

**TEACHING THE IMPACT OF LITIGATION COSTS ON THE
LEGAL ENVIRONMENT OF BUSINESS: INSTRUCTION TO
SUPPLEMENT UNDERGRADUATE BUSINESS LAW
TEXTBOOKS IS NEEDED**

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*Pearson v. Chung*¹

In 2005, Administrative Law Judge Roy Pearson walked into a Northeast Washington D.C. dry cleaning establishment owned by a family of Korean Immigrants (“the Chungs”) and asked to have a pair of pants altered. Several days later, he came to pick up the pants, and was given a pair of pants he claimed were not his. Pearson ultimately sued the Chungs for \$54 million dollars. That figure included \$500,000 in attorney's fees, \$2 million for “discomfort, inconvenience, and mental distress,” and \$15,000 to cover the costs of a rental car to use to drive to another dry cleaning service. The focus of Pearson’s lawsuit evolved into a consumer protection claim, and, after rejecting an offer to settle the case for \$12,000, he spent more than two years flooding the court with arguments just plausible enough to allow him a hearing. Of course, Pearson’s claims were ultimately denied. Nevertheless, the legal costs associated with defending Pearson’s unrelenting claims drained the Chung’s savings and took an exhausting emotional toll. On September 19, 2007, the Chungs were forced to close their dry cleaning business. Pearson is still appealing the judgment in the Chungs favor.

*Interactive Gift Express v. Compuserve Inc.*²

In 1985, computer programmer Charles Freeny successfully patented an idea in which products were purchased electronically, and then delivered at a point of sale in the form of a Compact Disc. Freeny believed that machines using the method—now patented as a “System for Reproducing Information in Material Objects at a Point of Sale Location”—could be used in retail stores to solve production and distribution inefficiencies.³ In 1989, following the exponential expansion of on-line commerce, Freeny sold his patent to an entrepreneur for \$200,000.

In 1994, the patent was resold to businessman Arnold Freilich. After securing the patent, Freilich formed E-data, Inc., and established himself as chief executive officer of the company. Freilich then hired David Fink, a notoriously

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¹961 A.2d 1067 (2008); see also Marc Fisher, *Wearing Down the Judicial System with a Pair of Pants*, WASH. POST, Jun. 14, 2007, at B1; Lubna Takruri, *Dry Cleaner in Pants Suit Closes*, SAN FRAN. CHRON., Sept. 19, 2007, <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2007/09/19/national/a120031D47.DTL>.

²No. 95-6871, 1998 WL 247485 (S.D.N.Y. May 15, 1998).

³For a more detailed discussion of Freeny’s patented idea, see SETH SHULMAN, *OWNING THE FUTURE* 79 (1999).

aggressive⁴ patent attorney, and sent letters to 75,000 separate companies warning that if they were conducting business over the internet, they were likely infringing on the Freeny patent. In its letters, E-data offered amnesty to companies who signed up for a licensing arrangement that required annual fees of \$5,000 to \$50,000, depending on company revenues. E-data also made it clear that any company who refused to sign a licensing agreement would be subject to a patent infringement lawsuit.

In response to the letter, many big firms including IBM, Adobe, Intermind Corporation, and Kidsoft agreed to pay the licensing fee. Although the patent's absurdly broad claim over all internet transactions made E-data's ability to enforce the patent questionable, many businesses recognized that it was less expensive to pay the alleged fee than to engage in a legal battle.⁵

*Yankee Candle Co., Inc. v. Bridgewater Candle Co. Inc.*⁶

In 1998, Bridgewater Candle Company entered into the candle market with a line of decorative candles for use in the home. Almost immediately after its entry, Yankee Candle Company—a much larger competitor and the leader in the candle industry—filed a largely frivolous⁷ lawsuit against Bridgewater alleging Bridgewater had infringed on a Yankee copyright thereby violating federal and common law trade dress law. The case was filed without notice to Bridgewater and without any meaningful pre-litigation attempt to resolve the companies' differences.

