is determined by the following calculation.

$$\begin{aligned} &\text{Number of children} + \\ &\text{Physical custodial arrangement (if joint custody, the number of overnights each party has the minor children)} + \\ &\text{The gross income of the parties (usually based on a 40 hour work week}^{192}) = \\ &\text{The child support amount.}^{193} \end{aligned}$$

Depending on the custodial arrangement, for example, if there are two minor children and parent 1 makes \$30,000 in gross income each year and parent 2 makes \$120,000 in gross income each year, the following child support amounts will apply. Child support can create a substantial monthly financial obligation.

Custodial Arrangement	Child Support Award
Sole custody	\$1,550 paid to parent 1.
Joint custody with parent 1 having 183 overnights and parent 2 having 182 overnights.	\$599 to the parent 1.
Joint custody with parent 1 having 235 overnights and parent 2 having 130 overnights.	\$1,446 paid to parent 1.

VII. Conclusion

Divorce law involves a number of business law issues already in the business law curriculum. Students are likely to experience, know someone who will experience, or manage someone who will experience divorce. As a result, a brief examination of divorce law in the business law curriculum can enhance their awareness of the impact divorce law may have in their life or business. Business law professors should consider introducing basic principles of divorce law in their curriculum throughout the semester. Alternatively, this article facilitates the objective of introducing business students to divorce law through 50-minute introduction to divorce law in a business law course.

Appendix 1
Case Study: Teaching Principles of Divorce Law to Business Students Within 50 minutes

¹⁹² See Utah Code 78B-12-203(2) for the determination of gross income for child support purposes.

¹⁹³ The child support calculator can be found here: <https://orscsc.dhs.utah.gov/orscscapps/orscscweb/action/public/custodyWorksheet/show>

Consider Harley and Taylor Smith who started living together, without being married, in 1992. In 1995, they began referring to the other, to friends, neighbors, and relatives as “my husband” or “my wife”. The Smith couple began to share bank accounts and tell the auto insurance company they were married in order to get a discount. Harley bought Taylor a \$30,000 engagement ring and they married in 1998. Harley had purchased two houses, one in 1988 (the marital home) and one in 1993 (an investment home). In 1992, Harley invited Taylor to move into the marital home.

Harley finished an MBA in 1985 and accrued a sizeable student loan. Harley accepted an offer to work at IBM in consulting. Harley formed part of the IBM team that founded Lexmark, a printer company.

Taylor, after the couple had married and had three children, despite Harley’s constant urging, refused to finish college or obtain employment. Taylor wanted to stay home with the three children and care for them. As the children grew older, Taylor’s unemployment became a source of contention, but not a deal breaker in the marriage for Harley.

Harley and Taylor acquired a ski boat they keep at their cabin in Park City, Utah. Both assets are free and clear from debt or obligation.

Harley worked hard to grow in his career. He played a pivotal role in Lexmark going public in 1995. As a reward for all of his hard work, he was granted a sizeable number of stock options. Some of the stock vested within two years and the rest in 1998.

Harley’s parents passed away in 2005 in a tragic sky-diving accident. Harley was an only child and thus the only heir. Taylor’s parents passed away from old age. Taylor is also an only child and thus the only heir. Harley used his inheritance (cash after the estate was liquidated) to pay off all of his debt, including student loans, mortgage and both of the real estate properties, ATVs, yacht, and place the remaining inheritance in a joint bank account. Taylor liquidated her inheritance and spent it all on herself and her friends in Hawai’i and Las Vegas. The total amount she inherited was \$150,000.

This trip frustrated Harley, not only because Taylor was profligate in her spending, but because Harley was left to care for the three minor children alone—one of whom has special needs. Although Harley and Taylor have shared the duties of caring for the children, it has been a burden and Harley’s resentment toward Taylor has built over the years.

While at IBM Harley accrued a sizeable retirement account, as part of a defined contribution plan. Harley takes a loan out on the retirement account to start a new tech company with a high school friend who are the only members of the LLC. The LLC develops software for 3D Printing. The LLC has garnered a lot of interest from investors and has an estimated market valuation of \$50 million, an evaluation according to Harley.

Harley and Taylor filed for divorce in May of 2016 in California.

Teacher’s Note on Divorce Case Study

The first issue is jurisdiction. The parties filed in California, a community property state. Students should have an understanding of how property is classified and distributed in community property and equitable distribution states.

Harley and Taylor (“the parties”) have acquired a number of assets over the marriage, which include: two homes, ski boat, yacht, cabin in Park City, Utah, stock options from Harley’s employer, ATVs, stock, and a 401K.

The general rule is to divide all marital property equally, including marital debts. However, the facts show the parties marry in 1998, but had lived together in what appears to be a common law marriage. The time between moving in together in 1992 and marrying in 1998 will be important for division of the marital estate. For example, Harley purchased two homes. The first one was purchased in 1988 before the parties moved in together, but the second home was purchased in 1993, a year after they began living together and well before they married in 1998. A court will have to determine whether Taylor is entitled to equity in the property before marriage. Taylor will likely argue the parties had established a common law marriage as early as 1992. The property purchased in 1988 will likely remain separate property and not subject to division.

Harley acquired stock from his company. The stock vested in 1997 and 1998. Depending on whether a court finds there was a common law marriage, the stock may or may not be subject to division. If no common law marriage is established, the stocks will remain Harley’s separate property. The parties’ 401K will likely be divided from the date of marriage to the date of divorce, meaning any acquired retirement before marriage will be Harley’s separate property; however, the common law analysis will make a difference on the dates of division. The other issue with the retirement account is the loan used as an investment for Harley’s startup in 3D printing software. A court will likely see the loan as marital debt. Likewise, a court will require an expert valuation of the LLC in order to award Taylor half the value of Harley’s portion of the business. Harley’s valuation will be unacceptable as a valuation. The \$30,000 engagement ring may be source of dispute because of the unsettled law on engagement rings. With that said, the engagement ring is likely to be pre-marital property and thus not subject to division.

The parties each receive an inheritance. Inheritance, if not co-mingled, will be considered separate property and not subject to division. Taylor spent her inheritance. Harley used his inheritance to pay off his student loan, but he also pays off the mortgages of the real estate properties, which is likely to benefit Taylor. The issue is whether the inheritance was co-mingled when Harley paid off the mortgages of the properties. Because the properties are marital property, the inheritance will likely lose its classification as separate property. The same analysis applies for the yacht, ATV, and joint bank accounts. In other words, Harley’s retirement has converted into marital property.

Taylor is also likely to be entitled to alimony in both community property and equitable distribution states. Although Taylor refused to obtain employment or education does not protect Harley from the claim of alimony. Rather a court is likely to view non-employment as an agreement between the parties. Additionally, custody will need to be established of the parties’ minor children, and especially, of the parties’ minor child with special needs. Once custody is established, child support will be calculated. Some type of joint legal and physical custody will be awarded the parties.

From Labor Rights To Tax Transparency: Using Norway’s GPFG As A Model For Advancing Human Rights In ESG Investment

By

Kevin J. McGarry*

INTRODUCTION

Growing interest and participation in sustainable finance and investment activities from all segments of business and industry presents an important opportunity to advance human rights. Traditionally, the word “sustainability” would often conjure thoughts linked specifically to environmental issues (e.g. air/water/soil pollution); in this regard, the idiom “cannot see the forest for trees” comes to mind.¹

As the practice of sustainability and its associated movements evolved, so too have myopic perceptions of sustainability as limited to traditional environmental issues. Incorporation of related macro issues into the sustainability dialogue stemming from reckless business investment activities, development practices, and consequent environmental degradation resulting in human rights violations became a necessity. However, human rights issues seem to be addressed as secondary or solely linked-with environmental concerns and not so much as separate explicit issues to be considered. This article intends to reflect on and suggest ways to more explicitly incorporate human rights and tax transparency considerations associated with business investment activities into the Environmental, Social, and Governance (“ESG”) metrics often employed to rate sustainable investment and financing decisions of companies; particular emphasis is placed on emerging trends in Norway’s GPFG divestment decisions based in human rights violations and, to a lesser extent, recent policy changes taken by CalPERS.

I. Origin and Evolution of ESG Sustainable Finance

A. *Sustainability, Business, and Finance*

The United Nations Global Compact (the “UNGC”) debut in early 2000 precipitated integration of sustainable finance on a global multilateral level.⁴³⁶ Eight years prior to the UNGC, in 1992, the UN Environment Programme Finance Initiative (the “UNEP:FI”) laid the groundwork for private sector banking, insurance, and investment involvement in sustainable finance.⁴³⁷ Outside of the UN system, the Coalition for Environmentally Responsible Economies (“CERES”) contemporaneously launched a set of sustainability reporting guidelines for companies.⁴³⁸ Gradually, the idea of sustainable finance cooperation between the private sector, multilateral intergovernmental organizations, and public interest

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¹ Dictionary of Cultural Literacy, 3rd Ed., Houghton Mifflin Company, 2005.

[http://dictionary.reference.com/browse/can't see the forest for the trees](http://dictionary.reference.com/browse/can't%20see%20the%20forest%20for%20the%20trees) (last visited May 19th, 2017).

⁴³⁶ United Nations, *United Nations Global Compact Annual Review – Anniversary Edition*, June 2010, at 9 available at https://www.unglobalcompact.org/docs/news_events/8.1/UNGC_Annual_Review_2010.pdf.

⁴³⁷ United Nations Environmental Programme Finance Initiative, About, (May 19th, 2017), <http://www.unepfi.org/about/>.

⁴³⁸ Global Reporting Initiative, What is GRI? – History, <https://www.globalreporting.org/information/about-gri/Pages/default.aspx> (last visited May 19th, 2017).

groups concretely manifested through the launch of the United Nations Principles for Responsible Investment (“UNPRI”) in 2006.⁴³⁹

During this period of growth and recognition for sustainable finance and investment, numerous parallel multilateral sustainability initiatives took hold as well. Along with the UNGC in 2000 came the Millennium Development Goals (“MDGs”) targeting various key problem areas associated with sustainability, poverty reduction, and development.⁴⁴⁰ Additionally, the UN Financing for Development Office (“UNFFD”) formed in 2003 to assist with the coordination and implementation of numerous finance and sustainability initiatives.⁴⁴¹ The UNFFD currently oversees the sustainable development and finance related commitments made in the “Doha Declaration on Financing for Development” in 2008.⁴⁴² With the transition from the MDGs to the Sustainable Development Goals (“SDGs”) underway, the UNFFD’s role in sustainable finance and investment became even more significant.⁴⁴³ These multilateral developments in sustainable finance and investment activities occurring in the 2000s found their origins in criticisms of early finance debates.

