

REVIEW
of
BANKING
&
FINANCIAL LAW

Volume 34

BOSTON UNIVERSITY SCHOOL OF LAW

GRADUATE PROGRAM IN BANKING AND FINANCIAL LAW

2014-2015

Table of Contents

ISSUE I – FALL 2014

DEVELOPMENTS IN BANKING AND FINANCIAL LAW: 20141

ARTICLES

WARGAMING FINANCIAL CRISES: THE PROBLEM OF (IN)EXPERIENCE
AND REGULATOR EXPERTISE115
John Crawford

THE LIMITS OF PRIVATE ORDERING WITHIN MODERN FINANCIAL
MARKETS191
Dan Awrey

THE RMBS PUT-BACK LITIGATIONS AND THE EFFICIENT ALLOCATION
OF ENDOGENEOUS RISK OVER TIME267
Robert T. Miller

ESSAY

CORPORATE PARENTHOOD: PRIVATE EQUITY DUTIES AND PORTFOLIO
COMPANY RIGHTS331
Sung Eun (Summer) Kim

NOTES

SIFI DESIGNATION OF INSURANCE COMPANIES—HOW GAME THEORY
ILLUSTRATES THE FSOC’S FAULTY CONCEPTION OF SYSTEMIC RISK351
Jacob Wimberly

ABERRATION OR SEMINAL DECISION?: EXAMINING THE IMPACT OF
ZUCKER V. FDIC (IN RE BANKUNITED FINANCIAL CORP.) ON
BANKRUPTCY LAW385
Lisa A. Bothwell

ISSUE II – SPRING 2015

DEVELOPMENTS IN BANKING AND FINANCIAL LAW: 2014405

FUNDING INNOVATION SYMPOSIUM

INTRODUCTION.....517

STATE CROWDFUNDING AND THE INTRASTATE EXEMPTION UNDER FEDERAL
SECURITIES LAWS – LESS THAN MEETS THE EYE?.....521
Theodore Weitz & Thomas D. Halket

THE NONFINANCIAL RETURNS OF CROWDFUNDING565
Andrew A. Schwartz

COMPLIANCE WITH THE SECURITIES LAWS IN CROWDFUNDED SECURITIES
OFFERINGS: STARTUPS IT’S YOUR RESPONSIBILITY!.....581
Kristen A. Young, Esq.

ARTICLES

REAL ARROW-SECURITIES FOR ALL: JUST AND EFFICIENT INSURANCE
THROUGH MACRO-HEDGING609
Robert Hockett

TOO BIG TO PROSECUTE: COLLATERAL CONSEQUENCES, SYSTEMIC
INSTITUTIONS AND THE RULE OF LAW655
SHARON E. FOSTER

NOTES

ELIMINATING THE TAX ON EMBEZZLED FUNDS: A CALL FOR REFORM713
Emily Finestone

STANDING ON THE SIDELINES: HOW NONJUDICIAL FORECLOSURE LAWS
PREVENT HOMEOWNER CHALLENGES TO FORECLOSURES—AND HOW
JUDGES AND LEGISLATORS SHOULD RESPOND745
Thomas S. Markey

Contributors

DAN AWREY

*Associate Professor of Law and Finance,
Oxford University*

JOHN CRAWFORD

*Associate Professor of Law,
University of California, Hastings College of Law*

SHARON E. FOSTER

*Associate Professor,
University of Arkansas, School of Law*

THOMAS D. HALKET

*Member, Halket Weitz, LLP, New York;
Adjunct Professor of Law,
Fordham University School of Law*

ROBERT HOCKETT

*Professor of Enterprise-Organizational and Finance-Regulatory
Law,
Cornell Law School*

SUNG EUN (SUMMER) KIM

*Visiting Assistant Professor,
University of Illinois College of Law*

ROBERT T. MILLER

*Professor of Law and F. Arnold Daum Fellow,
University of Iowa College of Law;
Senior Scholar,
Classical Liberal Institute, New York University School of Law*

ANDREW A. SCHWARTZ

*Associate Professor of Law,
University of Colorado Law School*

THEODORE WEITZ

*Member, Halket Weitz, LLP, New York;
Adjunct Professor of Law,
Fordham University School of Law*

KRISTEN A. YOUNG, ESQ.

