George Mason Law Review

NEWSLETTER

Fall Newsletter **November 2010**

George Mason Law Review
3301 Fairfax Drive
Arlington, VA 22201
(703) 375-9529
info@georgemasonlawreview.org

Keep up with the Law Review on the web!

www.GeorgeMasonLawReview.org
http://twitter.com/geomasonlrev

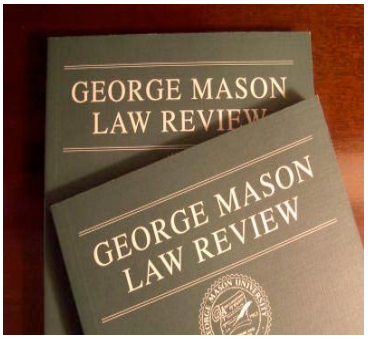
IN THIS NEWSLETTER

Notes from the Editors

Geoffrey Fehling
Editor-in-Chief
gfehling@gmu.edu

Anthony Peluso
Executive Editor
apeluso@gmu.edu

With the fall semester coming to a close, the Law Review staff is hard at work on our eighteenth volume and would like to give our alumni an update on our accomplishments up to this point. Highlights of the year so far include: welcoming our twenty-nine new candidate members, who are already hard at work on the second drafts of their notes and comments; wrapping up the fall issue of Volume 18, which ships to subscribers this week; and preparing for many exciting events during the year ahead, including the 14th Annual Antitrust Symposium and the annual Alumni Reception.



We hope you all have had a chance to browse our new website (www.georgemasonlawreview.org) to keep up with our latest publications and other journal news. Finally, we would like to thank all the alumni who have been assisting our second-year candidate members as mentors on their note and comment topics. As always, we would love to hear from you about any events, opportunities, or other news! Please feel free to contact us at any time.

Best,

Geoff & Tony

Joshua Newborn Wins The Burton Foundation's Legal Writing Award

The Law Review congratulates Joshua Newborn, Senior Research Editor 2009-2010, for winning the Burton Foundation's prestigious 2010 Legal Writing Award. The foundation selected Newborn as one of only fifteen top student writers from law schools nation wide to receive this award.

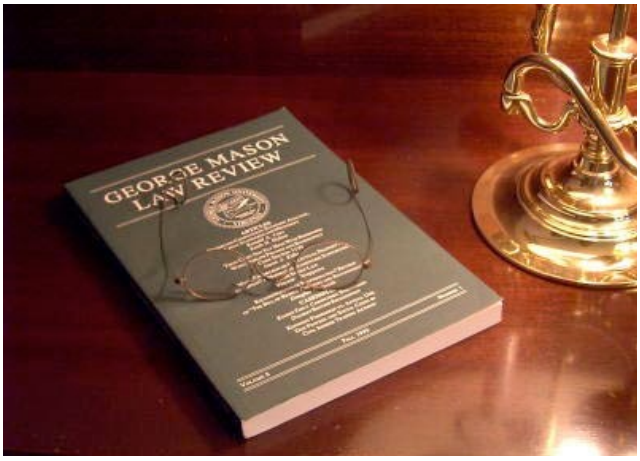
In 1999, the Burton Foundation established the Awards Program in an effort to reward clear, concise, and effective legal writing. In association with the Library of Congress, the Burton Awards Committee rewards the top fifteen law students and thirty partners from the 1,000 largest law firms in the United States in this highly competitive program.

Newborn's winning casenote, *An Analysis of Credible Threat Standing and* Ex Parte Young *for Second Amendment Litigation*, analyzes and ultimately suggests the rejection of the D.C. Circuit's "credible threat" standing doctrine. Instead, it concludes that the Supreme Court's "credible threat" analysis should be used when determining whether a threat of enforcement exists in light of *Ex parte Young*.

Preview of the November Issue

The Law Review has an exciting set of articles slated for publication in its November issue. The articles are available online at the Law Review Website and will be available in print soon. The following is a preview of what to expect:

In *Credit Bidding and the Design of Bankruptcy Auctions*, bankruptcy lawyers Vincent S. J. Buccola and Ashley C. Keller argue that credit bidding should be permitted by bankruptcy courts. Credit bidding is the practice of offsetting the value of a creditor's claim against the purchase price of the debtor's assets. Credit bidding is required under section 363 of the Bankruptcy Code, but is only an option under section 1129. The authors propose that because credit bidding tends to augment and cannot decrease total creditor recoveries, it would be an abuse of discretion for courts to approve a reorganization plan which does not allow credit bidding under section 1129 without good reason.



