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President's Message
An ABA pilot project seeks to help veterans facilitate disability claims and other benefits.

Opening Statements
Hastings law students get hands-on experience through Startup Legal Garage.

A new expungement app helps those with criminal records begin anew.

Are you a good lawyer? Take our quiz.

Short takes and fast facts on the law.

Cartoon Caption Contest: Check out last month's winner and try crafting a caption for the current cartoon.

Docket
NATIONAL PULSE A law on cyberbullying is struck down in New York's high court.

NATIONAL PULSE In New Jersey, legalized sports gambling isn’t a sure bet.

SUPREME COURT REPORT Can Sarbanes-Oxley's anti-shredding provision be used to prosecute a commercial fisherman?

Practice
ETHICS Lawyers struggle to reconcile technology and the traditional practice of law.

WORDS Don’t let your legal training ruin the pleasures of leisure reading.

Your ABA
A new project helps women learn the characteristics that may lead to advancing in the legal profession.

Opponents of requiring law firms to adopt the accrual method of accounting gain support.

Opinion offers guidance on ethics compliance to supervisors and managers in prosecutors' offices.

Precedents
The Mafia becomes a household word after a 1957 raid in Apalachin, New York.

Business of Law
PROFILE Litigator Michele Roberts leverages her communication skills to win a new role leading the National Basketball Players Association.

LAW BY THE NUMBERS Survey suggests personal connections play a major role in hiring of outside firms.

LAW PRACTICE Technology rewires the drafting and reviewing of contracts.

MARKETING Social media programs can help gauge your online marketing efforts.

VISUAL LAW Assessment of the risks multinational clients face becomes more graphic.

LAW PRACTICE As technology changes, so have the roles of paralegals and legal assistants.

LAW PRACTICE Holland & Knight lawyers run a data privacy risk-checking lab to protect clients' digital products.
Precedent, Compliance, and Change in Customary International Law: An Explanatory Theory

Pierre-Hugues Verdier and Erik Voeten

This article articulates an explanatory theory of customary international law under which precedential concerns are central to explaining CIL formation, compliance, and change. The theory shows how fundamental legal and institutional features of CIL complicate the use of mechanisms such as reciprocity, retaliation, and reputation. One major reason for states to observe CIL rules, even when tempted not to do so, is that breaches have precedential effects and may weaken and perhaps destroy the rule in question. Standard accounts of state practice, opinio juris, and the role of courts are analyzed from this perspective, drawing examples from foreign sovereign immunity and the outer limits of the territorial sea.

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Chemical Weapons and the International Criminal Court

Andreas Zimmermann and Meltem Şener

The OPCW’s Arrangements for Missed Destruction Deadlines Under the Chemical Weapons Convention: An Informal Noncompliance Procedure

Masahiko Asada

International Decisions

Edited by David P. Stewart

Featured Decisions

Can the ICTY Šainović and Perišić Cases Be Reconciled? (Leila Nadya Sadat)

International Criminal Tribunal for the Former Yugoslavia rulings on specific direction as an element of criminal liability for aiding and abetting war crimes

Federalism, Treaty Implementation, and Political Process: Bond v. United States (Curtis A. Bradley)

U.S. Supreme Court decision on presumptive federalism limits to legislative implementation of U.S. treaty obligations

Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening) (Sonia E. Rolland)

International Court of Justice judgment on legality of Japan’s Antarctic whaling program under the International Convention for the Regulation of Whaling

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European Court of Justice decision on the right to be forgotten under the European data protection directive
Netherlands v. Nuhanović; Netherlands v. Mustafić-Mustić (Misha Zgonec-Rojez)
Dutch Supreme Court judgments on international responsibility of Dutch government for deaths of civilians in Srebrenica

Contemporary Practice of the United States Relating to International Law
Edited by Kristina Daugirdas and Julian Davis Mortenson