B. From MPT and EMH to ESG

In the early 1950s Harry Markowitz developed a new investment theory, Modern Portfolio Theory (“MPT”), which emphasizes maximizing returns while minimizing risk through diversification of investments.⁴⁴⁴ Nearly two decades later, Eugene Fama built upon Markowitz’ concepts adding neoclassical economic ideals of rationality in developing the Efficient Market Hypothesis (“EMH”).⁴⁴⁵ Critics of MPT with respect to sustainable finance and investment emerged en masse following the financial crisis. One particular commentator argues that contemporary investment theory should measure investment success by more than whether or not they ‘make money’ for investors.⁴⁴⁶ More

⁴³⁹ United Nations, Press Release, *United Nations Secretary-General Launches “Principles for Responsible Investment” Backed by World’s Largest Investors*, Apr. 27, 2006 available at http://2xjmlj8428u1a2k5o3411m71.wpengine.netdna-cdn.com/wp-content/uploads/un-uneppi-gc_press_20060427.pdf.

⁴⁴⁰ United Nations, General Assembly, *United Nations Millennium Declaration*, Sept. 18, 2000, G.A. Res. A/RES/55/2 available at <http://www.un.org/millennium/declaration/ares552e.pdf>.

⁴⁴¹ United Nations, General Assembly, *Ensuring effective secretariat support for sustained follow-up to the outcome of the International Conference on Financing for Development*, Mar. 5, 2003, G.A. Res. A/RES/57/273, available at http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/57/273&Lang=E.

⁴⁴² United Nations, Follow-up International Conference on Financing for Development to Review the Implementation of the Monterrey Consensus, *Doha Declaration on Financing for Development: outcome document of the Follow-up International Conference on Financing for Development to Review the Implementation of the Monterrey Consensus*, Dec. 9, 2008, A/CONF.212/L.1/Rev.1*, available at <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/N08/630/55/PDF/N0863055.pdf?OpenElement>.

⁴⁴³ United Nations, General Assembly, *Organization of the United Nations summit for the adoption of the post-2015 development agenda*, Dec. 16, 2014, A/69/L.43*, available at http://www.un.org/ga/search/view_doc.asp?symbol=A/69/L.43&Lang=E.

⁴⁴⁴ See Markowitz, H., *Portfolio Selection*, 7(1) J. FIN. 77 (1952).

⁴⁴⁵ See Fama, E.F., *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25(2) J. FIN. 383-417 (1970).

⁴⁴⁶ See generally Lydenberg, S., *Beyond Risk: Notes Toward a Responsible Investment Theory in CORPORATE GOVERNANCE FAILURES*, Hawley, Kamath and Williams eds., University of Pennsylvania Press (2011).

specifically, Lydenberg argues that the definition of financial market success and investment success should include a greater purpose-driven goal oriented toward just and sustainable societies.⁴⁴⁷

Another post-2009 financial crisis commentator coming from a joint scholar and investment practitioner background criticized MPT and short-termism.⁴⁴⁸ Youngdahl's work emerged as an outcome of the author's experience as a lawyer for employee retirement funds and scholar-fellow with Harvard's 'Initiative for Responsible Investment.'⁴⁴⁹ Thus, the primary focus is on fiduciary duty issues within an ERISA context and the tensions created by the Department of Labor's ("DOL") legal guidance (DOL guidance for sustainable investment activities will be discussed in greater detail in last part of the next section) for trustees interested in sustainable investment activities. Youngdahl, similar to other post-2009 financial crisis commentators, criticized MPT in light of the fiduciary conflicts it creates, but particularly for sustainable investment.⁴⁵⁰ The overall thrust of Youngdahl's propositions are that ESG integration within fiduciary obligations and modified variations of MPT to promote sustainable investment counter short-termism by providing a more comprehensive investment picture.⁴⁵¹ Moreover, such integration between ESG and fiduciary obligations within modified versions of MPT have gained significant ground in Europe (as highlighted in the Freshfields Report⁴⁵² and discussed in the next section of this article).⁴⁵³

II. Integrating Human Rights Into ESG

A. ESG and Human Rights Background

The Global Reporting Initiative (the "GRI") began in Boston, Massachusetts in 1997 as an offshoot of earlier works by the non-profit organizations known as the "Coalition for Environmentally Responsible Economies" ("CERES") and the Tellus Institute.⁴⁵⁴ The most current iteration of the GRI Guidelines is known as "G4" and is part of an on-going process to refine the process and approach to sustainability reporting. G4 Guidelines adopt a flexible approach to sustainability reporting that allows firms to adopt what are known as "core" or "comprehensive" options to demonstrate reporting compliance with the Guidelines.⁴⁵⁵ The "core" option represents essentially the bare minimum for a compliant sustainability

⁴⁴⁷ *Id.*

⁴⁴⁸ See generally Youngdahl, J., *Practitioners' Note: The Time Has Come For a Sustainable Theory of Fiduciary Duty in Investment*, 29 HOFSTRA LAB. & EMP. L.J. 115 (2011).

⁴⁴⁹ *Id.*; for information regarding The Harvard Kennedy School's Initiative for Responsible Investment see Hauser Center, <http://hausercenter.org/iri/>.

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.*

⁴⁵² Freshfields Bruckhaus Deringer, *A legal framework for the integration of environmental, social and governance issues into institutional investment*, October 2005, available at http://www.unepfi.org/fileadmin/documents/freshfields_legal_resp_20051123.pdf; see also United Nations Environment Programme: Finance Initiative, *Fiduciary responsibility: Legal aspects of integrating environmental, social and governance issues into institutional investment*, July 2009, available at <http://www.unepfi.org/fileadmin/documents/fiduciaryII.pdf> [continuing the work of the initial 2005 Freshfields report]; see also United Nations Environment Programme: Finance Initiative, *Fiduciary Duty in the 21st Century*, September 2015, available at https://www.unpri.org/download_report/6131 [a more current iteration of Freshfields combined with a comprehensive update on UNEP:FI activities related to ESG].

⁴⁵³ See Youngdahl, *supra* note 14.

⁴⁵⁴ The Global Reporting Initiative, "What is GRI?: History" (May 19th, 2017) <https://www.globalreporting.org/information/about-gri/gri-history/Pages/GRI's%20history.aspx>.

⁴⁵⁵ The Global Reporting Initiative, *An Introduction to G4: The Next Generation of Sustainability Reporting*, 2015, available at <https://www.globalreporting.org/resourcelibrary/GRI-An-introduction-to-G4.pdf> [hereinafter "GRI4"].

report by providing background for how an organization communicates ESG issues and impacts.⁴⁵⁶ In addition to this background requirement, a organization must discuss its management approach and report a minimum of one indicator associated with all of the organization’s “Material Aspects.”⁴⁵⁷ Material Aspects are defined as “issues that are significant to a business’ economic, environmental and social [EES] impacts and that substantively influence the assessments and decisions of its stakeholders.”⁴⁵⁸

All of the Big Four Accounting Firms⁴⁵⁹ are involved in the GRI, with Deloitte even providing certification training for sustainability reporting.⁴⁶⁰ While this is commendable for the firms to get involved, their motives and methods of engaging with integrated and sustainability reporting has set off alarms among some commentators concerned with treatment and consideration of the Social metric aspects. One scholar who has studied the GRI extensively, Galit Safarty, notes some of the major shortfalls of over-reliance on quantitative measures as the sole measure for sustainability practices.⁴⁶¹ Further, Safarty emphasizes some of the problems that emerge from converting public values to numbers to comport with the notation “that what gets measured gets done.”⁴⁶² The most important aspect of Safarty’s work, however, is found in the discussion regarding the role and current involvement of the Big Four in the GRI.

By providing third party assurance for sustainability reporting within an accounting context, the Big Four have the ability to either do a lot of good or cause tremendous setbacks for the sustainable finance movement. As Safarty points out, one major area for concern involves the interpretation of legal norms, particularly those linked with international human rights law and environmental law, by accountants (not lawyers).⁴⁶³ Related to this (and an issue not uncommon for the Big Four) are concerns for conflicts of interest in providing third party assurance on sustainability reporting.⁴⁶⁴

In order to enhance the legitimacy for accounting firm sustainability reporting there should be clear conflict of interest rules in place to address the concerns of possibly weakened indicators. Further, accountants should be interpreting and applying environmental and international human rights law in the sustainability reporting context. If the Big Four want to continue to offer services in the area of sustainability reporting they should employ lawyers for legal interpretation or somehow demonstrate comprehensive understanding and ability of their accountants to interpret and apply such legal standards and norms traditionally outside the scope of the general knowledge base of accountants. More on the relationship between GRI and other reporting initiatives as related to human rights within an ESG context is discussed later in Section III (A). Sustainability reporting is just one component in addressing the lack of explicit and separate human rights considerations in ESG. One of the leaders in ESG investment, the Norwegian government, uses a model that could provide a good starting point for others in explicit and consistent human rights integration.

⁴⁵⁶ *Id.* at 6.

⁴⁵⁷ *Id.*

⁴⁵⁸ *Id.* at 4.

⁴⁵⁹ Deloitte, PriceWaterhouseCoopers, Ernst&Young, and KPMG.

⁴⁶⁰ Deloitte Global, “Global Reporting Initiative Certified Training Courses” (May 19th, 2017) <http://www2.deloitte.com/us/en/pages/risk/events/gri-certified-training-courses.html>.

⁴⁶¹ Sarfaty, G. A., *Regulating Through Numbers: A Case Study of Corporate Sustainability Reporting*, 53 VA. J. INT’L L. 575 (2013).

⁴⁶² *Id.*

⁴⁶³ *Id.*

⁴⁶⁴ *Id.*

B. Norway's Government Pension Fund Global and Council of Ethics

When it comes to sovereign wealth funds, no country can top Norway's Government Pension Fund Global's ("GPF") success of investment performance tied into ESG compliance, and more recently specific human rights considerations. At the close of 2014, the GPF returned 7.6% or 544 billion kroner.⁴⁶⁵ At the start of 2014, the GPF reached a point where the fund could theoretically provide one million crowns to every living individual in Norway at that time...a little more than just a "rainy day fund."⁴⁶⁶ As of September 2017, the GPF reached a value of \$1 trillion.⁴⁶⁷ Aside from its amazing financial performance, the GPF is also a leader in moving sustainable finance considerations to the forefront of discussions on sustainable investment fund performance. So, what makes Norway's GPF different from other sustainable investment funds in terms of human rights considerations?