In *Material Witness Detention in a Post-9/11 World: Mission Creep or Fresh Start?*, Professor Donald Q. Cochran examines the use of the Material Witness Statute as a tool for detaining suspected terrorists and analyzes its constitutionality under the Fourth Amendment. He argues that the statute's use in this context is constitutional so long as the objective requirements of the statute are met. He recognizes the limitations of its use in the national security context and outlines a new statutory framework for national security detention that includes a probable cause standard specifically tailored for use in the national security context.

In *Saving the Savings Clause: Advocating a Broader Reading of the* Miller *Test to Enable States to Protect ERISA Health Care Plan Members by Regulating Insurance*, Professor Beverly Cohen argues for a broad reading of the test set forth in *Kentucky Association of Health Plans, Inc. v. Miller* so that states may indirectly regulate health insurance businesses within their states' borders. She proposes a broad reading consistent with the intent and expansive language of ERISA's Savings Clause.

In *Patent Litigation, Personal Jurisdiction, and the Public Good*, Professor Megan M. La Belle argues that the lower federal courts have been too restrictive in granting personal jurisdiction to alleged patent infringers to bring declaratory judgment actions. As a result, there have been too few actions and too many "bad" patents, undermining the patent system. Professor La Belle concludes that courts should extend personal jurisdiction in these types of cases in order to be consistent with Supreme Court precedent and to counteract these negative policy implications.

In *Not a* Tecom *Party: There's "Very Little Likelihood"* Geren v. Tecom *Will Promote Sound Government Contracting Practices*, Law Review Member Edward R. Brown analyzes the Federal Circuit's ruling in *Geren v. Tecom* and its impact on government contracting. He examines the history and rationale of government contracting and argues that the *Tecom* ruling was both legally incorrect and would lead to unsound government contracting policy.

In *Beyond the Lens of* Lenz: *Looking to Protect Fair Use During the Safe Harbor Process Under the DMCA*, Senior Research Editor Cattleya Concepcion examines the Ninth Circuit's ruling in *Lenz v. Universal Music Corp.* on the issue of the fair use of copyrighted material under the DMCA's safe harbor on Internet video sites such as YouTube. She argues that while the court correctly ruled in the case, the law still needs clarification in order to protect fair use content on the internet.

In *A Distinction Without a Difference: How* Callahan v. Millard County *Drew an Unwarranted Line in the Sand of Fourth Amendment Jurisprudence*, Executive Editor Anthony Peluso analyzes the Tenth Circuit's ruling in *Callahan v. Millard County*. The ruling created an exception to the "consent once removed" doctrine when informants, rather than undercover police officers, gain consensual access to a home and observe evidence of illegal activity. In such a case, police officers may not enter a home without a warrant based upon probable cause. He argues that the Fourth Amendment does not require courts to make this distinction, and he examines the impact of the circuit split this ruling created.

Chelsea Sizemore Wins the Arthur E. Schmalz Write-On Award

The Law Review congratulates second-year Candidate Member Chelsea Sizemore for winning the 2010 Arthur E. Schmalz Award. After the annual Write-On Competition comes to a close, the Law Review's editors select the best entry to win the Schmalz Award. Sizemore's comment received the highest score out of the ninety-five entries in this year's competition.

Sizemore's comment, entitled *The Role of Fourth Amendment Jurisprudence in Interpreting § 2515 and the 'Clean Hands' Exception*, examined a circuit split over whether the 1968 Omnibus Crime Control and Safe Streets Act (Title III) contains a "clean hands" exception for evidence obtained through illegal wiretapping. Arguing that because the deterrence of law enforcement was established as the guiding principle behind the Fourth Amendment exclusionary rule prior to 1968, Sizemore concluded that reading a "clean hands" exception into Title III's suppression is also well-grounded.

Commenting on the award, Sizemore stated that she was "both honored and surprised." She continued: "Being a part of Law Review is an incredible opportunity for intellectual growth, and I look forward to the responsibilities and rewards that come with being a candidate member."

Chelsea Sizemore

Arthur E. Schmalz was editor-in-chief of the Law Review from 1992 to 1993 and is currently a partner in the Litigation and Intellectual Property practice at Hunton & Williams in McLean, Virginia. In 1992, the George Mason University School of Law administration attempted to bring the Law Review under faculty supervision, believing that students were too inexperienced to edit legal scholarship. In response, Schmalz and then-Student Bar Association President Christian Curtis created another journal, the *George Mason Independent Law Review*. Due to the concerted efforts of Schmalz and Curtis, Dean Henry Manne recognized the need for a fully circulated publication with students as the sole editors and managers, and thus the *George Mason Independent Law Review* became George Mason's official law review.