Counsel, Sullivan & Worcester LLP

Review of Banking & Financial Law

Editor-in-Chief

Christopher J. Mercurio

Executive Editor for Management

Marisa K. Roman

Executive Editor for Professional Articles

Jacob Wimberly

Executive Editor for Notes & Comments

Thomas S. Markey

Executive Editors for Developments

Adam Santeusanio

Michael Vandenberg

Executive Editor for Symposium

Jennifer Gardner

Executive Editor for Marketing

Deniz Aktas

Executive Editor for Communications

Adriana Henquen

Article Editors

Timothy Bolte

Lisa Bothwell

Chloe Brighton

Kyle Howard

Michael Kaplan

Lisa Ann Landry

Eva Maryskova

Jacqueline Nutile

Sean Rosenthal

Faculty Advisors

Frederick Tung

Professor of Law

Howard Zhang Faculty

Research Scholar

James E. Scott

Director

Graduate Program in

Banking and Financial Law

Staff

Steven Barros
Paige Brewin
Eunjae Cho
William Cushing
Angela DiIenno
Justin Fitzgerald
Sean Gordon
Samuel Gorski
Courtney Johnson
Matthew Lee
Anthony Maneiro
Alexandria Martin
Jason Mei

Holly Ovington
Graham Rogers
José Andre Roman
Gianna Sagan
Eric Schlichte
Drew Singer
Maria Slobodchikova
Silvia Stockman
Tyler Spunaugle
Alexander Vitruk
Daniel Warren
Justin Zeizel

Boston University School of Law

ADMINISTRATIVE OFFICERS

ROBERT A. BROWN, B.S., M.S., Ph.D., *President*

MAUREEN O'ROURKE, B.S., J.D., *Dean; Michaels Faculty Research Scholar; Professor of Law*

DAVID I. WALKER, B.E., J.D., *Associate Dean for Academic Affairs; Maurice Poch Faculty Research Scholar; Professor of Law*

JAMES E. FLEMING, A.B., PH.D., J.D., *Associate Dean for Intellectual Life; Frank R. Kenison Distinguished Scholar in Law; Professor of Law*

MARGARET MAISEL, B.A., M.A., J.D., M.A.T., *Associate Dean for Experiential Education, Clinical Professor of Law*

GERALDINE MUIR., B.A., M.A., J.D., *Associate Dean for Student Affairs*

ELIZABETH H. CERRATO, B.A., J.D., *Assistant Dean for Administration*

MAURA J. KELLY, B.A., J.D., *Assistant Dean for Career Development and Public Service*

JOHN RICCARDI, A.B., J.D., *Assistant Dean for Graduate and International Programs and Enrollment Services; Director, LL.M in American Law Program*

Boston University School of Law

EMERITI FACULTY

MICHAEL S. BARAM, B.S., LL.B., *Professor of Law Emeritus*

JOSEPH F. BRODLEY, B.A., LL.B., LL.M., *Professor of Law Emeritus*

STANLEY Z. FISHER, A.B., LL.B., *Professor of Law Emeritus*

NEIL HECHT, B.A., J.D., LL.M., J.S.D., *Professor of Law Emeritus*

LOIS H. KNIGHT, B.S., J.D., *Professor of Law Emerita*

JULIUS B. LEVINE, A.B., J.D., D.Phil., *Professor of Law Emeritus*

FRANCES H. MILLER, A.B., J.D., *Professor of Law Emerita*

WALTER W. MILLER, JR., A.B., B.D., LL.B., LL.M., *Professor of Law Emeritus*

EVA S. NILSEN, B.A., J.D., LL.M., *Professor of Law Emerita*

DANIEL G. PARTAN, A.B., LL.B., LL.M., *Professor of Law Emeritus*

WILLIAM E. RYCKMAN, JR., B.S., LL.B., *Professor of Law Emeritus*

Boston University School of Law

FACULTY

SUSAN M. AKRAM, B.A., J.D., *Clinical Professor of Law*

MARLENE ALDERMAN, B.S., M.L.S., J.D., *Director, Pappas Law Library; Associate Professor of Law and Legal Research*

GEORGE ANNAS, A.B., J.D., M.P.H., *William Fairfield Warren Distinguished Professor and Chairman, Health Law, Bioethics & Human Rights Department, Boston University School of Public Health; Professor of Law*

HUGH BAXTER, A.B., J.D., Ph.D., *Professor of Law and Professor of Philosophy*

JACK M. BEERMANN, B.A., J.D., *Harry Elwood Warren Scholar; Professor of Law*

DAVID BREEN, B.A., M.P.A., J.D., *Clinical Associate Professor of Law*

KHIARA M. BRIDGES, B.A., J.D., PH.D., *Associate Professor of Law and Associate Professor of Anthropology*

CONSTANCE A. BROWNE, B.A., J.D., *Clinical Associate Professor of Law*

ROBERT G. BURDICK, A.B., J.D., *Director, Civil Law Clinical Program; Clinical Associate Professor of Law*

DANIELA CARUSO, LL.B., LL.M., Ph.D., *Professor of Law*

KENT A. COIT, A.B., M.A., J.D., Ph.D., *Professor of the Practice of Law; Director, Transactional Law Program*

KRISTIN COLLINS, B.A., M.LITT, M.A., J.D., *Peter Paul Development Professor; Professor of Law*

Boston University School of Law

MARY C. CONNAUGHTON, B.A., M.S.W., J.D., *Clinical Associate Professor of Law*

JUDITH E. DIAMOND, B.A., M.A., J.D., *Clinical Associate Professor of Law*

ANNA Di ROBILANT, LL.M., Ph.D., S.J.D., *Associate Professor of Law*

STACEY L. DOGAN, B.S., J.D., *Law Alumni Scholar, Professor of Law*

LILIAN V. FAULHABER, A.B., M.PHIL., J.D., *Associate Professor of law*

ALAN L. FELD, A.B., LL.B., *Maurice Poch Faculty Research Scholar; Professor of Law*