The GPF built its foundation for sustainable investment activities upon a core comprised of the UN Global Compact, OECD Principles of Corporate Governance, and OECD Guidelines for Multinational Enterprises.⁴⁶⁸ Through a combination of applying these core international standards with their own, constantly evolving, sustainable investment practices, and by pursuing shareholder engagement, the managers of the GPF carry out investment decisions. Sometimes the end result is divestment or a decision not to invest at all due to negative assessments of environmental and social (E and S metrics). In 2014, the GPF divested from forty-nine companies that failed to meet the fund's standards.⁴⁶⁹

The fund focuses on long-term returns to safeguard the wealth of the Norwegian people now and well into the future. This attention to long-term concerns places the sustainable investment activities and decision-making for investment choices very much in alignment. Through a system of governance via a Council of Ethics established by the Ministry of Finance and the Norges Bank Executive Board (overseen by a Supervisory Council), the GPF has managed to successfully lead the way in sustainable investment, but most importantly, in specifically integrating human rights into the social metric for the ESG assessment.⁴⁷⁰ An aspect that is quite unique to the GPF governance structure in comparison to other sovereign wealth funds and sustainable investment oriented funds is a fairly powerful and relevant Council of Ethics.

When the UN Guiding Principles on Business and Human Rights were introduced in 2011, the GPF Executive Board signed on to the investor statement supporting it.⁴⁷¹ In 2014, the GPF supported four shareholder proposals requesting comprehensive reports on identification and analysis of human rights risks both through direct company operations and indirectly through the companies' supply chains.⁴⁷²

⁴⁶⁵ Norges Bank, Investment Management, "Positive Results for All Asset Classes", Press Release, March 13, 2015, available at <http://www.nbim.no/en/transparency/news-list/2015/positive-results-for-all-asset-classes/>.

⁴⁶⁶ Alister Doyle, *All Norwegians Become Crown Millionaires, in Oil Saving Landmark*, Jan. 8th, 2014, REUTERS, available at <http://www.reuters.com/article/2014/01/08/us-norway-millionaires-idUSBREA0710U20140108>.

⁴⁶⁷ Mikael Holter and Sveinung Sleire, *The World's Biggest Wealth Fund Hits \$1 Trillion*, September 19, 2017, BLOOMBERG, available at <https://www.bloomberg.com/news/articles/2017-09-19/norway-wealth-fund-says-reached-1-trillion-in-value>.

⁴⁶⁸ Norges Bank, *Responsible Investment 2014* at 7, February 2015 available at <http://www.nbim.no/globalassets/reports/2014/2014-responsible-investment.pdf> [hereinafter GPF 2014].

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.* at 15.

⁴⁷¹ *Id.* at 17.

⁴⁷² *Id.* at 32.

The imposition of Norway's GPFGE ethics guidelines began in 2004 and since then have adapted to growing concerns that come with a more expansive definition of sustainable finance and investment.⁴⁷³

Part of the success of the GPFGE, argue Halvorssen and Eldredge, can be attributed the active ownership mechanism and active exclusion or black-listing of firms that engage in unethical and unsustainable behavior.⁴⁷⁴ With respect to the S metric, the GPFGE is definitively a leader by considering human rights violations beyond the scope of simply labor rights issues (e.g. inclusive of "political terror").⁴⁷⁵ In 2014, twenty-four (or approximately 18%) of the 135 company reports produced by the GPFGE addressed human rights concerns beyond labor rights aspects of human rights.⁴⁷⁶ The exclusion and/or divestment of companies by recommendation of the Council of Ethics resulted in sixty companies being excluded from the fund by the close of 2014.⁴⁷⁷ Of the sixty companies excluded, three were specifically for human rights violations, two for violations of "other fundamental ethical norms", and three for "serious violations of the rights of individuals in situations of war or conflict" which arguably falls within the category of humanitarian law violations.⁴⁷⁸ The human rights and humanitarian violations combined comprised approximately 28.5% of the conduct-based exclusions from investment by the GPFGE in 2014.

The GPFGE model of exclusion for ethical violations inclusive of human rights considerations (defined broadly and inclusive of humanitarian issues) is fairly unique in approaching the Social metric for ESG analysis. Norway has inspired quite a bit of scholarly comment on and practical duplication of their evolving ethical exclusion approach. One such commentator, Ghahramani, proposes use of three models of sovereign-driven portfolio investment in relation to government pursuit of CSR and international law compliance linkages to sustainable investment (e.g. human rights violations).⁴⁷⁹ The model exemplified by Norway's GPFGE approach of "ethics-based legislative exclusion" plays an active role integrating human rights into the "S" consideration of ESG metrics.⁴⁸⁰

The companies currently excluded from Norway's GPFGE for human rights or humanitarian violations include: Wal-Mart Stores, Inc., Wal-Mart de Mexico SA de CV, Zuari Agro Chemicals Ltd., and Atal SA/Poland for "serious or systematic human rights violations" and Africa Israel Investments, Danya Cebus and Shikun & Binui Ltd for "[s]erious violations of the rights of individuals in situations of war or conflict."⁴⁸¹ In addition, five companies, Potash Corporation of Saskatchewan, Elbit Systems Ltd., San Leon Energy Plc, Cairn Energy Plc, and Kosmos Energy Ltd. were also excluded from the GPFGE, but for "serious violations of fundamental ethical norms", which tend to involve threats to human rights principles, such as self-determination.⁴⁸² The recommendations of the GPFGE Council of Ethics that resulted in each company's exclusion from the fund provide insight into the thought process for human rights assessment linked to sustainable investment and finance decision-making. To maintain consistency with the GPFGE's separation between "human rights" and "humanitarian" exclusions, the recommendations for each set companies will be addressed separately as well. However, the two

⁴⁷³ Halvorssen, A. M. and Eldredge, C., *Investing in Sustainability: Ethics Guidelines and the Norwegian Sovereign Wealth Fund*, 42 DENV. J. INT'L L. & POL'Y 389 (2014).

⁴⁷⁴ *Id.*

⁴⁷⁵ See GPFGE 2014, *supra* note 34, at 46.

⁴⁷⁶ *Id.* at 48.

⁴⁷⁷ *Id.* at 75.

⁴⁷⁸ *Id.*

⁴⁷⁹ Ghahramani, S., *Sovereigns, Socially Responsible Investing, and the Enforcement of International Law Through Portfolio Investment and Shareholder Activism: The Three Models*, 35 U. PA. J. INT'L L. 1073 (2014).

⁴⁸⁰ *Id.*

⁴⁸¹ Runar Malkenes and Tor Martin Bærum, "Company Exclusions: Responsible Investments", April 9th 2014, NORWEGIAN MINISTRY OF FINANCE, available at <https://www.regjeringen.no/en/topics/the-economy/the-government-pension-fund/internt-bruk/companies-excluded-from-the-investment-u/id447122/>.

⁴⁸² *Id.*

“ethical norms” company exclusions will be addressed in their substantively relevant legal groupings (i.e. Elbit Systems Ltd. – humanitarian and Potash Corporation- human rights).

1. GPFG Ethics Divestment Decisions – Human Rights Cases

Wal-Mart Stores (and Wal-Mart de Mexico SA de CV) were the first companies to be excluded from the GPFG for human rights violations.⁴⁸³ In the decision to exclude Wal-Mart from the fund, the GPFG Council of Ethics directly references internationally recognized human rights norms as well as legally binding international human rights treaty law.⁴⁸⁴ In addition to citations to the International Covenant on Civil and Political Rights (“ICCPR”), the International Covenant on Economic, Social and Cultural Rights (“ICESCR”), and the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”), the GPFG Council of Ethics decision references a U.S. Supreme Court case, *Wal-Mart Stores, Inc. v. Dukes*, involving gender discrimination against women.⁴⁸⁵

Much in alignment with the Guiding Principles on Business and Human Rights, the GPFG Council of Ethics addressed Wal-Mart’s corporate complicity in human rights violations as part of their divestment decision. Generally, the Council noted “conditions falling far short of the standards Wal-Mart itself requires of its suppliers and complicity in violations of ILO labour standards and human rights standards” and cross-referenced Wal-Mart Stores, Inc. *Standards for Suppliers: Internal Code of Conduct* [2004 version] to underscore the reasoning behind the divestment decision.⁴⁸⁶ Specific violations range from active prevention of unionization (citing internal company documents such as “Wal-Mart: A Manager’s Tool Box to Remaining Union Free”) to slavery in violation of ICCPR Article 8 paragraph 3 and ICCPR Article 9.⁴⁸⁷ Moreover, the Council referred to working conditions at textile factories in Wal-Mart’s supply chain throughout the world as “abysmal” and rife with systematic abuse of employees/captured laborers (including children in violation of ILO Convention 182 and the UN Convention on the Rights of the Child).⁴⁸⁸

Five years after the Wal-Mart divestment decision, the Council reviewed a second company for human rights violations that led to divestment. Although officially divested under the GPFG category “Other particularly serious violations of fundamental ethical norms”, the Potash Corporation of Saskatchewan decision involves implicit human rights allegations. The Potash decision involved phosphate resource extraction in the Western Sahara resulting in exploitation that does not give proper consideration to the local population.⁴⁸⁹ The primary human rights issue addressed by the Council was self-determination given Morocco’s lack of sovereignty over the Western Sahara.⁴⁹⁰ The case implicitly addressed self-determination in a political autonomy sense and in an economic sense through the right to prevent

⁴⁸³ *Id.*

⁴⁸⁴ Gro Nystuen et. al., Petroleum Fund Council on Ethics, *Recommendation of 15 November 2005: Wal-Mart Stores Inc.*, Nov. 6, 2006, NORWEGIAN MINISTRY OF FINANCE, available at <https://www.regjeringen.no/en/dokumenter/Recommendation-of-15-November-2005/id450120/> [unofficial English translation].

⁴⁸⁵ *Id.*; See also *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

⁴⁸⁶ *Id.*

⁴⁸⁷ *Id.*

⁴⁸⁸ *Id.*

⁴⁸⁹ Petroleum Fund Council on Ethics, *Recommendation of 15 November 2010: Potash Corporation of Saskatchewan & FMC Corporation*, Nov. 15, 2010, NORWEGIAN MINISTRY OF FINANCE, available at https://www.regjeringen.no/globalassets/upload/fin/etik/2011/rec_phospahte.pdf [unofficial English translation].