Although the claims were quickly determined to be without merit, Yankee proceeded with litigation in a way that did significant damage to Bridgewater's operations. In a particularly revealing instance, Yankee intentionally scheduled depositions for Bridgewater marketing personnel on the exact day of an important candle trade show. When reminded of the conflict, Yankee's counsel did not respond by rescheduling. Rather, in a series of ugly letters, Yankee's counsel threatened to force Bridgewater into contempt proceedings in South Carolina, and to enforce the subpoenas for those dates. Additionally, Yankee exploited its economic advantage over the much smaller Bridgewater by moving to take an unlimited number of depositions, making discovery difficult, and refusing to produce its witnesses so that Bridgewater was forced to direct resources into the preparation of motions to compel. Despite the weakness of its claims, Yankee consistently refused

⁴Freilich referred to Attorney Fink as "the pit bull of patent infringement." *Id.*

⁵For example, Stewart Baker, a Washington D.C. attorney who was fighting E-data's patent on behalf of several businesses reported: "We have clients who have said that at my level of business right now it is cheaper just to pay the license than to even ask my lawyers to examine what the defenses might be." *Id.* at 80.

⁶99 F. Supp. 2d 140, 143 (D. Mass. 2000); *Yankee Candle Co. v. Bridgewater Candle Co.*, 107 F. Supp. 2d 82, 86-87 (D. Mass. 2000); *Yankee Candle Co., Inc. v. Bridgewater Candle Co., LLC*, 259 F.3d 25 (1st Cir. 2001).

⁷Yankee's claim was "was objectively unreasonable, especially as to its factual underpinnings." *Yankee Candle Co., Inc. v. Bridgewater Candle Co., LLC*, 140 F. Supp. 2d 111, 116 (D. Mass. 2001).

to meet with a mediator. It also burdened the court with repetitive and unnecessarily long briefs, including a 100-page memorandum of law in opposition, and a 114-page response to Bridgewater's ten-page statement of undisputed facts. As the court later noted, Yankee's intent to drive the economically disadvantaged Bridgewater out of business became increasingly clear.

Yankee's tactics forced Bridgewater to retain the services of specialized intellectual property law firms from three different cities. When all was said and done, Bridgewater owed its legal counsel more than one million dollars. Of course, Bridgewater was able to gain compensation for the bulk of the direct costs of litigation by showing that Yankee's case was unreasonable and malicious. Nevertheless, the cloud of litigation interfered with the company's operations and pushed Bridgewater's profit margin over \$629,000 into the red.

I. INTRODUCTION

The conventional view of the legal process—and the view held by a majority of undergraduate business students—provides that courts determine the facts in a particular legal dispute and then apply those facts to generate just outcomes.⁸ However, as the examples above illustrate, the reality of the legal system is not that simple. The influence of cost in litigation is substantial, and can have a determinative effect on legal outcomes.⁹ Yet, if the textbooks used to teach undergraduate business law accurately portray typical course composition as a whole, this vital topic is not being adequately addressed.

This article reviews the fundamental purpose of undergraduate business law instruction and explains why it is important to teach undergraduate business students about the impact that the cost of litigation can have on legal outcomes. It then surveys the current treatment of the subject in the leading undergraduate business law textbooks. Based on this review, the article petitions for supplemental instruction to help students internalize the influence of cost in litigation as it contributes to the legal environment of business.

⁸See Lynn M Lopucki & Walter O. Weyrauch, *A Theory of Legal Strategy*, 49 DUKE L. J. 1405, 1407 (2000).

⁹See *id.*; see also Keith N. Hylton, *Litigation Costs and the Economic Theory of Tort Law*, 46 U. MIAMI L. REV. 111 (1991); Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment* 90 VA. L. REV. 1849 (2004) (describing nuisance value litigation strategies); Jonathan K. Van Patten & Robert E. Willard, *The Limits of Advocacy: A Proposal for the Tort of Malicious Defense in Civil Litigation*, 35 HASTINGS L. J. 891 (describing economic defense strategies to nuisance lawsuits); Jonathan T. Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 IND. L. J. 59, 60 (1997) (“It is self-evident that parties make litigation and settlement decisions based upon the procedural setting, and not just the merits, of a given case. In particular, lawyers and clients alike understand that the cost of litigation may affect outcomes.”).

II. THE ROLE OF LAW IN THE BUSINESS SCHOOL CURRICULUM: STUDENTS SHOULD BE PROVIDED WITH THE LEGAL KNOWLEDGE NECESSARY TO EFFECTIVELY NAVIGATE THE LEGAL ENVIRONMENT OF BUSINESS

To argue that a particular topic deserves attention in an introductory business law course, we must first define the general role of legal instruction in the undergraduate business curriculum. This, no doubt, seems like an obvious statement. But this curriculum has been notoriously fluid, and at times its basic purpose has been blurred by debate over relatively minor details.¹⁰

When originally established, legal instruction in undergraduate business education covered topics that are now frequently defined as “traditional.” Specifically, a student was exposed to one or two courses dealing with legal systems, procedures, criminal law, torts, and contracts.¹¹ Subjects like partnerships, corporations, negotiable instruments, bankruptcy, secured transactions, and sales were also sporadically bundled into the curriculum.¹² At the time, instruction in these subjects was of primary importance because there was more uniformity within the student body and the legal system was relatively simple.¹³ Accordingly, teaching business students about specific laws effectively provided them with the tools they needed to function in their future careers.