Peter Cockrell Wins the Adrian S. Fisher Casenote Award

The Law Review congratulates Peter Cockrell, winner of the 2010 Adrian S. Fisher Casenote Award. Each year, the Law Review presents the Adrian S. Fisher Award to the candidate member who authors the best student piece chosen for publication.

Cockrell's comment, *Subprime Solutions to the Housing Crisis: Constitutional Problems with the Helping Families Save Their Homes Act of 2009*, focuses on the constitutionality and effectiveness of the Homes Act. After describing the events and conditions that led to the recent housing crisis and the federal government response, Cockrell analyzes the effectiveness of the Homes Act in achieving its goal of decreasing home foreclosures by providing incentives to mortgage loan servicers.

One incentive that the Homes Act provides is a safe harbor provision that protects mortgage lenders from liability when the lender adopts a "qualified loss mitigation plan." Cockrell argues that the incentives built into the Homes Act will not increase the amount of modified loans to the extent necessary considering the rate of foreclosures.

Furthermore, Cockrell argues that the Homes Act raises potential constitutional issues under the Takings Clause of the Fifth Amendment. For example, the comment highlights that mortgage investors under the Act do not receive more compensation if there is an increase in value of a property in the future, potentially failing to meet the "just compensation" requirement. Thus, the safe harbor provision could end up as a regulatory taking, which could discourage mortgage loan servicers to modify mortgage loans.

Peter Cockrell

Instead, Cockrell suggests that the additions of bankruptcy provisions originally proposed as part of the Homes Act would better serve the goal of the Act but warns that the constitutional issues would not be easily solved. Cockrell proposes alternative solutions for reaching the envisioned goal of altering lenders incentives to promote mortgage loan modifications, which would reduce home foreclosures.

Cockrell is a 2006 graduate of the University of Virginia and will graduate from George Mason University School of Law in Spring 2011.

Review of the Summer Issue

The Law Review published its summer issue in August, highlighting the George Mason Law Review's Thirteenth Annual Symposium on Antitrust Law and featuring an appealing collection of antitrust law articles and comments.

In *Symposium Conference Report: Two Watersheds: The New Case Law of Bundles, Rebates, and Class Certification*, Law Review Editors Lindsey Champlin, Nathan Chubb, and Anthony Peluso review the highlights of the symposium, recounting the speakers' remarks and the panel discussions.

In *Proof of Common Impact in Antitrust Litigation: The Value of Regression Analysis*, co-authors Pierre Cremieux, Ian Simmons, and Edward A. Snyder explore regression analysis methods and their ability to provide a common method of proof in the context of antitrust class action claims. Emphasizing the importance of keeping an open door policy for private litigants to bring class actions, the authors explain the role and importance of macro- and micro-commonality tests in evaluating regression results. They then present a systematic framework for evaluating regression analyses. Pierre Cremieux is a Managing Principal with Analysis Group in Boston. Ian Simmons is a partner with O'Melveny & Myers. Edward A. Snyder is a Dean & George Pratt Shultz Professor of Economics at the University of Chicago Booth School of Business.

In *Antitrust, Class Certification, and the Politics of Procedure*, Professor Joshua P. Davis and attorney Eric L. Cramer argue against applying the class certification standard in antitrust cases to benefit large corporate defenders absent adequate justification. Recognized by Chambers USA *America's Leading Lawyers for Business* as one of Pennsylvania's top antitrust lawyers, Eric L. Cramer is a Shareholder at Berger & Montague, P.C. Dean's Circle Scholar Joshua P. Davis is a Professor of Law and Director of the Center for Law and Ethics at the University of San Francisco School of Law.

In *Class Certification in Antitrust Cases: An Economic Framework*, economist and Professor Hal J. Singer and consultant Robert Kulick describe how to correctly satisfy the predominance requirement for antitrust class certification proceedings without implicating issues that are properly resolved at the merits stage of the trial. The authors argue that a court considering class certification should

determine whether the conduct in question is best explained by an economic model for a monopolization strategy or by an economic model for competition. They then show how this approach is consistent with recent antitrust decisions involving class certification. Hal J. Singer is the President & Managing Partner at Navigant Economics LLC and also an Adjunct Professor at Georgetown University McDonough School of Business. Robert Kulick is a Managing Consultant at Navigant Economics LLC.