United States Negotiates Prisoner Exchange to Secure Release of U.S. Soldier Held in Afghanistan
United States Refuses to Grant Visa to Iranian UN Envoy
Multilateral Naval Code of Conduct Aims to Prevent Unintended Conflict in Contested Areas of East and South China Seas
Senate Approves Treaties to Regulate Fishing
United States Indicts Chinese Military Officials for Economic Espionage
U.S. Supreme Court Declines to Terminate Long-Running Efforts to Force Argentina to Pay Defaulted Sovereign Debt
United States Condemns Uganda’s Antigay Law as Violating Human Rights
President Barack Obama Certifies That U.S. Peacekeepers in Mali Are Immune from ICC Jurisdiction
United States’ Legal Justification for Drone Strike on Anwar al-Awlaki Released
Asserting Self-Defense, United States Seizes Suspect in Benghazi Mission Attack
U.S. Supreme Court Interprets Child Abduction Treaty

Recent Books on International Law
Edited by Richard B. Bilder

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Goodman, Ryan, and Derek Jinks. Socializing States: Promoting Human Rights Through International Law (David Sloss)
Boisson de Chazournes, Laurence. Fresh Water in International Law; Boisson de Chazournes, Laurence, Christina Leb, and Mara Tignino (eds.). International Law and Freshwater: The Multiple Challenges (Joseph W. Dellapenna)
Cameron, Lindsey, and Vincent Chetail. Privatizing War: Private Military and Security Companies Under Public International Law (Laura A. Dickinson)
Dunoff, Jeffrey L., and Mark A. Pollack (eds.). Interdisciplinary Perspectives on International Law and International Relations: The State of the Art (Emilie M. Hafner-Burton and David G. Victor)

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International Legal Materials, Contents, Vol. LIII, Nos. 2, 3
A Contented Lot?
Overall job satisfaction in our annual midlevel survey is the highest we’ve seen in a decade, but problems remain, especially for women and minorities.

SPECIAL REPORT

The Associates Survey
74 Memo From Your Midlevels
Blunt talk from more than 5,000 associates about billables pressure, pay and job satisfaction at 132 firms.

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- The National Report
- The Local Picture

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BY JULIE TRIEDMAN
Nearly a fourth of Am Law 100 firms are getting new leaders. We profile the incoming class, describe what they’re in for and discuss how to succeed at succession.

90 The Road to $50 Billion
BY MICHAEL D. GOLDHABER
Ten years after Russia seized oil giant Yukos, arbitrators found it liable for an eye-popping sum. The inside story of Shearman & Sterling’s winning strategy.

LIFETIME ACHIEVERS

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Our 11th annual awards honor lawyers with distinguished careers and a dedication to public service.

- MARTHA BARNETT
Holland & Knight
- MICHAEL COOPER
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- DONALD DUNNER
Finneegan Henderson
- VERNON JORDAN JR.
Akin Gump
- RHODA KARPATKIN
Consumers Union
- ROBERT MUNDHEIM
Shearman & Sterling
- CHARLES QUEENAN JR.
K&L Gates
- THOMAS SAGER
DuPont

Law Firm Distinguished Leader Award
- WILLIAM LEE and
WILLIAM PERLSTEIN, Wilmer
Cleary Strikes Out
BY MICHAEL D. GOLDBERG
This year the firm has seen a series of high-profile litigation losses.

Shorts
- Plane Talk
- The High-Tech Edge
- Satisfaction Guaranteed at Bingham?
- Battling the Undead
- An Innocent Man

Big Deals
Reynolds American/Lorillard; G.E./Alstom; Salix/Cosmo; Nook spinoff

Big Suits
Insider trading loss for Manhattan U.S. attorney; Citi coughs up $7 billion.

Canadian Big Deals
Amaya/Rational; Auxili-um/QLT; Harlequin sale; BlackBerry asset sale.

The work

In-House

The Careerist
BY VIVIA CHEN
Associate satisfaction—what a strange and funny concept. (Associates are neurotic, after all.)

Dicta
BY ARIC PRESS
In today’s economy, law firms need a foreign policy or they’re missing an opportunity.

Coming Next Month

The Global 100
The world’s 100 largest law firms, ranked by gross revenue, head count and profits per partner.

Global Legal Awards. We feature the winners among global firms for disputes, finance, M&A and citizenship.

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Corrections
In “Yardstick for a World of Good” (July), the lists “Biggest Improvements in Pro Bono Rank” and “Biggest Declines in Pro Bono Rank” were incorrect. The correct versions appear on page 16.

Our brief about Apple Inc.’s acquisition of Beats Electronics (“Big Deals,” August) incorrectly identified the general counsel of Beats. She is Rafferty Jackson.