Through the middle of the twentieth century, however, “business law” grew more complex.¹⁴ Meanwhile, a staggering increase in the demand for education led to the matriculation of students with very different career goals.¹⁵ This made it difficult to cover all of the specific laws that a student was likely to encounter, and attempts to cover this ever-expanding body of material transformed undergraduate

¹⁰See Thomas W. Dunfee et al., *The Business Law Curriculum: Recent Change and Current Status*, 18 AM. BUS. L.J. 59, 64-69 (1980) (surveying the curriculum changes at several undergraduate institutions over a five year period).

¹¹See e.g., HERBERT A. TONNE, *BUSINESS EDUCATION: BASIC PRINCIPLES AND TRENDS* (1939); FRANK C. PIERSON, *THE EDUCATION OF AMERICAN BUSINESSMEN* (1959); see also Bruce Childers, *Introductory Law Courses in a College of Business: A Change in Emphasis*, 77 AM. BUS. L.J. 82 (1984); Mark A. Buchanan, *The Legal Environment Requirement: How is it Being Met?*, 21 AM. BUS. L.J. 237, 241 (1983) (defining these subjects as traditional for classification in a survey); Dunfee et al., *supra* note 10, at 63.

¹²Childers, *supra* note 11.

¹³PIERSON, *supra* note 11, at 3-6.

¹⁴*Id.* at 206-07; see also ROBERT H. BORK, *THE ANTITRUST PARADOX* 347 (1978) (“The last several decades have witnessed an enormous proliferation of regulatory and licensing authorities at every level of government, federal, state, and local. In order to enter the market and vie for consumers’ favor, business of all types must gain various types of approval from governmental agencies, departments, and officials. Licensing authorities, planning boards, zoning commissions, health departments, building inspectors, public utilities commissions, and many other bodies control and qualify the would-be competitor’s access to the marketplace.”).

¹⁵PIERSON, *supra* note 11, at 206-07.

business law instruction into a broad and superficial survey of black letter rules.¹⁶

In 1959, faced with curriculum standards that were leaving business students with knowledge of narrow rules, but without a practical context to give the rules meaning, the now frequently quoted Robert A. Gordon and James E. Howell performed studies that led them to recommend that the superficial introductory business law course be abandoned in favor of a course that did more to familiarize students with the framework of the law, and how that framework influences conduct among businessmen and the formation of business policy.¹⁷ That same year, Frank C. Pierson also analyzed trends in the business law curriculum and recommended that a class on the political and legal factors in business be taught.¹⁸ Pierson concluded that the current business law class—which was almost exclusively informational rather than analytical in character—was ineffective because the great majority of students did not have the background and experience necessary to usefully apply the material they were taught.¹⁹ He eventually replaced the traditional business law course in his school’s curriculum with a course that taught the background, importance, and role of law in our society, the legal system of the United States and its workings, private property and contracts as basic concepts of a free enterprise system, and the evolution of legal attitudes toward business.²⁰

The ideas presented by Gordon, Howell, and Pierson—now generally defined as the “environmental approach” to business law instruction—were unusually influential. In a very basic sense, they refocused business law instruction back on its intuitive purpose. That is, adjusting for our increasingly complex society, the environmental approach advocated for a business law curriculum which provided business students with the necessary tools to function effectively in the modern world of business.²¹

In 1969, The American Association of Collegiate Schools of Business (“AACSB”) added legitimacy to the “environmental approach” by eliminating the traditional business law course from its curriculum requirements and replacing it with a broad requirement that business schools include at least one course which

¹⁶The problem of excessive specialization was a problem with undergraduate business education in general. For example, one undergraduate business institution offered an eight-course major in “Principles of Baking.” The school’s catalog described this major, which included courses on Bread and Roles, Principles of Baking, Cakes and Sweet Baked Products, and a two semester course on Cakes and Variety Products, as a program that “will help students secure the broad vision of economic affairs and the understanding of fundamental economic courses which are today essential for successful business leadership.” *Id.* at 219-20.

