

# **Law 205. Litigation and Dispute Resolution Theory Course Description**

*3 Credit Hours*

Provides the cornerstone of the Litigation Law track. It introduces the theory and practice of litigation and other forms of dispute resolution, and draws upon the basic tools of decision theory, game theory, and economic analysis to address some of the key features of the litigation process and its institutions. Among the topics addressed are the decision to commence litigation and whether to settle or go to trial; settlement negotiations; strategic behavior as affecting decision making by both private actors and the courts; economic analyses of litigation; agency or moral hazard problems presented by both lawyers and courts; the impact of attorney's fee arrangements, fee-shifting rules, and court-imposed sanctions; party versus court control of proceedings; and the effect of enforcement costs on competing substantive legal rules.

## **Course Requirements**

**TWEN Registration is mandatory - to register, go to <http://lawschool.westlaw.com>**

### **Classroom Meetings:**

- Class attendance and participation are required.
- Students must certify attendance by signing the roll sheet. Students that do not sign the roll sheet will be considered absent.
- Persons absent for more than 20% of the classroom meetings (more than two classes) will not receive a passing grade.

### **Office Hours:**

- Room 422
- Office Hours by appointment.

### **Grading**

- Students in this class will receive both a substantive grade and a writing grade.
- The basis for the substantive grade is as follows: Term Paper (50%), 3 Writing Assignments (50%).
- The basis for the writing grade is as follows: Term Paper (100%).
- All requirements and assignments are subject to change.

### **Reading Assignments:**

- Reading assignments can be found by clicking on the Reading Assignments link. A preliminary reading list for the entire semester has been uploaded. However, this preliminary list is subject to change, and students are responsible to check each week for any updates.

### **Writing Assignments:**

- Writing assignments will be posted one week before the due date, and can be found by clicking on the Writing Assignments link. There will be 3 assignments, each worth 1/6 of the final grade. The assignments will be due on 9/16, 10/14, and 11/18.
- 
- Length guideline for writing assignments (1000 - 1500 words).

### **Term paper**

- Term Paper must use economic analysis to analyze a case decision or legal rule.
- Paper should be 25-30 pages in length
- Preliminary topics are due on 10/07/09
- Final Papers are due on 12/22/09.□

### **□Texts:**

- Posner, R. A., *The Economic Analysis of Law*, current edition (EAL).
- Cover and Fiss, *The Structure of Procedure* (CF)
- Dixit & Nalebuff, *Thinking Strategically* (TS)

## Reading Assignments:

\*\* - Required, \* - Recommended, (R) Readings not available on LEXIS/WESTLAW.

### August 26, 2009 - Class #1.

#### Basic Structure of the Course & Overview

##### General Background:

\*Posner, EAL, Chapter 1, 2.

\*Kobayashi and Parker, "Civil Procedure," forthcoming in the Encyclopedia of Law and Economics (2000). Available Online at <http://allserv.rug.ac.be/~gdegeest/7000book.pdf>

##### Introduction to Decision Theory (Readings available at <http://mason.gmu.edu/~bkobayas/litchp1.doc>)

\*\*Cornell, "The Incentive to Sue: An Option Pricing Approach," 19 J. Legal Stud. 173 (1990) (R).

\*\*Miller, "The Damages Dilemma in the Bet-the-Company Case," 17 Litigation No. 2, p. 12. (R)

### September 02, 2009 - Class #2.

#### Judge and Jury Decisionmaking

##### Overview

Frontline Video - Inside the Jury Room (to be shown in class).

Peremptory Challenges, Jury Size and Ex-Post Controls over the Jury

\*\*Lempert, "Jury Size and the Peremptory Challenge" (CF)

Judge versus Jury Decisionmaking.

\*\*Kalven and Ziesel, *The American Jury*, (1966) (excerpts from CF, Chp 5).

\*Clermont and Eisenberg, "Trial by Jury or Judge: Transcending Empiricism," 77 Cornell L. Rev. 1124 (1992).

### September 9, 2009 - Class #3.

#### Game Theory and Trial Expenditures

Application I: The Prisoner's Dilemma

\*\* *Page v. U.S.*, 884 F.2d 300 (1989).

\*\**U.S. v. Singleton*, 144 F.3d 1343 (1998), vacated

\*\**U.S. v. Singleton*, 165 F.3d. 1297 (1999).

Application II: Lawyers and Litigation Expenditures

\*\*Gilson and Mnookin, "Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation," 94 Colum. L. Rev. 509 (1994).