⁴⁹⁰ *Id.*

resource exploitation, both of which are covered as recognized legal rights in the ICCPR and ICESCR respectively.⁴⁹¹

The more recent exclusions from the GPFG for human rights concerns occurred with Zuari Agro Chemical, Ltd. in 2013 and Atal SA/Poland in 2017. The importance of the Zuari case to enhancing the presence and importance of human rights in determinative sustainable investment and finance decisions, particularly in lending teeth to the S-metric, cannot be underscored enough. In the very beginning of the decision, the Council establishes a clear line of demarcation on the responsibility of companies to comply with international human rights law despite the direct legal obligations being tied to States themselves and then derived from the international human rights conventions those States are party to.⁴⁹² Most importantly, in the Zuari decision, the Council adopts an aggressive position on company accountability to international human rights law regardless of a company's home country legal recognition of such rights by stating:

it is sufficient to establish that the company in question is acting in a manner that links it to serious or systematic violations of internationally recognised human rights. This applies regardless of whether the state where the violations are taking place has ratified the conventions against which the circumstances are assessed.⁴⁹³

The primary concern of the Council in the Zuari case involved the use of child labor, particularly children under the age of ten.⁴⁹⁴ With Zuari Agro Chemical, the Council estimated that approximately 20% of the child laborers were under the age of 10 and children overall comprise approximately 30% of Zuari's agricultural labor.⁴⁹⁵ After concluding that Zuari demonstrates no intention to remedy their human rights abuses, the Council recommended the exclusion of Zuari Agro Chemicals from any investments by the GPFG.⁴⁹⁶

Most recently, in the Atal/SA Poland exclusion decision, the Council decided to exclude the Polish Company due to serious human rights violations arising from sub-contracting with North Korea.⁴⁹⁷ Notably, the Council reaffirmed a conclusion from their *Zuari* exclusion decision, in that the Council stated in the Atal/SA exclusion decision that “[a]lthough international human rights conventions impose obligations on states and not companies, companies can be said to contribute to human rights violations. This applies irrespective of whether the state in which the violations take place has ratified the conventions against which the actions are assessed.”⁴⁹⁸ The specific human rights violations involved

⁴⁹¹ Articles 1 and 27 in the ICCPR address human rights associated with political self-determination and Article 1 in the ICESCR; *see also* United Nations, *Self-Determination Integral to Basic Human Rights, Fundamental Freedoms, Third Committee Told as It Concludes General Discussion*, Sixty-Eighth General Assembly, GA/SHC/4085, Nov. 5, 2013, *available at* <http://www.un.org/press/en/2013/gashc4085.doc.htm>.

⁴⁹² Petroleum Fund Council on Ethics, *Recommendation on the exclusion of Zuari Agro Chemicals Ltd. from the Government Pension Fund Global's investment universe*, April 18, 2013, NORWEGIAN MINISTRY OF FINANCE, *available at* https://www.regjeringen.no/contentassets/f65ed42d67ee49d29ee8d238ff53d61d/zuari_eng.pdf [unofficial English translation][henceforth “Zuari Ethics Decision”].

⁴⁹³ *Id.* at 2.

⁴⁹⁴ *Id.* at 6-7.

⁴⁹⁵ Zuari Ethics Decision, *supra* note 58, at 9.

⁴⁹⁶ *Id.* at 10.

⁴⁹⁷ Petroleum Fund Council on Ethics, *Recommendation on the exclusion of the company Atal SA*, Aug. 25, 2017, NORWEGIAN MINISTRY OF FINANCE, *available at* <https://nettsteder.regjeringen.no/etikkradet-2017/files/2018/01/Recommendation-Atal-SA-20473.pdf> [unofficial English translation].

⁴⁹⁸ *Id.* at 1-2.

threats to North Korean workers directly and to their families/children if they defect or fail in their labor tasks.⁴⁹⁹

Three of the Council exclusion decisions (and three of the four companies, since Wal-Mart and Wal-Mart de Mexico were addressed jointly) based on human rights abuses involved severe and on-going abuse of children as a primary motivating factor for divestment by the GPF. The *Potash* exclusion adopted a broader view through indirect incorporation of human rights law via divestment due to violations of self-determination resulting from indigenous resource exploitation. Since the last human rights based exclusion of Atal/SA in late 2017, the Council announced that three more companies were placed under observation for serious or systematic violations of human rights.⁵⁰⁰

In May 2017, the Council initially recommended the exclusion of Hansae Yes24 Holdings Co. Ltd. And Hansae Co. Ltd. for serious or systematic violations of human rights.⁵⁰¹ However, in what appears to be a rare instance of company responsiveness to the Council's concerns regarding human rights violations, the Hansae companies undertook a sincere effort to address the violations. Thus, the Council and Executive Board opted to place the Hansae companies under observation rather than to exclude them from the GPF.⁵⁰² The third company placed under observation in 2017 was Pan Ocean Co. Ltd. Unlike the *Hansae* initial formal decision to exclude, the Council only recommended formal observation of Pan Ocean.⁵⁰³ The Council's reasoning behind recommending a formal observation instead of exclusion for Pan Ocean turned on a response from the company that Pan Ocean will address the areas of concern when threatened with the possibility of exclusion.⁵⁰⁴ An excerpt from the response from Pan Ocean under threat of exclusion highlighted in the formal recommendation when read denotes a mixture of motivations and grievances with complying- "strongly feeling social responsibility", "affect our profit by making our selling prices lower", and "the negative impact on our reputation".⁵⁰⁵

The *Hansae* and *Pan Ocean* decisions to observe represent an interesting shift in the human rights specific exclusions because of the pre-exclusion responsiveness of the companies. The question remains as to whether this will be a continuing trend in 2018 and beyond. Further, in order to build a complete picture of human rights related divestment, the Council decisions for divestment associated with direct (human rights violations of individuals in conflict zones) humanitarian violations must also be considered. The companies excluded for humanitarian violations were all involved in business activities in the territories of the West Bank and East Jerusalem.

⁴⁹⁹ *Id.* at 3.

⁵⁰⁰ Norges Bank's Executive Board, Observation and Exclusion of Companies: Companies Placed Under Observation (Jan. 16, 2018), <https://www.nbim.no/en/responsibility/exclusion-of-companies/>.

⁵⁰¹ Petroleum Fund Council on Ethics, *Recommendation to exclude Hansae Yes24 Holdings Co Ltd and Hansae Co Ltd from the Government Pension Fund Global (GPF)*, May 5, 2017, NORWEGIAN MINISTRY OF FINANCE, available at <https://nettsteder.regjeringen.no/etikkradet-2017/files/2017/06/Recommendation-Hansae-4.mai-2017-ENG-6.pdf> [unofficial English translation].

⁵⁰² Norges Bank's Executive Board, Decision To Place Companies In The Portfolio Of The Government Pension Fund Global Under Observation (June 29, 2017), <https://www.nbim.no/en/transparency/news-list/2017/decision-to-place-companies-in-the-portfolio-of-the-government-pension-fund-global-under-observation/> (According to GPF Guidelines, "Observation may be decided when there is doubt as to whether the conditions for exclusion are met or as to future developments, or where observation is deemed appropriate for other reasons". *Id.*).

⁵⁰³ Petroleum Fund Council on Ethics, *Recommendation to place Pan Ocean Co Ltd under observation*, June 29, 2017, NORWEGIAN MINISTRY OF FINANCE, available at <https://nettsteder.regjeringen.no/etikkradet-2017/files/2018/01/Tilr%C3%A5dning-Pan-Ocean-Co-ENG-20445.pdf> [unofficial English translation].

⁵⁰⁴ *Id.* at 7.

⁵⁰⁵ *Id.*

2. GPFG Ethics Divestment Decisions – Conflict/War Human Rights Violations Cases

The first decision of the Council on non-munitions related humanitarian violations involved the company, Elbit Systems Ltd., which supplied the surveillance system for the West Bank territories, thus participating and perpetuating human rights violations against the occupants of the West Bank.⁵⁰⁶ In 2012, three years following the initial Elbit decision, the Council expanded on reasoning behind Elbit in its decision to exclude Shikun & Binui Ltd. from the GPFG as well for similar reasons. The Shikun & Binui decision involved violations of the Geneva Conventions and associated human rights due to the Shikun’s on-going participation in illegal settlement construction⁵⁰⁷ in the occupied territories on the West Bank and in East Jerusalem.⁵⁰⁸ The final two companies excluded within this group were Danya Cebus Ltd. and Africa Israel Investments Ltd. in 2014. The Council chose to exclude these companies from the GPFG for on-going (with no intention to stop) involvement in the construction of illegal settlements in East Jerusalem.⁵⁰⁹

These eight companies excluded from the GPFG for human rights violations (either direct human rights or within the context of humanitarian) provide insight and perspective on ways to include human rights considerations in sustainable investment and finance decisions. Given the extensive legal analysis conducted in the Council’s decisions to exclude these companies, it may be possible to construct a stronger and easily transferrable framework for integration into the S-metric in ESG considerations. However, reliance on the GPFG decisions alone will not be adequate if the goal is to build a robust and comprehensive human rights measurement tool for S-metric areas in ESG analysis.

In February of 2016, Norges Bank Investment Management (the “NBIM”), which manages the GPFG, formalized their human rights considerations with the adoption of an explicit human rights policy.⁵¹⁰ The NBIM explicitly stated: “Companies have a responsibility to respect human rights, including in their own operations, as well as in supply chains and other business relationships. The expectations are based on international standards like the UN Guiding Principles on Business and Human Rights and the OECD’s guidelines and principles.”⁵¹¹ The NBIM formal expectations document outlines four primary categories of expectations towards companies in relation to

⁵⁰⁶ Petroleum Fund Council on Ethics, *Recommendation on the exclusion of the company Elbit Systems Ltd.*, Sept. 3, 2009, NORWEGIAN MINISTRY OF FINANCE, available at <https://www.regjeringen.no/en/dokumenter/the-council-on-ethics-recommends-that-th/id575451/> [unofficial English translation].

⁵⁰⁷ In a 2004 advisory opinion, the International Court of Justice found the construction of the settlements to be illegal under international humanitarian law; see International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, July 4, 2004, available at <http://www.icj-cij.org/docket/files/131/1671.pdf>.

⁵⁰⁸ Petroleum Fund Council on Ethics, *Recommendation for exclusion of Shikun & Binui Ltd. from the Government Pension Fund Global (GPFG)*, Dec. 21, 2011, NORWEGIAN MINISTRY OF FINANCE, available at https://www.regjeringen.no/contentassets/f65ed42d67ee49d29ee8d238ff53d61d/shikun_binui_eng.pdf [unofficial English translation].

⁵⁰⁹ Petroleum Fund Council on Ethics, *Recommendation to exclude the companies Africa Israel Investments Ltd. and Danya Cebus Ltd. from the investment universe of the Government Pension Fund Global*, Nov. 1, 2013, NORWEGIAN MINISTRY OF FINANCE, available at https://www.regjeringen.no/contentassets/f65ed42d67ee49d29ee8d238ff53d61d/africa_israel_nov_2013.pdf [unofficial English translation].

⁵¹⁰ Norges Bank Investment Management, Human Rights Expectation Document, Feb. 4, 2016, <https://www.nbim.no/en/transparency/news-list/2016/human-rights-expectation-document/>.

⁵¹¹ *Id.*

human rights.⁵¹² It will be interesting to review the cases that emerge under the new expectations adopted in 2017.