¹⁷ROBERT A. GORDON & JAMES E. HOWELL, *HIGHER EDUCATION FOR BUSINESS* (1959); see also William Zelermyer, *A New Approach to Business Law*, 3 AM. BUS. L. J. 352, 356 (1965).

¹⁸PIERSON, *supra* note 11, at 227.

¹⁹*Id.* at 206-07.

²⁰*Id.* at 227.

²¹For example, Gordon, Howell, and Pierson did not argue that contract law was not important, but that the environment of business had developed to a point where the rules governing contracts held little meaning without a macro understanding of the environment which influenced their application.

exposed students to a background of the economic and legal environment of business enterprise along with the effect of ethical considerations, and social and political influences on business.²² Following the AACSB's curriculum change, introductory undergraduate business law courses underwent a widespread shift toward "environmental instruction."²³

Despite this apparent overhaul, however, the *role* of law in the business school curriculum did not fundamentally change. The shift to the environmental approach was simply a response to an increasingly complex environment. Although there was—and still is—debate over the definition of "the legal environment of business,"²⁴ both the so called traditionalists and environmentalists have always pushed for the curriculum which they felt would provide business students with tools most vital to their ability to function in the business world. Based on this observation, and in concurrence with John R. Allison who has addressed the role of law in the business curriculum in more depth, it can be said that the undergraduate business law curriculum has always intended to promote an understanding of legal processes affecting business, help students recognize legal issues, and help students understand how to manage legal risks.²⁵ Building on this precedent, it can be generally stated that in a modern school of business, instruction in the law should convey to the student a vision of the legal environment with enough detail to allow him to function effectively as a businessman within that environment.²⁶

²²Gary A. Moore & Stephen E. Gillen, *Managerial Competence and the Business Law Curriculum: The Corporate Counsel Perspective*, 3 AM. BUS. L. J. 352, 356 (1985).

²³See Childers, *supra* note 11, at 85 (stating that survey showed that by 1977, about 40 percent of schools had shifted to the environmental introductory instruction); see also Dunfee et al., *supra* note 10, at 65-75 (stating that survey conducted in 1980, and based on the survey results of a 186 undergraduate business schools, showed that Legal Environment courses were being added rapidly and there was a "trend toward environmentalization"); Buchanan, *supra* note 11, at 246 (stating that survey showed that business law was moving toward an environmental approach).

²⁴Dunfee et al., *supra* note 10, at 60 ("[N]ot all business law faculty think the same thing when they use the term legal environment."); see also Elliot Klayman & Kathleen Nesser, *Eliminating the Disparity Between the Business Person's Needs and What is Taught in the Basic Law Course*, 22 AM. BUS. L. J. 41 (1984).

²⁵See John R. Allison, *The Role of Law in the Business School Curriculum*, 9 J. LEGAL STUD. EDUC. 239 (1991).

²⁶This general definition of the role of legal education in business is accepted by many other commentators. See, e.g., George J. Siedel, *Commentary: 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, 736-37 (2000) ("[G]iven the high value of law, business schools attempting to develop successful managers in today's global business world should offer at least one core course that enables students to recognize and analyze the legal implications of business decisions, and to understand and implement the advice of legal counsel in situations where the issues are significant enough to justify the costs (both time and financial) associated with seeking professional advice.")

III. AN INTERNALIZED UNDERSTANDING OF THE INFLUENCE OF COST IN LITIGATION IS VITAL TO A FUNCTIONAL UNDERSTANDING OF LEGAL ENVIRONMENT OF BUSINESS

So what does an undergraduate student need to know in order to function effectively in today's business world? Several empirical studies have indicated that numerous topics, both traditional and non-traditional, are considered valuable.²⁷ For example, instruction on both contract formation (traditional) and "how to find and work with an attorney" (non-traditional) have consistently been ranked as important in surveys of businesspeople and lawyers.²⁸ The perceived importance of understanding the impact of cost in the legal process has never been included or ranked in a survey. But an understanding of cost, like an understanding of contracts or where to find an attorney, is something that touches almost every corner of the legal environment of business and is vital to a student's ability to function in the business world.²⁹ Indeed, teaching students black letter law without reference to the extra-legal influence of cost may even have a negative overall impact on the student's practical understanding of business law.