\*\*Posner (EAL) Chapter 21, Section 10.

\*\*Trubek, et al., "The Costs of Ordinary Litigation," 31 UCLA L. Rev. 72 (1983).

#### **September 16, 2009 - Class # 4.**

##### **The Decision to litigate versus settle**

Models of the Litigation/Settlement Decision:

\*\*Posner (EAL), Chapter 21, Section 4-7

\*\* Kobayashi, "Case Selection, External Effects, and the Trial/Settlement Decision," pp. (17-33) in *Dispute Resolution*, D. A. Anderson, ed., JAI Press (1996). (posted in course materials section)

\*\*Chayes, "The Role of the Judge in Public Law Litigation" (CF)

\*\*Fiss, "Against Settlement," 93 Yale L.J. 1073 (1984).

#### **September 23, 2009 - Class #5.**

##### **Settlement, Plea Bargaining and Negotiation**

Settlement Negotiation

\*\*ABA, Litigation Manual, pp. 858-90, 918-25 (articles by Sullivan, Nolan, Lynch, Wallach, and Madden). (These readings are posted in course materials section)

\*Gross and Syverud, "Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial," 90 Mich. L. Rev. 319 (1991).

· Credibility

Schelling, The Strategy of Conflict, Chapter 2 & 5 (1960).

Bebchuk, "Suing Solely to Extract a Settlement Offer," 17 J. Legal Stud. 437 (1988).

\*\*Bebchuk, "A New Theory Concerning the Credibility and Success of Threats to Sue," 25 J. Legal Stud. 1 (1996)

Nalebuff, "Credible Pretrial Negotiation," 18 RAND J. Econ. 198 (1987).

#### **September 30, 2009 - Class #6.**

##### **Predictability, Mixed Strategies and Rule 11**

General Theory of Procedure

\*Posner (EAL) Chapter 20, Chapter 21, Section 1-3, 11.

\*Posner, "An Economic Approach to Legal Procedure and Judicial Administration," 2 J. Legal Stud. 399 (1973). (CF)

Craswell and Calfee, "Deterrence and Uncertain Legal Standards," 2 J.L. Econ. & Org. 279 (1986).

\*\*Calfee and Craswell, "Some Effects of Uncertainty on Compliance with Legal Standards," 70 Va. L. Rev. 965 (1984).

Frivolous Suits and Noerr-Pennington Immunity

- \*Klein, "Strategic Sham Litigation: Economic Incentives in the Context of the Case Law," 6 Int'l Rev. L. & Econ. 241 (1986) (Reading is posted in the course materials section).
- \*Klein, "Predation in the Courts: Legal Versus Economic Analysis in Sham Litigation Cases," 10 Int'l Rev. L. & Econ. 29 (1990).
- \*\*Professional Real Estate Investors, Inc., v. Columbia Pictures 113 S.Ct. 1920 (1993).
- \*\*Grip-Pak Inc. v. Illinois Tool Works., 694 F.2d 466 (1982), cert denied, 461 U.S. 958 (1983).

#### Sanctioning FRCP Rule 11

- \*\*Cooter and Gell v. Hartmarx Corp., 496 U.S. 384 (1990).
- \*\*Willy v. Coastal Corp., 112 S.Ct. 1076 (1992).
- \*\*Kobayashi and Parker, "No Armistice at 11: A Comment on the Proposed Amendments to Rule 11 of the Federal Rules of Civil Procedure," 3 Sup. Ct. Econ. Rev. 93 (1993).

#### **October 07, 2009 - Class #7**

##### **Information, Work Product, and Attorney Client Privilege**

###### A Theory of Information

- \*Hirshleifer, "The Private and Social Value of Information," 61 Am. Econ. Rev. 561 (1971).
- \*Kitch, "The Law and Economics of Rights in Valuable Information, 9 J. Legal Stud. 683 (1980).

###### Work Product and Attorney Client Privilege

- \*\*Allen, Grady, Polsby, and Yashko, "A Positive Theory of Attorney-Client Privilege and the Work Product Doctrine," 19 J. Legal Stud. 359 (1990). (Posted in course materials section)
- \*Easterbrook, "Insider Trading, Secret Agents, Evidentiary Privilege, and the Production of Information," 1981 Sup. Ct. Rev. 309.
- \*\*Kaplow and Shavell, "Legal Advice about Information to Present in Litigation: Its Effects and Social Desirability," 102 Harv. L. Rev. 565 (1989).
- \*\*Hickman v. Taylor, 329 U.S. 495 (1947).
- \*\*Upjohn v. U.S. 449 U.S. 383 (1981).
- \*\*Swidler and Berlin and James Hamilton v. U.S., 118 S. Ct. 2081 (1998).