3. *GPFG New Expectations – Tax Transparency*

In May of 2017, the GPFG adopted a new set of guidelines linking good corporate governance to tax transparency. The GPFG outlined three principles for their new tax transparency expectations: 1) companies should pay taxes where they generate economic value, 2) a company’s board bears the responsibility for the company’s tax arrangements, and 3) participation in country-by-country reporting is essential disclosure transparency.⁵¹³ As Norges Bank Investment Management notes in the tax transparency expectations document, “Representatives of the investment community have nevertheless not generally issued expectations as to how businesses should govern and conduct their tax affairs.”⁵¹⁴ Part of this stems from the belief that “companies, through their directors, owe a fiduciary duty to their shareholders to minimise taxes.”⁵¹⁵ Although the document does not specifically mention human rights, it does place the issues associated with tax transparency within the context of both the OECD Principles of Corporate Governance and the OECD Guidelines for Multinational Enterprises.⁵¹⁶

On a much smaller scale, human rights concerns are being considered (legislatively speaking) in American sustainable investment activities through state statutes (e.g. California) prohibiting investment in companies that do business with sovereigns or their SOE-affiliates with large human rights violations; Ghahramani refers to this model as “nation-centric legislative exclusion.”⁵¹⁷ The last model, “extra-legislative activism”, most commonly used by CalPERS, specifically employs the use of ESG in conjunction with legislated requirements. CalPERS provides a decent consideration of human rights within the “social” component of ESG with its “Emerging Equity Market Principles” [EEMP].⁵¹⁸

C. *CalPERS’ EEMP As a Complement*

The California health and retirement benefits administrator, CalPERS, is the largest public fund of its kind in the United States.⁵¹⁹ Three years after Norway’s GPFG adopted its ethical guidelines for sustainable investment activities, CalPERS adopted its “Emerging Equity Market Principles” (“EEMP”). The first principle of “political stability” includes considerations for human and economic rights.⁵²⁰ Tensions caused by lagging interpretations of American fiduciary duties for institutional investors (e.g. CalPERS) and slow U.S. Department of Labor guidance on the related fiduciary issues for sustainable

⁵¹² Norges Bank Investment Management, *Human Rights Expectations Towards Companies*, at 3-4, 2016, available at <https://www.nbim.no/contentassets/3258fe10181544cc8e02566c7237fa5f/human-rights-expectations-document2.pdf>.

⁵¹³ Norges Bank Investment Management, *Tax and Transparency: Expectations Towards Companies*, at 2, 2017, available at <https://www.nbim.no/contentassets/48b3ea4218e44caab5f2a1f56992f67e/expectations-document---tax-and-transparency---norges-bank-investment-management.pdf>.

⁵¹⁴ *Id.* at 4.

⁵¹⁵ Norges Bank Investment Management, *Tax and Transparency: Expectations Towards Companies*, at 2, 2017, available at <https://www.nbim.no/contentassets/48b3ea4218e44caab5f2a1f56992f67e/expectations-document---tax-and-transparency---norges-bank-investment-management.pdf>.

⁵¹⁶ *Id.*

⁵¹⁷ See Ghahramani, *supra* note 44.

⁵¹⁸ *Id.*

⁵¹⁹ CalPERS, “About CalPERS” (May 19th, 2017) <http://www.calpers.ca.gov/index.jsp?bc=/about/home.xml>.

⁵²⁰ CalPERS, *Emerging Equity Market Principles*, available at <https://www.calpers.ca.gov/eip-docs/investments/policies/inv-asset-classes/equity/ext-equity/emerging-eqty-market-principles.pdf>.

investment activities have held CalPERS back from achieving GPFG-level integration of human rights considerations in the S metric and from comprehensive sustainable investment engagement.

Many of the fiduciary legal problems faced by pension funds who wish to engage in sustainable investment activities extensively stem from Modern Portfolio Theory (“MPT”). In 2009, Johnson and de Graaf analyzed traditional concepts of legal fiduciary standards and duties emerging from MPT, particularly as related to pension funds and ‘herding’ behavior of investment activity.⁵²¹ Johnson and de Graaf refer to the current practice of fiduciary obligations in light of market changes as a “Lemming Fiduciary Standard” due to a failure to truly evaluate current practices based on what was once considered more of a “prudent expert fiduciary standard.”⁵²² They further argue that this results in obsessive focus on short-term results which consequently violates the fiduciary duty of impartiality, particularly for pension funds that “manage assets to meet liabilities over several generations.”⁵²³ This last component is particularly important in comparing human rights integration into ESG analysis by Norway’s GPFG and CalPERS.

Some commentators argue that rather than seek a complete overhaul of American legal fiduciary duty standards, beneficiary participation enhancement within fund governance is a better approach.⁵²⁴ Richardson advocates for this slightly different approach to ESG and fiduciary duties/obligations for fund governance. Unlike other commentators, Richardson suggests limited reform to fiduciary duties with stronger emphasis on strengthening beneficiary participation and voice within overall fund governance.⁵²⁵ Richardson argues this can be achieved through the creation of legal requirements obligating representation of beneficiaries on fund boards or explicitly requiring that fund boards actively consult with beneficiaries.⁵²⁶ The examples provided in his article for variations on these suggestions include: Ontario’s former South African Trust Investments Act of 1988 and the Connecticut Retirement Plans and Trust Funds.⁵²⁷

A bit of a variation on this approach suggested by Jackson links issues of corporate law with shareholder primacy as contributing to the very short-termism problems pointed out by others, such as Johnson and de Graaf.⁵²⁸ Jackson’s work provides a comprehensive legal-historical overview of corporate governance in the U.S., U.K., and Germany and the evolution towards not just stakeholder theory, but viewing the stakeholder as shareholder models.⁵²⁹ Specifically, Jackson discusses how aspects of corporate law combined with shareholder primacy contribute to short-termism at the expense of other stakeholder interests.⁵³⁰ Thus, through the application of capital lock-in theory, stakeholder interests can be incorporated into the general theory of corporate governance deferring to a board of directors (which allegedly represents a “neutral mediating hierarch”) with strong fiduciary obligations.⁵³¹ This assertion

⁵²¹ Johnson, K. L. & Jan de Graaf, F., *Modernizing Pension Fund Legal Standards for the Twenty-First Century*, ROTMAN INT’L J. OF PENSION MGMT. (2009).

⁵²² *Id.*

⁵²³ See Johnson and Jan de Graaf, *supra* note 87.

⁵²⁴ Richardson, B. J., *Fiduciary Relationships for Socially Responsible Investing: A Multinational Perspective*, 48 AM. BUS. L.J. 597 (2011).

⁵²⁵ *Id.*

⁵²⁶ *Id.*

⁵²⁷ *Id.*

⁵²⁸ Jackson, K. V., *Towards a Stakeholder-Shareholder Theory of Corporate Governance: A Comparative Analysis*, 7 HASTINGS BUS. L.J. 309 (2011).

⁵²⁹ *Id.*

⁵³⁰ *Id.*

⁵³¹ *Id.*

is supported by the fact that “no modern [American] court has struck down a decision by a board of directors because it favored stakeholder interests at the expense of shareholder interests.”⁵³²

In March of 2015, CalPERS adopted a more stringent global governance policy.⁵³³ The thirteenth Global Governance Principle in CalPERS new global governance policy explicitly charges CalPERS with a policy of “eliminating human rights violations.”⁵³⁴ To achieve this, the relevant CalPERS governance principle states that companies should be in compliance with Global Sullivan Principles or the United Nations Global Compact Principles.⁵³⁵ Given the relative recency of CalPERS new global governance policy adoption, it will be a matter of time before an outcomes assessment similar to the human rights case analysis of Norway’s GPFG can be conducted. Ultimately, CalPERS is constrained by U.S. legal standards, which have slowly been evolving to better accommodate ESG oriented investment activities.

III. Legal and Accounting Considerations and ESG Human Rights

As noted from the immediately preceding discussion on CalPERS, there are several obstacles to other institutional investors fully adopting the GPFG approach to greater human rights integration, including emerging relationships to tax transparency. One area highlighted by the GPFG in their new tax transparency expectations deals with differing interpretations of specific fiduciary duties in relation to tax minimization strategies. This is just one of several issues to contend with.

A. Contingent Liabilities and Human Rights Reporting

It is important to take into account discussion of contingent liability treatment when considering how to approach re-defining or enhancing current attributes of what defines the human rights aspects of the “S” in ESG. This is particularly so given potential application of contingent liability treatment to help enhance a measureable approach to incorporate actions taken by companies that may violate justiciable human rights into the “S”. Difficulties arise when considering the multiple definitions and treatments of what constitutes a contingent liability from a loss perspective, particularly in relation to U.S. GAAP and IFRS Accounting Standards. Inconsistencies in reporting hampers progress in ESG advancement.

Under U.S. financial accounting standards, a loss contingency can range from probable to remote with the three specific categorical terms of “probably”, “reasonably possible”, and “remote” used to define the range of a contingent loss.⁵³⁶ Further, two additional conditions are required for an estimated loss from a loss contingency to be reported on financial statements: 1) “it is probable that an asset had been impaired or a liability had been incurred at the date of the financial statements” and 2) “the amount of the loss can be reasonably estimated.”⁵³⁷ The rules are designed to both bar accrual of losses in relation to future periods (the probability aspect) and to ensure integrity of financial statements by having a loss be

⁵³² *Id.*

⁵³³ CalPERS, *Statement of Investment Policy for Global Governance*, March 16, 2015, available at <https://www.calpers.ca.gov/eip-docs/investments/policies/global-governance.pdf>.

⁵³⁴ *Id.* at 12.

⁵³⁵ CalPERS, *Statement of Investment Policy for Global Governance*, March 16, 2015, available at <https://www.calpers.ca.gov/eip-docs/investments/policies/global-governance.pdf>.

⁵³⁶ Financial Accounting Standards Board, ASC 450 – Contingencies, -20 “Loss Contingencies”, available at <https://asc.fasb.org/section&trid=2127173>.

⁵³⁷ *Id.* at 450-20-25 (the phrase “date of financial statements” is further defined as “the end of the most recent accounting period for which financial statements are being presented”).

reasonably estimable.⁵³⁸ The treatment of business risks is an important component of ASC 450-20 when exploring relationships between business activities and accountability for human rights violations within the context of expanding understanding of the Social metric in ESG.

U.S. financial accounting standards state “general or unspecified business risks do not meet the conditions for accrual in paragraph 450-20-25-2, and no accrual for loss shall be made.”⁵³⁹ As recognition of business obligations, both legally binding and investor expected, to respect not only the environment, but also human rights grows, so too will the prospect for loss contingencies that may have previously not met the conditions for accrual. Two of the most relevant loss contingencies for ESG assessment purposes are litigation and environmental liabilities.⁵⁴⁰ Since the purpose of this article is to focus on the “S” in ESG, environmental liabilities will be only be discussed in so far as they relate to litigation associated with human rights violations tied to environmental liabilities. Before delving into the relevant jurisprudence to loss contingencies and contingent liabilities, contingency treatment differences under U.S. GAAP and IFRS must be discussed.