Take the example of the undergraduate business student's introduction to patent law. In a current introductory business law course, students may be directed toward laws which indicate they can obtain a patent to protect an invention by showing that the invention is novel, non-obvious, and useful.³⁰ Students are informed that after making these demonstrations, they will have a legal monopoly over the invention for as long as twenty years.³¹ However, drafting a claim which adequately describes and protects an invention can be a tedious and time-consuming process, and usually requires the assistance of a patent attorney.³² Recently, the average fee for a utility patent novelty search alone was estimated at \$1,500.³³ If the

²⁷See John D. Donnell, *Redesigning the Required Undergraduate Business Law Course*, 2 J. LEGAL STUD. EDUC. 1 (1984); see also William G. Elliot & Arthur Wolfe, *The Need for Legal Education by Persons in Business*, 19 AM. BUS. LAW J. 153, 162 (1981); Klayman & Nesser, *supra* note 24, at 54; Moore & Gillen, *supra* note 22, at 373.

²⁸See Moore & Gillen, *supra* note 22, at 381-83 (comparing all of the studies).

²⁹In fact, because most legal disputes do not even reach a stage where black letter rules come into play, an understanding of the influence of litigation costs on business decisions is arguably even more relevant to an understanding of contract law or other "important" black letter laws. See Keven M. Clermont and Theodore Eisenberg, *Litigation Realities*, CORNELL L. REV. 119, 121 (2002) ("In the American Civil Litigation system today, few cases reach trial.").

³⁰See, e.g., HENRY R. CHEESEMAN, *ESSENTIALS OF BUSINESS AND ONLINE COMMERCE LAW* 534-536 (2006) (textbook currently used by one of the authors to teach an introductory legal environment of business course).

³¹*Id.*

³²See David R. McKinney & Edwin S. Wall, *Patent Law Basics*, 28-Aug. WYO. LAW. 24, 26 (advising non-specialist attorneys that "[t]he procedure for obtaining a patent requires the assistance of a patent attorney.").

³³See AM. INTELLECTUAL PROP. LAW ASS'N., *REPORT OF THE ECONOMIC SURVEY* 87 (2003).

idea or invention is determined to meet the novelty requirements, continued professional assistance will likely be required to successfully tread through established patent filing procedures.³⁴ This assistance is expensive, with patent attorneys charging an average of \$250 an hour for their service.³⁵ The filing fees required by the United States Patent Office will also add a few hundred dollars to the bottom line.³⁶ Indeed, the current patent process makes it very difficult, if not impractical, for individuals or small businesses with limited financial means to actually secure a patent.³⁷

Similarly, students may be taught that the law gives a patent holder the exclusive right to use the invention during the term of the patent, and that a patent holder can prohibit others from using any product that is substantially the same, license the product to others for a fee, and recover damages from anyone who uses the product without permission.³⁸ However, once a patent is obtained, its protection is not impenetrable nor immune to challenge.³⁹ And even where a patent is determined to be valid, “recovering damages” is not an event, but a process that can be emotionally and financially draining. For patent lawsuits with less than \$1 million at risk, the median cost of discovery was recently estimated at \$350,000, with the median estimated total litigation cost estimated at \$600,000.⁴⁰ For suits with \$1-\$25 million at risk, the median estimated cost of discovery was \$1.25 million and the median estimated total litigation cost was \$2.5 million.⁴¹ For suits with more than \$25 million at risk, the median estimated cost of discovery was \$3 million and the median estimated total litigation cost was \$5 million.⁴² Indeed, the cost of obtaining and maintaining a patent sets a lower limit on the patent’s value. Accordingly, even if we assume that a valid patent will ultimately be protected through litigation,⁴³ the cost of litigation significantly alters the landscape in which

³⁴See A GUIDE TO FILING A NON-PROVISIONAL (UTILITY) PATENT APPLICATION, <http://www.uspto.gov/web/offices/pac/utility/utility.htm> (last visited November 15, 2008) (outlining several specific filing requirements).

³⁵See generally Pamela Samuelson, *Benson Revisited: The Case Against Patent Protection for Algorithms and Other Computer Program-Related Inventions*, 39 EMORY L. J. 1025 (1990); see also Gene Quinn, *Cost of Obtaining a Patent*, <http://www.ipwatchdog.com/patent/patent-cost/> (last visited November 15, 2008) (conservatively estimating that the cost to secure a patent of average complexity is between \$8,000 and \$10,000).

³⁶See A GUIDE TO FILING A NON-PROVISIONAL (UTILITY) PATENT APPLICATION, <http://www.uspto.gov/web/offices/pac/utility/utility.htm> (last accessed on November 15, 2008).