In *Antitrust, Institutions, and Merger Control*, Professor D. Daniel Sokol analyzes institutional interrelationships in the merger control arena. Professor Sokol employs both qualitative and quantitative methods of analysis and provides new empirical evidence from practitioner surveys which suggests no change in merger enforcement under Bush. D. Daniel Sokol is an Assistant Professor of Law at the University of Florida Levin College of Law.

The summer issue also includes comments by the Law Review's student authors. Featured in this issue is Peter Cockrell's comment, *Subprime Solutions to the Housing Crisis: Constitutional Problems with the Helping Families Save Their Homes Act of 2009*. This comment is described in detail in the associated story about the 2010 Adrian S. Fisher Award.

In *Inebriated and Unbalanced:* TFWS, Inc. v. Schaefer*'s Misguided Reconciliation of the Twenty-First Amendment with the Sherman Act*, *George Mason Law Review* Senior Articles Editor Lindsey Champlin analyzes the Fourth Circuit's redefinition of the Supreme Court's test for when a state liquor regulation can avoid preemption by the Sherman Act in *TFWS, Inc. v. Schaefer*. Arguing that the Fourth Circuit's redefinition misconstrued precedent and contravened federalist principles as well as the presumption against preemption, Champlin recommends that a rational basis standard of review be adopted in lieu of the Fourth Circuit's requirement that the state liquor regulation substantially further the relevant state interest, which requires a heightened showing.

In *Now, Voyager: Deixis and the Temporal Pragmatics of Statutes*, *George Mason Law Review* Member Jeremy Graboyes argues that the Supreme Court's strict reliance on plain meaning to statutorily interpret the word "now" in *Carcieri v. Salazar* curtailed the interpretative process because judicial precedent had not considered the question and no plain meaning of *now* exists in statutory language. Graboyes contends that, absent clear legislative intent in favor of one interpretation, courts could only interpret *now* by going beyond plain meaning to make a pragmatic determination of the statute's purpose.

Law Review Cited in Supreme Court Decision and Brief

The Law Review congratulates Clayton E. Cramer, Nicholas J. Johnson, and George A. Moscary, whose essay was cited in the highly debated U.S. Supreme Court opinion *McDonald v. City of Chicago, Ill.* issued on June 28. The Court used their essay, *This Right is Not Allowed By Governments That Are Afraid of the People: The Public Meaning of the Second Amendment When the Fourteenth Amendment Was Ratified*, to explain the public meaning of "the right to keep and bears arms" in the period preceding the enactment of the Fourteenth Amendment in both the majority and dissenting opinions.

The Law Review also congratulates Alyssa DaCunha, Editor-in-Chief 2009-2010. Her student note, *Txts R Safe 4 2Day:* Quon v. Arch Wireless *and the Fourth Amendment Applied to Text Messages*, was cited in a brief submitted to the United States Supreme Court in *City of Ontario v. Quon*. DaCunha's casenote examined both the statutory and constitutional protections for text messages and argued that the current statutory protections under the Act are both outdated and inadequate. The Petitioner's brief in *City of Ontario* used DaCunha's note to highlight the complex nature and difficult constitutional application of the Stored Communication Act as applied to text messages.

The Law Review is proud of its outstanding scholars for their contribution to the Parties' arguments and the Court's subsequent decision.

Law Review Plans Office Move

The *George Mason Law Review* is planning an office move in January from its current location in the Truland Building into offices in Hazel Hall. The move comes as part of a massive rearrangement of organizations and groups as they move into space in the new Founder's Hall building in Arlington. The Law Review is slated to take several rooms within a suite on the fourth floor of Hazel Hall in space currently occupied by the Mercatus Center. These offices will be located close to other student organizations and will bring all law school student organizations under one roof.

We invite all of our alumni who are returning to the school to visit our new offices after the move, which is expected to be completed by late January, 2011.

Upcoming Events

Alumni Reception
The Law Review will host its annual Alumni Reception on January 27, 2011, from 6:30-8:30pm at the offices of Latham & Watkins, 555 Eleventh Street, NW, Washington, D.C. Please keep an eye on your inbox for further details!

14th Annual Antitrust Symposium
The Law Review plans to host its 14th Annual Antitrust Symposium on February 9, 2011. The Symposium will be at the Willard InterContinental Hotel in Washington, D.C. Look for more information on the topics and panelists soon!

Calendar
Alumni Reception
January 27, 2011

Antitrust Symposium
February 9, 2011
(subject to change)

Special thanks to the following members for their work in crafting this newsletter:
Bryan Andersen, Ashley Fry, Carly Humphrey, Alysa Kociuruba,
Bret Lee, Stacey Sklaver, and Ben Sperry.