“Detective Story” (August) erroneously reported the date when Kroll associate Tamar Brott and Sam Anson discovered footage of Carlos Beristain in outtakes of the film “Crude” as March 24, 2009. In fact, it was March 24, 2010. In addition, Brett is not younger than Anson, and U.S. District Judge Lewis Kaplan’s order to copy Steven Donziger’s hard drive was dated Jan. 21, 2011, not Jan. 27, 2011.
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Claims against In-House Counsel: Will the Insurance Be There?
By Kara Altenbaumer-Price
To fully understand existing safety nets and those that may be missing, in-house counsel should carefully review the specific applications of all protections they have from their company—from indemnification to D&O insurance to employed lawyers insurance. ........................................ 10

TIP: In-house lawyers may not be protected by directors and officers insurance policies in cases where they are not acting as officers or where legal services are excluded from coverage.

Insurance Coverage for Punitive Damages
By Christopher H. Yetka
States are divided on whether punitive damages, which are supposed to act as a deterrent and punish, should be covered under liability policies. The majority have laws allowing recovery if a plaintiff can prove willful or grossly negligent conduct. ....................................... 18

TIP: Because punitive damages are not insurable in all courts, forum selection and choice of law must be considered in any coverage action implicating punitive damages.

New ISO Additional Insured Endorsements
By Nicholas N. Nierengarten
The 24 new AI forms issued by the Insurance Services Office, which took effect in 2013 along with a new blanket AI form for use in connection with commercial general liability policies, are generally an attempt to further reduce the scope of coverage afforded to AIs through three
revisions that introduce a new level of uncertainty and complexity into risk management relating to construction projects. ............................... 30

TIP: Parties using the new AI endorsements must evaluate not only their scope, but also the potentially applicable anti-indemnification statute and the insurance requirements in the underlying contract.

When Construction Goes Awry: The Availability of First-Party Insurance Coverage for Damage Caused by “Workmanship”
By Gerald P. (Kip) Dwyer Jr. and J. Tyler Butts

As more policies adopt more specific language regarding the workmanship exclusion—language that clearly contemplates, and excludes, both process and product—judicial adoption of a more comprehensive and meaningful analysis may replace reflexive application of the process vs. product dichotomy to find an ambiguity. ................................. 38

TIP: Based on recent decisions, courts appear less likely to apply an extra-textual interpretive gloss to the workmanship exclusion in first-party insurance policies than in the past.

If There Is One Bar a Lawyer Cannot Seem to Pass: Alcoholism in the Legal Profession
By Patrick R. Krill

The unique challenges of confronting addiction in others or oneself make it a trial unlike any other, and it is one for which speediness is not the goal. ................................. 46

TIP: Alcoholism is all around us in the practice of law, but we generally don’t know what to do about it. Addressing the issue is more important and less complex than you think.

True Excess Carrier Issues: Trigger, Duty to Defend, and Drop Down
By Nosizi Ralephata

Courts generally enforce excess coverage where the carrier has no reasonable expectation of primary coverage, such construction does not affect the insured’s rights, and the excess policy’s language clearly denotes that policy’s excess status. But excess carriers are subject to inconsistent results based on the specific policy language and the jurisdictions in which they are litigating. .... 52

TIP: Situations remain where the policy language is not the factor determining whether an excess carrier’s defense obligations are triggered and the excess carrier must drop down and take the place of a primary insurer.

PRACTICE TIP

The Policyholder Coverage Lawyer’s Perspective: What Clients Want from Their Coverage Lawyers
Jill B. Berkeley

How you find the right fit for yourself and your clients is a give-and-take process, with successes and losses. Trying new ideas without the fear of failing is the best strategy. ................................. 60

TIP: Give your policyholder clients the benefit of your experiences and provide them with insights into how insurers are likely to proceed.
Rolling Back the Repo Safe Harbors