³⁷See, e.g., Valerie Calloway, *In the Process of Controverting its Constitutionally Given Purpose the U.S. Patent System Discriminates Against Inventors With Limited Financial Means*, 11 L. & INEQ. 565 (1993).

³⁸CHEESEMAN, *supra* note 30, at 334-36.

³⁹See Jean O. Lanjouw & Mark Shankerman, *Protecting Intellectual Property Rights: Are Small Firms Handicapped?*, 47 J. L. & ECON. 45 (2004).

⁴⁰See Cheryl Lee Johnson, Practicing Law Institute, *Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series*, 941 PLI/PAT 65, 67 (citing AM. INTEL. PROP. LAW ASS’N., REPORT OF THE ECONOMIC SURVEY 25-26 (2007)).

⁴¹*Id.*

⁴²*Id.*

⁴³This is probably not a realistic assumption. Research has shown that only slightly more than

business decisions related to the patent are made.⁴⁴ If students do not understand this concept, the instruction of black letter laws related to patents adds nothing to the student's ability to navigate the legal environment of business. The student's incomplete understanding may even motivate them to make poor business decisions.

Undergraduate business law instruction relating to contract formation provides another clear example of why it is important to convey the influence of cost in litigation to business students. Currently, a student reading one of the major introductory law textbooks will likely be introduced to laws governing contract formation and the concepts of offer, acceptance, breach, and remedies. A textbook used by one of the authors in the past introduces these concepts with a hypothetical example, reproduced below:

Suppose Ace Productions hires Reina to star in its new movie, *Inside Straight*. Ace promises Reina \$3 million, providing she shows up June 1 and works until the film is finished. But late in May, Joker Entertainment offers Reina \$6 million to star in its new feature, and on June 1 Reina informs Ace that she will not appear. Reina has breached her contract, and Ace should recover compensatory damages.

What are the damages that flow directly from the contract? Ace obviously has to replace Reina. If Ace hires Kween as its star and pays her a fee of \$4 million, Ace is entitled to the difference between what it expected to pay (\$3 million) and what the breach forced it to pay (\$4 million), or one million in compensatory damages. Suppose the rest of the cast and crew are idle for two weeks because of the delay in hiring a substitute, and the lost time costs the producers an extra \$2.5 million. Reina is also liable for those expenses. Both the new actress and the delay are inevitable.⁴⁵

After reading this story, in the absence of an understanding of the costs associated with litigation, a student is left to believe that in business, a contract

fifty percent of patent enforcement actions are effectively prosecuted. John R. Allison & Mark A. Lemley, *Empirical Evidence on the Validity of Litigated Patents*, 26 AIPLA Q. J. 185, 205 (1998) (stating that fifty-four percent of patents were found valid in a population of 300 final validity decisions); see also Kimberly A. Moore, *Judges, Juries, and Patent Cases: An Empirical Peek Inside the Black Box*, 99 MICH. L. REV. 365, 385 (2000).

⁴⁴The effect of cost is no less prevalent on the defending end of patent litigation. See e.g., *Interactive Gift Express v. Compuserve Inc. et al.*, No. 95-6871, 1998 WL 247485 at 1 (S.D.N.Y. May 15, 1998) (second example introducing this article); see also Andrea Lynn Evensen, *Don't Let the Sun Go Down on Me: An in Depth Look at Opportunistic Business Method Patent Licensing and a Proposed Solution to Allow Small-Business Method Users to Sing a Happier Tune* 37 J. MARSHALL L. REV. 1359 (2004).

⁴⁵JEFFREY F. BEATTY & SUSAN H. SAMUELSON, LEGAL ENVIRONMENT 600 (2^d ed. 2005).

violation is essentially harmless because the non-violating party will be restored to a previously held position and receive the benefit of the bargain. This perception leaves students with a false sense of security. Perhaps a more practical continuation of the story is appropriate to demonstrate the idea.

Suppose after violating her contract, attorneys for Ace threaten to bring a legal action against Reina for her failure to perform. They claim that the actress owes them a total of \$3.5 Million in compensatory damages (\$1 million for the extra expense of hiring Kween, and \$2.5 million for production delays). Reina's lawyers respond first by making the outrageous claim that no valid contract exists because the actress was intoxicated when producers tricked her into agreeing to star in the movie.⁴⁶ They also contend that, even if the contract were enforceable, the claim to \$2.5 million in lost time costs is speculative, and therefore not recoverable.⁴⁷

Reina's attorneys represent that they are willing to go to court and remind Ace that they will have to provide discovery related to the alleged contract. Specifically, they will require the producers to testify regarding Reina's mental state at the time of the agreement. They will also request that the director and major actors in the movie be present to testify about their experiences contracting for the film. Of course, if Ace doesn't want to lose any more time in the production of the film, which, according to the story, is over a million dollars a week, Reina's attorneys suggest that the actress may be willing to settle for \$500,000.