The IFRS equivalent to U.S. GAAP ASC 450-20 is found in IAS 37 which differs in several ways from ASC 450-20. A relevant difference between the two provisions involves how they define probability of incurring a contingent loss. More specifically, GAAP requires a greater degree of certainty (“likely”) while IFRS applies a lesser degree of certainty (“more likely than not”).⁵⁴¹ Another major difference between the two standards involves the disclosure requirements of contingencies, with IFRS providing a disclosure exception if the company would be seriously prejudiced by disclosure.⁵⁴² This last aspect, the disclosure exception provided for by IFRS, can provide a detrimental ‘out’ when evaluating a company’s sustainable business practices using ESG metrics. Inclusion of contingent liabilities and associated discussions of materiality specifically for human rights abuses within existing reporting frameworks, such as the GRI and the UNGP reporting framework, will further the goal of recognizing human rights within ESG.

B. U.S. Uncertainty, ERISA Fiduciary Guidance, and Human Rights

ESG investment activities in the U.S. are regulated by the Employee Retirement Income Security Act (ERISA) with interpretative guidance from the U.S. Department of Labor. The state of uncertainty on exactly what is and is not acceptable in ESG investment activities is best demonstrated by the wording in U.S. Department of Labor’s Interpretative Bulletin 2015-01:

The Department believes that in the seven years since its publication, IB 2008-01 has unduly discouraged fiduciaries from considering ETIs and ESG factors. In particular, the Department is concerned that the 2008 guidance may be dissuading fiduciaries from (1) pursuing investment strategies that consider environmental, social, and governance factors, even where they are used solely to evaluate the economic benefits of investments and identify economically superior

⁵³⁸ *Id.* at 450-20-25-3 to 25-5.

⁵³⁹ ASC 450-20-25-8, “Business Risks.”

⁵⁴⁰ See generally Jonathan Schiff, Allen Schiff, and Hannah Rozen, *Accounting for Contingencies: Disclosure of Future Business Risks*, 13(3) MGMT. ACCT. Q. 1 (2012), available at http://www.imanet.org/docs/default-source/maq/maq_spring_2012_schiff-pdf.pdf?sfvrsn=0.

⁵⁴¹ *Id.* at 3.

⁵⁴² *Id.*

investments, and (2) investing in ETIs even where economically equivalent. Some fiduciaries believe the 2008 guidance sets a higher but unclear standard of compliance for fiduciaries when they are considering ESG factors or ETI investments.⁵⁴³

The bulletin goes on to make it clear that ERISA does not prohibit considering ESG factors, using ESG metric tools, nor is there a presumption that additional documentation will be required to justify ESG based investment decisions.⁵⁴⁴ Yet, the matter of proper compliance to successfully engage in ESG investment activities still looms large presenting an uncertain path forward, particularly for the less popular of ESG activities – explicit and separate human rights based investments.

To this end, in acknowledgement of the uncertainty surrounding existing U.S. legal guidelines, a few multilateral efforts are underway. The United States is one country that has an active group within the UNEP:FI working on fiduciary duty issues in U.S. law within an ESG context.⁵⁴⁵ Moreover, the UNPRI released a report earlier in 2016 containing two legal opinions from Groom Law Group and the law firm Morgan Lewis on ESG and ERISA.⁵⁴⁶ As U.S. legal guidance and interpretation continues to develop, perhaps looking to international partners, such as Norway, could help formulate more concrete guidelines. In addition to these sources, other opportunities for collaboration may exist through partnerships with multilateral lending institutions.

In November of 2014, Vinod Thomas, Independent Evaluation Director General for the Asian Development Bank (“ADB”), made a significant statement on ADB (and implicitly all development bank) safeguard policies in support of sustainable finance. More specifically, Thomas said: “Safeguards are needed because public and private investors do not automatically mitigate the damages that spill over from their actions. Meeting the **safeguards cannot be aspirational or a goal to be considered down the road, but rather a regulation that is legally binding.**”⁵⁴⁷ Thomas’ statement regarding the strength of force for social safeguards in development bank investment activities bodes well for future enforcement considerations of human rights violations within the context of ESG.

IV. Conclusion

The potential for expanding human rights considerations within ESG investment analysis continues to grow with the emergence of explicit discussions of human rights as considerations not only integrated with, but more importantly, also apart from the environmental (“E”) and governance (“G”) factors in ESG. Consideration of non-traditional areas, such as tax transparency, and issues of self-determination by the GPFG demonstrate a willingness to push the

⁵⁴³ United States Department of Labor, Interpretative Bulletin 2015-01, Oct. 26, 2015, *available at* <http://webapps.dol.gov/FederalRegister/HtmlDisplay.aspx?DocId=28547&AgencyId=8&DocumentType=1>.

⁵⁴⁴ *Id.*

⁵⁴⁵ See United Nations Environment Programme: Finance Initiative, *Fiduciary Duty in the 21st Century: US Roadmap*, 2016, *available at* https://www.unpri.org/download_report/24188.

⁵⁴⁶ See United Nations Principles for Responsible Investment, *Addressing ESG Factors Under ERISA*, Feb. 25, 2016, *available at* https://www.unpri.org/download_report/25250.

⁵⁴⁷ Santos, L. A., *ADB Leads Push for Requirements-Based Safeguards*, DEVEX, Nov. 12, 2014, <https://www.devex.com/news/adb-leads-push-for-requirements-based-safeguards-84815> (last visited Feb. 13th, 2017)[emphasis added].

discussion of social metrics beyond traditional contexts such as human rights defined solely by labor rights. The examination of several sources, with particular emphasis on Norway's GPFG show promise in expanding opportunities for further integration of human rights within ESG. Given the recency of many of these changes, future research will involve reviewing outcomes from the GPFG's new and explicit human rights investment policies and how related human rights divestment decisions in the future will help shape the future of human rights considerations in ESG. Lastly, closer attention to the use of integrated reporting by global accounting firms with respect to such firms' interpretations of what constitutes reportable human rights violations will also need continued analysis in light of a quickly changing landscape for human rights in ESG.

**WHEN IT'S NOT BUSINESS AS USUAL:
ENGAGING STUDENTS IN CREATING INDIVIDUALIZED
EDUCATIONAL EXPERIENCES IN BUSINESS LAW**

By

Casey Rockwell^{1*}

INTRODUCTION

Across the country, Colleges of Business are charged with preparing the students who are to become the leaders in industries such as finance, real estate, marketing, management, and the law. For a number of students, a bachelor's degree is terminal and, therefore, they must be skilled to enter the workforce upon graduation. In the area of business law in particular, the charge is to prepare students for situations including but not limited to employment law, contracts, property and real estate transactions, copyright and trademark infringement. This article supports the proposition that one can use students' personal interests in a tailored educational path to promote classroom discussion and to prompt outside reading.

“A legal background is necessary in order to develop the business person's awareness of the interrelationship between government and business, to integrate legal considerations into managerial decisions, and to evaluate the costs and benefits of particular business alternatives.”¹ In a typical Business Law class, course content is generally at the discretion of the instructor. It can be heavily influenced by standardized syllabi, standardized textbook selections, or standardized testing including the Major Fields Test. Some may even turn to current research on skill sets that are required for certain segments of the business field, from small business executives to Fortune 500 CEOs. With Business Law serving as a core course for such degree plans as accounting, construction management, financing, and real estate, how do instructors provide the tailored experience for each student that will prepare him/her for the field of choice? This paper proposes the inclusion of the students in that process.

This article will begin with a brief overview of the existing literature as to which legal concepts should be included in the course. The article then discusses a pedagogical approach to engaging students in the conversation of tailoring their own education.

II. Literature Review

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¹S.S. Paschall, *Expanding Educational Objectives Through the Undergraduate Business Law Course*, 19 AKRON L. REV. 615 (1985).

A. Themes Recommended for Inclusion

A number of studies have been conducted regarding the legal concepts to be taught in undergraduate business law classes, including such topics as ethics,² corporate responsibility,³ employment law,⁴ risk management, in-depth contracts, and property law. Additionally, several studies have noted non-tangible concepts like critical thinking and research skills as key to the success of undergraduate business law students. What has caused the increase of focus on the topics being taught inside the business law curriculum? In a study conducted by George Siedel, findings indicated a list of factors affecting the importance of business law including litigation, regulation, globalization, technology, compliance, and entrepreneurship.⁵ The argument is whether or not our current content is still relevant in the ever-changing business marketplace.

B. Association to Advance Collegiate Schools of Business (AACSB) 2013's Standards

The idea of relevancy issues from the AACSB Standards. A number of its standards for business accreditation encourage institutions to make purposeful steps to engage numerous parties in the conversation of topics and skills necessary for graduates.

1. Standard 8

Standard 8 of the AACSB Standards establishes a baseline stating, “The school uses well- documented, systematic processes for determining and revising degree program learning goals; designing, delivering, and improving degree program curricula to achieve learning goals; and demonstrating that degree program learning goals have been met.”⁶ Deeper into that discussion, AACSB denotes a basis for judgment that includes “curricula management [that] facilitates faculty-faculty and faculty-staff interactions and engagement to support development and management of both curricula and the learning process.” These

² T. Hazels, *Ethics and Morality: What Should be Taught in Business Law?*, 19 ACAD. OF EDUC. LEADERSHIP J. 2, 77 (2015); C. Bagley et al., *Deep Links: Does Knowledge of the Law Change Managers' Perceptions of the Role of Law and Ethics in Business?*, 47 HOUS. L. REV. 2, 259 (2010); S. Willey et al., *Integrating Ethics Across the Curriculum: A Pilot Study to Assess Students' Ethical Reasoning*, 29 J. LEGAL STUD. EDUC. 2, 263 (2012).

³ S. R. Sipe, *Maximizing Student Learning Through Enron: The Ultimate B-Law Case Study*, 24 J. LEGAL STUD. EDUC. 2, 325 (2007).

⁴ S. M. Denbo, *Employee v. Employer: Integrating Employment Law Issues and Critical Thinking Skills into the Undergraduate Business Law Curriculum*, 15 J. LEGAL STUD. EDUC. 1, 107 (1997).

⁵ G. J. Siedel, *Six Forces and the Legal Environment of Business: The Relative Value of Business Law Among Business School Core Courses*, 37 AM. BUS. L.J. 4, 717 (2000).