Edward R. Morrison, Mark J. Roe, and Christopher S. Sontchi

Recent decades have seen substantial expansion in exemptions from the Bankruptcy Code's normal operation for repurchase agreements. These repos, which are equivalent to very short-term (often one-day) secured loans, are exempt from core bankruptcy rules such as the automatic stay that enjoins debt collection, rules against prebankruptcy fraudulent transfers, and rules against eve-of-bankruptcy preferential payment to favored creditors over other creditors. While these exemptions can be justified for United States Treasury securities and similarly liquid obligations backed by the full faith and credit of the United States government, they are not justified for mortgage-backed securities and other securities that could prove illiquid or unable to fetch their expected long-run value in a panic. The exemptions from baseline bankruptcy rules facilitate this kind of panic selling and, according to many expert observers, characterized and exacerbated the financial crisis of 2007–2009. The exemptions from normal bankruptcy rules should be limited to United States Treasury and similar liquid securities, as they once were. The more recent expansion of these exemptions to mortgage-backed securities should be reversed.

That Pesky Little Thing Called Fraud: An Examination of Buyers' Insistence Upon (and Sellers' Too Ready Acceptance of) Undefined "Fraud Carve-Outs" in Acquisition Agreements

Glenn D. West

In those states that have a high regard for the sanctity of contract, a well-crafted waiver of reliance provision can effectively eliminate the specter of a buyer's post-closing fraud claim based upon alleged extra-contractual representations of the seller or its agents. But undefined "fraud carve-outs" continue to find their way into acquisition agreements notwithstanding these otherwise well-crafted waiver of reliance provisions. An undefined fraud carve-out threatens to undermine not only the waiver of reliance provision, but also the contractual cap on indemnification that was otherwise stated to be the exclusive remedy for the representations and warranties that were set forth in the contract. Practitioners continue to exhibit a limited appreciation of the many meanings of the term "fraud" and the extent to which a generalized fraud carve-out can potentially expand the universe of claims and remedies that can be brought outside the remedies specifically bargained-for under the parties' written agreement. Given the frequent insistence upon (and continued acceptance by many of) undefined fraud carve-outs, and recent court decisions that bring the undefined fraud carve-out issue into focus, this article will examine the various (and sometimes surprising) meanings of the term "fraud", and the resulting danger of generalized fraud carve-outs, and will propose some possible responses to the buyer who insists upon including the potentially problematic phrase "except in the case of fraud" as an exception to the exclusive remedy provision of an acquisition agreement.
Fiduciary Society Unleashed: The Road Ahead for the Financial Sector
Edward J. Waitzer and Douglas Sarro

Informational asymmetries, misaligned incentives and artificially elongated chains of intermediation have created a disconnect between the financial sector and the "real economy" that is detrimental to the public interest. Courts and regulators are increasingly intervening to break the cycle. We argue that fiduciary law offers a conceptual framework both for understanding and responding to this trend, and that the financial sector, rather than waiting for this trend to develop and reacting to new rules in a piecemeal way, should be proactive and try to shape the way in which this trend develops. We describe some elements of what such an approach might look like, and consider how regulators and political institutions can encourage financial institutions to adopt this approach, and in so doing support a broader transition to a more sustainable economy.

The Evolving Role of Special Committees in M&A Transactions: Seeking Business Judgment Rule Protection in the Context of Controlling Shareholder Transactions and Other Corporate Transactions Involving Conflicts of Interest
Scott V. Simpson and Katherine Brody

Special committees of independent, disinterested directors have been widely used by corporate boards to address conflicts of interests and reinforce directors' satisfaction of their fiduciary duties in corporate transactions since the wave of increased M&A activity in the 1980's. In 1988, The Business Lawyer published an article titled The Emerging Role of the Special Committee by one of this article's co-authors, examining the emerging use of special committees of independent directors in transactions involving conflicts of interest. At that time, the Delaware courts had already begun to embrace the emergent and innovative mechanism for addressing corporate conflicts. Now, after over thirty years of scrutiny by the Delaware courts, it is clear that the special committee is a judicially recognized (and encouraged) way to address director conflicts of interest and mitigate litigation risk. This article will examine the role of the special committee in the context of conflict of interest transactions, with a particular focus on transactions involving a change of control or a controlling stockholder, from a U.S. perspective (in particular, under the laws of the State of Delaware), and will briefly consider international applications of the concepts discussed. To this end, this article will examine recent case law developments and compare the special committee processes at the heart of two high-profile Delaware decisions, and, finally, provide guidance to corporate practitioners on the successful implementation of a special committee process.
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