Although Ace's attorneys are almost certain they would win the full amount if the case went to trial, they realize that Reina's argument does not quite qualify as frivolous. After reviewing the choices available, and in the midst of continued pressure from sponsors of the film who are threatening to withdraw because they don't have a star to put in their commercials, Ace decides to take the \$500,000, hire Kween, and get back to producing the film with as little interruption as possible.⁴⁸

⁴⁶The legal defense of mental incapacity is presented as a defense to contract enforcement in the textbook. *Id.* at 205.

⁴⁷The textbook also mentions this legal argument. *Id.* at 279.

⁴⁸In fact, a case similar to this theoretical one occurred in 1994 when actress Kim Basinger failed to fulfill an agreement to star in the film "Boxing Helena." Ultimately, a court found that Basinger was liable for over \$8 million in damages for failing to appear in the film. *See Main Line Pictures, Inc. v. Basinger*, No. B077509, 1994 WL 814244 (Cal. Ct. App. Sept. 22, 1994). Although \$8 million in damages were awarded, Basinger appealed and ultimately settled out of court by paying \$3.8 million.

Our continuation of the textbook example is important to the business student's legal education. Indeed, the principle it illustrates is vital to an accurate perception of the legal environment of business. When the costs, both time and financial, of litigation are incorporated into instruction related to contracts, outcomes very different from those generated by a simple rule based theoretical model are reached. An understanding of laws applied in a theoretical vacuum are of little worth to a business student who will be making decisions in the real world.⁴⁹ The costs of litigation are intertwined with the law related to contracts, patents, and every other topic we cover in an introductory law class. A student's perception of the legal environment of business, therefore, is materially skewed and functionally detrimental without an understanding of this practical idea.

IV. UNDERGRADUATE BUSINESS LAW TEXTBOOK TREATMENT OF THE EFFECT OF LITIGATION COSTS ON THE LEGAL ENVIRONMENT OF BUSINESS IS INADEQUATE

Despite the foundational importance of the topic, the textbooks currently used in introductory business law courses generally pay little attention to the influence cost has on the legal environment of business.⁵⁰ Indeed, although most textbooks mention that litigation is expensive in sections introducing Alternative Dispute Resolution ("ADR"), very little effort is dedicated to the practical effect of cost as it contributes to the legal environment of business.⁵¹

For example, one textbook includes a section comparing litigation to ADR. The book simply asserts that expediency and cost are two compelling reasons businesses turn to ADR to resolve disputes. A discussion of the practical influence these expenses can have on the legal process is omitted. Another leading textbook presents a slightly longer explanation of why cost might lead people away from litigation. Specifically, the text informs the reader that trials are costly and time-consuming, and goes on to explain that only a very small percentage of lawsuits actually go to trial. Further, the text suggests that alternatives to traditional court

⁴⁹See examples introducing article, *supra* notes 1-7 and accompanying text.

⁵⁰A request to the author's textbook representatives for the most frequently used textbooks in undergraduate business schools yielded thirteen books which account for over seventy-five percent of the undergraduate business law text market. These textbooks were reviewed individually and this review forms the basis of the discussion here. As the authors have no desire to criticize the phenomenal quality of these texts or minimize the efforts of their authors no direct citation to these texts will be offered. Rather, we hope to show generally that if business law textbooks alone are used as the template for undergraduate teaching, the role that the costs of litigation play in the legal environment of business will not receive the treatment it deserves.

⁵¹Seven of the thirteen textbooks reviewed introduce a discussion of the costs of litigation in portions of the text discussing ADR.

proceedings may provide relief from these negative extra-legal realities. Again, however, the discussion does not provide the business student with a meaningful understanding of how these negative realities practically impact business decisions? The text does not explain why ADR is less expensive or how a company is affected by drawn out legal disputes. If the student is unaware of the American standard of awarding attorney's fees,⁵² or is unaware of how gray the law can be, this discussion holds very little meaning as the student may not understand why cost is even relevant to the decision to litigate.