⁶ The Association to Advance Collegiate Schools of Business, *Eligibility Procedures and Accreditation Standards for Business Accreditation* (Sept. 24, 2017, 1:00 PM), <http://www.aacsb.edu/-/media/aacsb/docs/accreditation/standards/business-2017-update.ashx>.

fundamental notions tie closely with existing research on the importance of collaborative research between students and faculty members.⁷ Moreover, it notes, “Learning goals and curricula reflect expectations of stakeholders. Schools incorporate perspectives from stakeholders, such as organizations employing graduates, alumni, students, the university community, policy makers, etc., into curricula management processes.” This concept is designed to complement the research on advisory boards, including the importance placed on them from the faculty perspective.⁸

2. Standard 9

Standard 9 of the AACSB states, “Curriculum content is appropriate to general expectations for the degree program type and learning goals.”⁹ Guidance for documentation goes on to state the need to describe learning experiences appropriated to the delineated curriculum. Of particular interest is the focus on reflective thinking as a key component. Research supports the notion of the inclusion of critical and reflective thinking in the business law curriculum even going so far as to tie in problem-based learning and supporting the notion of the Socratic Method.

3. Standard 10

Standard 10 addresses the notion that, “Curricula facilitate student-faculty and student-student interactions appropriate to the program type and achievement of learning goals.”¹⁰ Building upon the research regarding the importance of collaborative research efforts between students,¹¹ it appears that the AACSB is encouraging collaborative research at the undergraduate level that deepens the discussion beyond classroom concepts and into critical application of one’s role in society.

III. Primer for Collaborative Research Efforts to Tailor Business Law Education

Both current research and the AACSB standards indicate an engaging opportunity allowing instructors and students to work collaboratively in order to assess the current market needs in relation to business law education. Beginning on the first day of class by establishing a rapport founded on a genuine interest in the students’ future career goals, the following example offers an opportunity for students to utilize critical thinking skills and reflection to delve deeply into how concepts learned throughout the semester are applicable in given fields.

A. *Learning Objectives*

⁷ K. Webber et al., *Student and Faculty Member Engagement in Undergraduate Research*, 54 RES. IN HIGHER EDUC. 2, 227 (2013).

⁸ K. M. Kilcrease, *Faculty Perceptions of Business Advisory Boards: The Challenge for Effective Communication*, 88 J. OF EDUC. FOR BUS. 2, 78-83 (2011).

⁹ The Association to Advance Collegiate Schools of Business, *Eligibility Procedures and Accreditation Standards for Business Accreditation* (Sept. 24, 2017, 1:04 PM), <http://www.aacsb.edu/-/media/aacsb/docs/accreditation/standards/business-2017-update.ashx>.

¹⁰ *Id.*

¹¹ L. M. McWey et al., *Cooperative Learning through Collaborative Faculty-Student Research Teams*, 252 FAM. RELATIONS 2, 252-262(2006).

Involving students in the creation of their own curriculum forms an excellent base for an engaged semester. In addition to engaging students in the creation of their own content, this exercise allows for meaningful review of key concepts. Utilizing this mid-semester group exercise, it is clear to the students that instructors are interested in making this material useful in their future careers and reinforcing the idea that students are expected to be an engaged participant in their education both now and when they enter the business world.

In particular, the primary learning objectives for this exercise are:

- To support the notion that individual interests are valued
- To demonstrate the cross sectional application of business law concepts
- To encourage student participation by demonstrating inclusiveness from varied teaching strategies including group work, classroom discussion, and spirited debate
- To reinforce critical thinking and reasoning skills necessary for future business success
- To provide a review of substantive law by gathering concrete examples for real-life applications
- To demonstrate that the concepts learned are relevant to a student's personal life and future professional endeavors

B. *The First Day of Class*

As with all courses, the first day of class can be a make-or-break moment where students decide whether information contained within the course will be meaningful to them and, as such, make the decision to engage. The conversation can begin with the fundamental question: "What is the top legal issue that you will face in your chosen industry?" From this point on, it is clear that the instructor is demonstrating a desire to learn more about the issues that are important to the student. Moreover, this question will serve as the root for the semester-long discussion of how the major concepts taught in the class will fit into each field.

C. *Implementing the Exercise: Mid-Semester Business Law Survey*

1. Overview

AACSB, as well as countless research articles, has noted the benefits that come from student-to-student and student-to-faculty research opportunities. The development of the research, and the survey instrument in particular, becomes the beginning of this research relationship.

2. Development of Mid-Semester Survey

As noted above, research has been tied to accreditation standards and success in the classroom. As such, the students become the lynchpin in the development of this research project by becoming certified as principal investigators, by drafting informed consent letters, and by survey development.

Students are given a one-hour training on basic research principles including informed consent, the necessity of confidentiality, and the importance of ethical reporting. Moreover, they are asked to complete IRB certificate training through the University of Miami, which will qualify them to serve as a principal investigator under the direction of a lead faculty member.

Once the students have completed their training, they are engaged in the process of drafting an informed consent letter. The informed consent letter must contain a description of the project, its purpose, and how the results will be utilized, engaging students in the conversation of why we are creating this project.

From there, students are broken into small groups to begin discussion on which topics should be included in the survey. Commonly included themes are employment law, contracts, debt collection, and liability. Through classroom discussion, those themes are reviewed and honed into specific legal concepts.

Once themes are chosen, in-class discussion begins on which research methods would provide comparable results. This opportunity allows the engagement of others in the campus community in discussions by inviting in the director of institutional research, instructors in business communication, and those in statistics to offer thoughts on what would carry the best results.

After selection of the appropriate research methods of Likert-scaled surveys along with open responses, the process of question development begins. Students submit questions to the class for consideration of inclusion, again resulting in additional reviewing of the concepts. The survey questions typically concern the various legal issues with which businesses had been involved, the number of times they actually had to consult an attorney, the number of times clients threatened them with lawsuits, the number of times they had to sue a client, supplier, or employee and the underlying reasons, the number of times the matters actually went to court, and the outcomes. Additional open response questions can be added to bring depth to the conversation regarding outside services, capital contributions, involvement in litigation, and resolution through alternative dispute resolution techniques.

3. Participant Selection

Participant selection is an opportunity for students to tailor their surveys to their chosen field, again reinforcing the focus on individuality. For example, a construction management major may choose to survey/interview chief officers or owners at large construction companies while accounting majors may choose to interview sole proprietors who set up their own small companies.

Participant selection also has the additional benefit of assisting students in meeting managers in the field that they would like to enter, building upon a commonly found mission tenet.

4. Survey Administration

Students are assigned to administer the survey with three different business organizations. The underlying purpose is to provide for student comparisons, as well as to provide exposure to a wider variety of businesses. Administration takes place at the various business locations and further connects the students to the businesses. In consideration of the participants, efforts are made to ensure that survey administration takes no more than 15-20 minutes.

5. Reporting of Results

Completed surveys are brought into class for discussion. Student research leads are appointed to tabulate data and lead discussions on trends present in the results. Trends are discussed in depth with regard to business size, organization type, and field of endeavor.

The skill of reflection is then reinforced through the assignment of a paper, requiring the students to reflect on the top issue that emerges and the effect that legislation, policies, and court cases play on that issue.

6. Feedback from Students

The author of this study utilized this assignment for several years while teaching at the graduate level. More recently, she introduced this exercise to a sophomore level business law class. Student feedback on the survey collection has been positive. Specific feedback will be gathered from the students at the completion of the reflection process. In order to gather this feedback, the author will anonymously survey students at the end of the reflection paper process.

7. Notes for Instructors

This activity occurs three-fourths of the way through the semester, so students have a wide variety of legal concepts from which to draw. Approximately three full classroom days are dedicated to research administration training, group discussion survey development, and results tabulation. The remainder of the time associated with this project is outside of class and is inclusive of survey administration, survey tabulation, and the drafting of the reflection paper.

Approximately one-fourth of the survey development is instructor-driven discussion with the remainder being a student-driven initiative, building in buy-in from students. It should also be noted that success has been found by breaking the survey development into various areas including training, experience, handling, and comfort level. After each group develops an outline, those concepts are brought back into the group for reporting and student-led debate regarding inclusion and refinement.

While circulating between the groups, instructors are encouraged to observe which issues are being noted, excluded, and included. While there may not be enough time to debrief entirely with each group, it is helpful to have each group share what concepts they discarded and why. This provides an opportunity for the instructor to pose any follow-up questions should there be pivotal concepts that were overlooked. Provided is a specific example of redirect that could be utilized.

“Group A, I noted that you wanted to include a question about the training in recent years, but you did not delineate if you were going to ask the source of this training. Would this information prove beneficial in your reporting if other businesses knew where they could obtain additional training?”

This type of analysis assists students in seeing the larger benefits of research. This could lead to discussions regarding small business resources that could prove beneficial to them in the future. This type of questioning also sets the stage for the type of inquiry and growth that is required in the business world.

Appendix A:

Small Business Assignment

Overview

The student will select three brick and mortar businesses and ask them to complete the Small Business Survey. In addition, the student will interview the participants in the areas of employment law, property, intellectual property, etc.

Instructions

Ask three businesses to complete the Small Business Survey. Scan and upload all three surveys together in one document that you will then upload into Blackboard.

Evaluation Rubric

Use the following rubric to guide your work.

Small Business Survey (20 Points)	Survey was fully completed by all three brick and mortar businesses (15-20 Points)	Survey is fully completed by at least two brick and mortar businesses (5-14 Points)	Survey is fully completed by at least one brick and mortar business (0-4 Points)
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Appendix B:

Informed Consent Draft

Participant Information Sheet

_____ and the students of the Business Law class from the department of _____ at _____ invites you to help us with research on legal topics facing small businesses. Your input can help the university develop curriculum that maximizes the preparedness of our students to enter the business environment.

You will be asked to think about your small business experience and participate in a 5-minute interview. From there, you will be asked to fill out a questionnaire telling us about your encounters with legal issues as it relates to your business.

Participation is voluntary and carries no known risks greater than those encountered in daily life. You may stop at any time and there are no penalties for early withdrawal; the interviews and surveys of anyone who withdraws will be destroyed.

Participation is also anonymous, so please do not write your name on any materials. It is not possible to connect the data to any particular person. The data collected is intended for use in scholarly publications and the data will be maintained in a locked office of the Principal Investigator at _____ for three years beyond the life of the study.

Questions or comments? Contact:

For questions about your rights as a research volunteer contact: Institutional Review Board at:

Thank you very much for helping with our research.

Appendix C:

Small Business Survey

Small Business Survey

Circle Position - Sole Proprietor Partnership LLC Corporation

Circle the number indicating to what extent, if any, each of the following legal issues affect your business.

	No Effect	Minor	Moderate	Major
Hiring and Firing	0	1	2	3
Unemployment Filing	0	1	2	3
Collections/Bad Checks/Credit	0	1	2	3
Contracts Issues	0	1	2	3
Trademarks/Patents	0	1	2	3
Sexual Harassment	0	1	2	3
Local Business Rules/Regulations	0	1	2	3
Fraud	0	1	2	3
Theft	0	1	2	3
Computer Hacking	0	1	2	3
Advertising/Marketing	0	1	2	3
Import/Export	0	1	2	3
Taxes-Payroll, Income, Sales Tax	0	1	2	3
Property Law-Landlord/Tenant	0	1	2	3
Negligence	0	1	2	3

Comments _____

Circle one legal action that represents the most frequently utilized for each of the legal issues.