TAMAR FRANKEL, LL.M., S.J.D., *Michaels Faculty Research Scholar; Professor of Law*

DAVID FROMKIN, B.A., J.D., ADV. DIP. IN LAW, *Professor of Law*

LEONARD H. GLANTZ, A.B., J.D., *Professor of Public Health, Professor of Socio-Medical Sciences and Community Medicine; Professor of Law*

WENDY GORDON, B.A., J.D., *William Fairfield Warren Distinguished Professor of Law*

PAUL R. GUGLIUZZA, B.A., B.B.A., J.D., *Associate Professor of Law*

MICHAEL C. HARPER, A.B., J.D., *Barreca Labor Relations Scholar; Professor of Law*

LAILA L. HLASS, B.A., M.A., J.D., *Clinical Associate Professor of Law*

CORNELIUS HURLEY, B.A., J.D., PMD, *Professor of the Practice of Banking & Financial Law*

KEITH N. HYLTON, B.A., J.D., Ph.D., *William Fairfield Warren Distinguished Professor of Law*

Boston University School of Law

MARIA O'BRIEN HYLTON, A.B., J.D., *Professor of Law*

WENDY J. KAPLAN, A.B., J.D., *Clinical Associate Professor of Law*

SEAN J. KEALY, A.B., M.G.A., J.D., *Clinical Associate Professor of Law*

SUSAN P. KONIAK, B.A., J.D., *Professor of Law*

PNINA LAHAV, LL.B., M.A., LL.M., J.S.D., *Law Alumni Scholar; Professor of Law*

GARY LAWSON, B.A., J.D., *Philip S. Beck Professor of Law*

GERALD LEONARD, A.B., Ph.D., J.D., *Law Alumni Scholar; Professor of Law*

KAREN PITA LOOR, B.S., J.D., *Clinical Associate Professor of Law*

DAVID B. LYONS, B.A., M.A., Ph.D., *Law Alumni Scholar; Professor of Law; Professor of Philosophy*

M. TRACEY MACLIN, B.A., J.D., *Joseph Lipsitt Faculty Research Scholar; Professor of Law*

NAOMI M. MANN, B.A., J.D., *Clinical Associate Professor of Law*

WENDY K. MARINER, B.A., J.D., LL.M., M.P.H., *Edward R. Utley Professor, Health Law, Bioethics & Human Rights; Professor of Law*

STEPHEN G. MARKS, B.A., J.D., Ph.D., *Faculty Director, Executive LL.M. in International Business Law Program; Professor of Law*

LINDA C. McCLAIN, A.B., M.A., J.D., LL.M., *Paul M. Siskind Research Scholar, Professor of Law*

MICHAEL J. MEURER, S.B., J.D., Ph.D., *Abraham and Lillian Benton Scholar; Professor of Law*

Boston University School of Law

ABIGAIL MONCRIEFF, B.A., J.D., *Peter Paul Development Professor; Associate Professor of Law*

NANCY MOORE, B.A., J.D., *Nancy Barton Scholar; Professor of Law*

KEVIN OUTTERSON, B.S., J.D., LL.M., *Associate Professor of Law; Associate Professor of Health Law, Bioethics & Human Rights*

WILLIAM W. PARK, B.A., M.A., J.D., *R. Gordon Butler Scholar in International Law; Professor of Law*

MARK PETTIT, JR., A.B., J.D., *Professor of Law*

DAVID ROSSMAN, B.A., J.D., *Director, Criminal Law Clinical Programs; Professor of Law*

DAVID J. SEIPP, A.B., LL.B., J.D., *Law Alumni Scholar; Professor of Law*

KATHARINE BAIRD SILBAUGH, B.A., J.D., *Law Alumni Scholar; Professor of Law*

KENNETH W. SIMONS, B.A., J.D., *The Honorable Frank R. Kenison Distinguished Scholar in Law; Professor of Law*

THEODORE S. SIMS, A.B., J.D., Ph.D., *Professor of Law*

ROBERT D. SLOANE, B.A., J.D., *R. Gordon Butler Scholar in International Law; Professor of Law*

FREDERICK TUNG, A.B., J.D., *Howard Zhang Faculty Research Scholar; Professor of Law*

ROBERT VOLK, B.A., J.D., *Director, Legal Writing and Appellate Advocacy Program; Associate Professor of Legal Writing*

Boston University School of Law

DAVID H. WEBBER, B.A., J.D., *Associate Professor of law*

JAY D. WEXLER, B.A., M.A., J.D., *Professor of Law*

LARRY W. YACKLE, A.B., J.D., LL.M., *Basil Yanakakis Faculty Research Scholar; Professor of Law*