#### **October 14, 2009 - Class #8.**

##### **Information and Discovery Rules**

###### Legal Discovery

- \*\*ABA, Litigation Manual, pp. 178-83 (article by Lundquist). (R)

\*Cooter and Rubinfeld, "An Economic Model of Legal Discovery," 23 J. Legal Stud. 435 (1994).

\*\*Easterbrook, Discovery as Abuse, 69 B. U. L. Rev. 635, 638 (1989)

#### Discovery Reform

\*\*Bell, Varner and Gottschalk, "Automatic Disclosure in Discovery-The Rush to Reform," 27 Ga. L. Rev. 1 (1992).

\*\*Schwarzer, "The Federal Rules, The Adversary Process, and Discovery Reform," 50 U. Pitt. L. Rev. 703 (1989).

\*\*2000 Amendments to the Federal Rules of Civil Procedure (posted in the Course Materials Section).

### **October 21, 2009 - Class #9.**

#### **Economic Analysis of Evidence**

\*\*Parker and Kobayashi, Evidence, in the Encyclopedia of Law and Economics (2000), available online at <http://allserv.rug.ac.be/~gdegeest/7900book.pdf>.

#### Expert Testimony

\*\*Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S.Ct. 2786 (1993).

\*\*Federal Rules of Evidence, Rules 403, 702, 703, 706.

\*\*Parker, "Daubert's Debut: The Supreme Court, the Economics of Scientific Evidence, and the Adversarial System," 4 Sup. Ct. Econ. Rev. 1 (1994).

\*\*Langbein, "The German Advantage in Civil Procedure," 52 U. Chi. L. Rev. 823 (1985).

#### Character Evidence

\*\*Federal Rules of Evidence 404, 412, 413, 414, 415.

\*\*Schrag and Scotchmer, Crime and Prejudice: The Use of Character Evidence in Criminal Trials," 10 J.L. Econ. & Org. 319 (1994)

### **October 28, 2009 - Class #10.**

#### **The Incentive effects of attorney fee structures**

##### Legal Fees as Contract

Smith and Cox, "The Pricing of Legal Services: A Contractual Solution to the Problem of Bilateral Opportunism," 14 J. Legal Stud. 167 (1985).

##### Contingent Fees

\*\*Miller, "Some Agency Problems in Settlement," 16 J. Legal Stud. 189 (1987). (Article is posted in course materials section)

\*\*City of Burlington v. Dague, 112 S.Ct. 2638 (1992).

\*\*Evans v. Jeff D. 475 U.S. 717 (1986).

\*\*Hay, "Optimal Contingent Fees in a World of Settlement," 26 J. Legal Stud. 259 (1997).

## Fee Shifting

- \*Shavell, "Suit, Settlement, and Trial: A Theoretical Analysis under Alternative Methods for the Allocation of Legal Costs," 11 J. Legal Stud. 55 (1982).
- \*\*Tetzlaff, "Opening Statement: The English Rule from the English Perspective," 18 Litigation No. 4, p. 1. **The Tetzlaff article is on Westlaw --type in 18 in the volume box and 1 in the page box after clicking on the link on the course home page.**
- \*\*ABA, Litigation Manual, pp. 1119-33 (article by Lutz). (Article is now posted in course materials section)
- \*\*Posner (EAL) Chapter 21, Section 12.
- \*\*Marek v. Chesny, 720 F.2d 474 (1985), Rev'd 473 U.S. 1 (1985).
- \*Snyder and Hughes, "The English Rule for Allocating Legal Costs," 6 J.L. Econ. & Org. 439 (1990).

## November 04, 2009 - Class #11.

### Multiple Litigants and External Effects I

#### Multiple Defendants, Prisoners' Dilemmas

- \*\*ABA, Litigation Manual, pp. 891-900, 1076-91, 1163-76 (articles by Dewey, McSweeney & Brody, Wiener, Grayson & Dodd, and Brown). (Articles are posted in Course materials Section)
- \*\*Bernstein and Klerman, "An Economic Analysis of Mary Carter Settlement Agreements," 83 Geo. L.J. 2215 (1995).

#### Contribution and Setoff Rules

- \*\*Klerman, Dan, Settling Multidefendant Lawsuits: The Advantage of Conditional Setoff Rules, 25 J. Legal Stud. 445 (1996).
- \*\*McDermott v. Amclyde, 114 S.Ct. 1461 (1994).
- \*Landes and Posner, "Joint and Multiple Tortfeasors: An Economic Analysis," 9 J. Legal Stud. 517 (1980).