Coding for Actions Taken

1-Seek to Settle It Informally 2-Seek Assistance from Mentors
 3-Seek Legal Counsel 4- Seek Alternative Dispute Resolution 5-Other

Incidents	Actions Taken				
Hiring and Firing	1	2	3	4	5
Unemployment Filing	1	2	3	4	5
Collections/Bad Checks/Credit	1	2	3	4	5
Contracts Issues	1	2	3	4	5
Trademarks/Patents	1	2	3	4	5
Sexual Harassment	1	2	3	4	5
Local Business Rules/Regulations	1	2	3	4	5
Fraud	1	2	3	4	5
Theft	1	2	3	4	5
Computer Hacking	1	2	3	4	5
Advertising/Marketing	1	2	3	4	5

Import/Export	1	2	3	4	5
Taxes-Payroll, Income, Sales Tax	1	2	3	4	5
Property Law-Landlord/Tenant	1	2	3	4	5
Negligence	1	2	3	4	5

Comments _____

Circle to indicate your level of training in these areas.

Codes

0 -No Training 1-Training in College 2-Professional Development Only

Hiring and Firing	0	1	2
Unemployment Filing	0	1	2
Collections/Bad Checks/Credit	0	1	2
Contracts Issues	0	1	2
Trademarks/Patents	0	1	2
Sexual Harassment	0	1	2
Local Business Rules and Regulations	0	1	2
Fraud	0	1	2
Theft	0	1	2
Computer Hacking	0	1	2
Advertising/Marketing	0	1	2
Import/Export	0	1	2
Taxes-Payroll, Income, Sales	0	1	2
Property Law-Landlord/Tenant	0	1	2
Negligence	0	1	2

Comments _____

Circle to indicate the extent to which community organizations and agencies are available as a resource to your business.

Codes

- 0 – I do not know this organization
- 1- I know them, but we have no interaction at all
- 2- Networking (Aware of Agency/Little Communication)
- 3- Coordination (Share Information and Resources/Formal Communication)
- 4- Collaboration (Share Ideas/Trusting and Frequent Communication/Consensus Decision Making)

Civic Clubs (Rotary, Lion's Kiwanis's)	0	1	2	3
Professional Organizations/Associations in your field	0	1	2	3
Attorney General's Office	0	1	2	3
Arkansas Small Business and Tech Development Center	0	1	2	3
Arkansas Department of Economic Development	0	1	2	3
US Small Business Administration	0	1	2	3
4-year Colleges/Universities	0	1	2	3
Community Colleges	0	1	2	3
Delta Regional Authority	0	1	2	3
Institute for Economic Advancement	0	1	2	3
Local Chamber of Commerce	0	1	2	3
Arkansas Chamber of Commerce	0	1	2	3
Local Police Departments	0	1	2	3
Arkansas State Police	0	1	2	3

Other: _____

Comments _____

Circle to indicate if you have received training in any of these areas in the last two years.

	Yes	No
Hiring and Firing	1	2
Unemployment Filing	1	2
Collections/Bad Checks/Credit	1	2
Trademarks/Patents	1	2
Sexual Harassment	1	2
Local Business Rules/Regulations	1	2
Fraud	1	2
Theft (Deterrence or Prosecution)	1	2
Computer Hacking (Deterrence or Prosecution)	1	2

Advertising/Marketing	1	2
Import/Export	1	2
Taxes-Payroll, Income, Sales Tax	1	2
Property Law-Landlord/Tenant	1	2
Negligence	1	2

Comments _____

Open Ended Questions:

1. Have you ever consulted a lawyer for your business?
 - a. How many times in the past 5 years? For what legal issues?

2. Have you ever been threatened with a lawsuit? If so, for what legal issues?
 - a. Did you win or lose?

3. Have you ever sued somebody – customer, vendor, landlord? If so, for what legal issues?
 - a. Did you win or lose?

4. Have you ever gone to mediation or arbitration to settle a dispute?

5. Was this settled to your satisfaction?

6. If something happens to you, what will happen to your business?
 - a. What legal arrangements have you made?

7. In one sentence, what's your overall opinion of attorneys?

8. For what issues would you call a lawyer vs. handle the problem yourself?

Demographics Survey

1. How many employees? **0-5** **6-10** **11-20** **21 or more**
2. Yearly sales? **0-\$100,000** **\$100,001-\$250,000** **\$250,001-\$500,000** **\$500,001 or above**
3. Service or retail business? **Service** **Retail**
4. How many years in current business? **0-5** **6-10** **11-15** **16 or more**
5. Sole proprietorship, partnership, corporation? Legal structure?

6. If you are comfortable, what were three sources of your initial capital contribution? How are these contributions secured?

7. Do you have an employee handbook?

Yes **No**

8. Does your business hold any trademarks, copyrights or patents?

Yes **No**

9. Online: How do you protect customer data on your website?

10. Have you had any trouble with employees using your office computers improperly?

Yes **No**

11. Do you use any outside professionals? Bookkeepers? Human resource? Attorneys? Payroll services? If so, which kind and how frequently?

12. Did you take a business law course?

Yes **No**

13. If yes, do you feel as though that course prepared you with the legal knowledge necessary to be successful in the business environment?

Yes **No**

14. If no, how could that course have been improved?

Appendix D:

Students will utilize critical thinking skills to analyze the completed surveys regarding the legal issues encountered. Reflecting on the information gathered, as well as personal experiences, incidents or knowledge drawn from the course materials and research, you will write a three full-page reflection paper on what you have determined to be the top issue of concern that has legal implications on small businesses in central Arkansas. Be sure to include a title page and reference page for a total of at least five pages. Determine what laws have impacted this issue with references to court cases. Examine state law applicable to your legal issue. Present recommendations you have for improvement as it relates to your chosen legal issue and small businesses.

Instructions

The following is a guideline of what should be included in the Reflection Paper Assignment:

- Introduction of the geographic (market region) where the businesses are located and business organization types interviewed
- Population and demographics of the region in which the businesses work (describe their customer base in terms of Little Rock. Ex: Little Rock is a metropolitan area that is comprised of 20% over 50, etc. This information can be obtained from the city, the census, or the Chamber.)
- Description of the services (resources) available to small businesses in the community (You can include items off the survey or things that they may have told you.)
- Description on who completed the small business survey and the date of the survey (Please do not use their actual names, as confidentiality is key.)
- Summary of small business surveys with details regarding themes recognized between concepts
- Identification of top issue of concern and why selected
- Review of current literature concerning top issue of concern including recent newspaper articles, journal articles, or any policies that you may have seen on site
- Citation of at least two statutory and/or case law references and how they related to the issue of concern
- Description of state laws and legislation enacted as a response to this issue
- Connections between content covered in class and the small businesses needs
- Business implications for survey findings
- Conclusion with recommendation(s) of improvement, demonstrating an understanding of the small business owners/managers' responsibility in the face of impending legal issues

Students should follow APA Publication Manual to prepare the paper. Please use the subheadings for your paper as provided in the rubric. These include:

Introduction and Market Region Information, Business Resources, Survey Results and Summary, Top Issue and Existing Literature Review, Case and Statutory Laws, Conclusion with Recommendations

The paper should be three full pages, double spaced (Times New Roman font, 12 point type, one-inch margins), include title and reference pages with at least two outside references for a paper of at least five pages in length.

Evaluation Rubric

Use the following rubric to guide your work.

Tasks	Exemplary	Acceptable	Unacceptable
Introduction and Market Region Data (10 Points)	Introduction includes in a detailed manner all components: name of city and state where businesses are located, types of businesses and business organization styles, populations and demographics of customers. (8-10 points)	Introduction includes a satisfactory explanation of most components: name of city and state where businesses are located, types of businesses and business organization styles, populations and demographics of customers. (4-7 points)	Introduction does not include a satisfactory explanation of components: name of city and state where businesses are located, types of businesses and business organization styles, populations and demographics of customers. (0-3 points)
Community Resources (10 Points)	Description of community is complete and detailed including many resource services and agencies available to the small businesses. (8-10 points)	Description of community is satisfactory including several (three or fewer) resource services and agencies available to small businesses. (4-7 points)	Description of community is unsatisfactory and does not include resource services and agencies available to small businesses. (0-3 points)
Survey Results and Summary (15 Points)	Description of who completed survey and summary including date, and complete in details with findings and trends (five or more). (12-15 points)	Description of who completed survey and summary including date, and complete in details with some (3-4) findings and trends. (7-11 points)	Description of who completed survey and summary including date, and complete in details with some (1-2) finding(s) and trends. (0-6 points)
Top Issue (15 Points)	Clear identification of top issue with complete and detailed explanation of why selected. (12-15 points)	Clear identification of top issue satisfactorily explaining why selected. (7-11 points)	Identification of top issue unsatisfactorily explaining why selected. (0-6 points)
Case and Statutory Law (15 Points)	Two or more statutory and/or case law references cited and how they relate to the issue of concern and a complete and detailed	At least one statutory and/or case law reference cited and how it relates to the issue of concern and a satisfactory description	No statutory and/or case law cited and how it relates to the issue of concern and an unsatisfactory description of state laws

	<p>description of state laws and legislation enacted in response to the top issue.</p> <p>(12-15 points)</p>	<p>of state laws and legislation enacted in response to top issue.</p> <p>(7-11 points)</p>	<p>and legislation enacted in response to top issue.</p> <p>(0-6 points)</p>
<p>Conclusion with recommendation(s)</p> <p>(15 Points)</p>	<p>Conclusion of reflection with detailed, thorough and logical recommendation of improvement that completely demonstrates an understanding of the owners/managers' responsibility relating to this issue.</p> <p>(12-15 points)</p>	<p>Conclusion of reflection with a satisfactory recommendation of improvement that somewhat demonstrates an understanding of the owners/managers' responsibility in relation to top issue.</p> <p>(7-11 points)</p>	<p>Conclusion of reflection with no recommendation of improvement and does not demonstrate an understanding of the owners/managers' responsibility in relation to top issue.</p> <p>(0-6 points)</p>
<p>Composition</p> <p>(5 points)</p>	<p>Reflection is at least three full pages in length and adheres to the use of subheadings throughout the paper. The title page and reference page are submitted with at least two references using APA format. No more than two mistakes or grammatical errors are present.</p> <p>(4-5 points)</p>	<p>Reflection is at least three full pages in length and adheres to the use of subheadings throughout the paper. The title page and reference page are submitted with at least two references using APA format. No more than four mistakes or grammatical errors are present.</p> <p>(2-3 points)</p>	<p>Reflection is unacceptable and does not adhere to the use of subheadings throughout the paper. A title page and/or a reference page are not submitted. APA format is not followed. Many grammatical errors are present.</p> <p>(0-1 points)</p>