A handful of textbooks venture outside the standard ADR-introduction to the cost of litigation.⁵³ For example, one book begins with the story of small business owner who developed popular product that appeared to be very profitable. The story develops to explain the legal problems the business owner encountered as the company expanded. He was sued by shareholders for mismanagement, had problems with hackers and copyright violations, faced lawsuits from employees for claims of discrimination and sexual harassment, and even became involved in litigation related to negligence brought by a customer who was injured by the product. This story does an excellent job of demonstrating how litigation can be both emotionally and financially draining. It even explains that the entrepreneur was probably not going to bring legal action against the copyright violators because the cost of attacking the problem would likely exceeded the income lost by ignoring it. Indeed, this sobering story provides an effective base from which to introduce students to the realities of how the cost of litigation plays into the legal environment of business. However, instead of building on the entrepreneur's story to reinforce the effects of cost in litigation, the text quickly abandons the example in favor of a survey of black letter law. Like other textbooks, practical applications of cost as it contributes to the legal environment are covered in a cursory way and their effect on the legal environment is not sufficiently conveyed.

Only one of the thirteen of the reviewed textbooks directly addresses the practical effect of extra-legal factors in litigation. This book provides a half-page cost-benefit analysis of a decision to litigate. The analysis explains that litigation can be emotionally and financially draining, informs the reader of the "American rule" for awarding attorney's fees, and even explains that attorneys typically bill in the range of \$100 to \$500 an hour. However, the book dedicates at least as much attention to topics like electronic fund transfer systems, and specific laws about toxic substances and hazardous waste. Approximately three times as much space is reserved for a discussion of specific property exemptions in bankruptcy.⁵⁴ While a short textbook discussion of the cost-benefit analysis of going to court is a step in the right direction, it is wholly inadequate to convey how important cost is to the

⁵²And it is safe to assume that most students are not familiar with this rule. See Murray S. Levin, *The Attorney-Client Relationship as a Business Law-Legal Environment Topic*, 21 J.LEGAL STUD. EDUC. 241, 243 (2004) (reporting that more than 75 percent of business students believe that there is a general "loser pays" attorneys' fee rule).

⁵³Three of the thirteen textbooks review introduced the topic without reference to ADR.

⁵⁴*Id.* at 354.

business law rubric.

In sum, the textbooks reviewed do not do enough to help students internalize the important influence that the cost of litigation has on the legal environment of business.

VI. CONCLUSION: SUPPLEMENTAL INSTRUCTION RELATING TO THE INFLUENCE OF COST ON LITIGATION IS LIKELY NECESSARY

Providing legal instruction that focuses exclusively on rules, while ignoring environmental factors which determine the application of the rules, results in a dysfunctional education. Put more bluntly, “beginning the study of law with a rule dominant model has the same validity as postulating the earth as the center of the universe in an [introductory] Astronomy I course.”⁵⁵ “The study of rules, their creation, evolution, interpretation, demise, etc., should, of course, be a part of anyone’s introduction to law, just as the earth should be included, contextually, in an introduction to astronomy.”⁵⁶ However, if we fail to convey the influence of cost on the legal environment of business, the rules lose their meaning.

An understanding of the impact that the cost of litigation can have on legal decisions and outcomes is part of the vital framework that undergraduate business students need to meaningfully navigate the business world they plan to enter. However, based on our review of textbook treatment of the subject, it appears business students are not being provided with sufficient instruction in this area.⁵⁷ Without a firm grasp on the role cost plays in our legal system, student perception of almost all other legal principles will be distorted and the profitability of the education provided to him will be diminished. Accordingly, supplemental instruction is a priority.

⁵⁵Henry T. Allen, *Law as a Liberal Art Versus Law as a Professional Discipline: A False Dichotomy*, 15 AM. BUS. L. J. 61 (1977).

⁵⁶*Id.*

⁵⁷We recognize that many instructors, maybe even all of them, are addressing this issue in their business law classrooms. However, we have not yet completed a formal study, by survey completion and analysis, of this particular issue, and so we do not have a firm grasp of what is actually happening in undergraduate business law classrooms. Consequently, as a beginning point to our exploration of this topic—and what we hope will be the continuation of a fruitful debate—we rely on the notion that textbooks drive the business course instruction. The next step in our study will be to obtain more data through a sampling survey of undergraduate business educators to assess how they incorporate cost into “legal environment of business law” instruction and to compare those findings with our supposition that cost is under represented.