## November 11, 2009 - Class #12

### Multiple Litigants II - Multiple Plaintiffs and Class Actions

#### Counterclaims and Joinder

- \*\*McInerney, "Counterclaims as Self-Inflicted Wounds," 18 Litigation No. 3, p. 17.
- \*\*Landes, "Counterclaims: An Economic Analysis," 14 Int'l Rev. L. & Econ. 235 (1995).
- Braverman, Janus was not a God of Justice: Realignment of Parties in Diversity Jurisdiction, 68 N.Y.U. L. Rev. 1072 (1993)

#### Capitalization of Litigation and Multiple Plaintiffs

- \*Landes and Posner, "The Economics of Anticipatory Adjudication," 23 J. Legal Stud. 683 (1994).

- \*\*Posner, (EAL) Chapter 21, Section 21.13.
- \*\*Parklane Hosiery v. Shore, 439 U.S. 322 (1979).
- \*Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation 402 U.S. 313 (1972).
- \*\*Hay, "Some Settlement Effects of Preclusion" 1993 U. Ill. L. Rev. 21 (1993).
- Spurr, "Collateral Estoppel," 11 Int'l Rev. L. & Econ. 47 (1991).

#### Vacatur

- \*\*Fisch, "Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur", 76 Cornell L. Rev. 589 (1991).
- \*\*U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership 115 S.Ct. 386 (1994).
- \*U.S. v. Munsingwear, Inc. 340 U.S. 36 (1950).

### **November 18, 2009 - Class #14.**

#### **Class Actions and Punitive Damages**

##### Class Actions

- Bernstein, "Judicial Economy and Class Actions," 7 J. Legal Stud. 349 (1978).
- Deweese, Prichard and Trebilcock, "An Economic Analysis of Cost and Fee Rules for Class Actions," 10 J. Legal Stud. 155 (1981).
- \*\*Phillips Petroleum v. Shutts, 472 U.S. 797 (1985).
- \*\*Friedman, "More Justice for Less Money," 39 J.L. & Econ. 211 (1996)
- \*\*Saks and Blank, "Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts," 44 Stan. L. Rev. 815 (1992)
- \*Cimino, et al. v. Raymark Industries, Inc., et al., 751 F.Supp. 649.

##### Punitive Damages and Penalty Structure

- \*Becker, "Crime and Punishment: An Economic Approach," 76 J. Pol. Econ. 169 (1968).
- \*\*State Farm Mut. Auto. Ins. Co. v. Campbell 123 S.Ct. 1513 (2003).
- \*\*BMW of North America, Inc. v. Gore, 116 S.Ct. 1589 (1996).
- \*\*Philip Morris USA v. Williams, 127 S.Ct. 1057 (2007).
- \*\*Exxon Shipping Co. v. Baker 128 S.Ct. 2605 (2008).
- \*\*Polinsky and Shavell, Punitive Damages: An Economic Analysis, 111 Harv. L. Rev. 869 (1998)
- \*Eisenberg, Goerdt, Ostrom, Rottman and Wells, "The Predictability of Punitive Damages," 26 J. Legal Stud. 623 (1997)
- Polinsky and Che, "Decoupling Liability: Optimal Incentives for Care and Litigation," 22 RAND J. Econ. 562 (1991).

### **December 02, 2009 - Class #14**

## **Procedure, Accuracy, Legal Error, and Mistake**

### Legal Error and Mistake

\*Parker, "The Economics of Mens Rea," 79 Va. L. Rev. 741 (1993)

\*Murphy and O'Hara, "Mistake of Federal Criminal Law: A Study of Coalitions and Costly Information," 5 Sup. Ct. Econ. Rev. 217 (1997) (LEXIS/WESTLAW).

\*Polinsky and Shavell, "Legal Error, Litigation, and the Incentive to Obey the Law," 5 J.L. Econ. & Org. 99 (1989).

Shavell, "Liability and the Incentive to Obtain Information about Risk," 21 J. Legal Stud. 259 (1992).

### Accuracy and Complexity

\*Kaplow, "The Value of Accuracy in Adjudication," 23 J. Legal Stud. 307 (1994).

Bebchuk and Kaplow, "Optimal Sanctions when Individuals are Imperfectly Informed about the Probability of Apprehension," 21 J. Legal Stud. 371 (1992).