

A Concept-Sensitive Managerial Analysis With Law: Applying a Business Concept to a Legal Rule to Identify the Domain of Business Situations

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Repository Citation

James E. Holloway, *A Concept-Sensitive Managerial Analysis With Law: Applying a Business Concept to a Legal Rule to Identify the Domain of Business Situations*, 6 Wm. & Mary Bus. L. Rev. 137 (2015), <http://scholarship.law.wm.edu/wmblr/vol6/iss1/5>

A CONCEPT-SENSITIVE MANAGERIAL ANALYSIS WITH LAW: APPLYING A BUSINESS CONCEPT TO A LEGAL RULE TO IDENTIFY THE DOMAIN OF BUSINESS SITUATIONS

JAMES E. HOLLOWAY*

ABSTRACT

The traditional fact-sensitive managerial analysis with law analyzes business situations to identify legal issues and applies legal rules to facts to make judicial decisions. The fact-sensitive managerial analysis takes decades to identify a family of business situations and lacks the analytical capacity to use business knowledge (concepts) and analytical methods to identify business situations. Alternatively, a concept-sensitive managerial analysis with law increases factual sensitivity by applying a business concept to a legal rule to shorten the duration of identifying an extensive family of business situations. All situations are not useful or effective when making business decisions or managing a business. Consequently, the concept-sensitive managerial analysis with law uses managerial discretion and analysis to identify situations in which known regulatory, economic, and other factors constrain managers' latitude in making business decisions. In other words, one or more situations include a business opportunity or contain a business problem that supports the need to initiate business decision making. Finally, the concept-sensitive managerial analysis with law supports business decision making that uses business information and methods and concurrently engages legal analysis and reasoning to determine legal obligations in ultimately making a useful and lawful decision.

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INTRODUCTION

Judges and lawyers have used and must continue to use a fact-sensitive managerial analysis of law¹ to decide and advise on legal issues occurring in business situations.² Judicial decisions and legal advice analyze and apply legal rules to the facts of business disputes to rule on legal issues.³ This analysis and application of legal rules together determine legal rights and obligations that exist in business situations. Each application of the traditional fact-sensitive managerial analysis identifies one specific situation and usually takes decades to identify a domain or family of similar situations to form precedents.⁴ Courts and lawyers will always need and use this fact-sensitive managerial analysis that determines one situation at a time to apply the law to facts. However, modern business education and research require recognition of numerous business situations involving a given legal rule or regulatory scheme. These situations that contain organizational and market opportunities create the need to initiate business decision making that must use legal rules and business knowledge in order to make both business-savvy and lawful decisions.

One situation must eventually be recognized and thereafter used to initiate decision making to identify business opportunities and manage business needs under current government regulation and public policy. For example, one might examine the business decisions surrounding an organization's workforce against the backdrop of current employment law and policy. The fact-sensitive managerial analysis of law inherently lacks the analytical capacity to recognize numerous business situations in which one situation is needed to initiate business decision making solely for business purposes. This analytical capacity is the use of business knowledge and analytical methods to recognize business situations and thereafter make business decisions. Yet modern legal education recognizes the importance of business knowledge and analytical methods to provide legal advice for

¹ *Am. Fed'n of State, Cnty. & Mun. Emps. v. Ill. State Labor Relations Bd.*, 775 N.E.2d 1029, 1032–33 (Ill. App. Ct. 2002) (“[T]he Board utilized the traditional, fact-[sensitive] managerial analysis to find that assistant public defenders were not managerial employees.”); *see infra* Part II.A and accompanying notes (discussing the fact-sensitive managerial analysis with law as applied by courts to decide disputes).

² *See Kewaunee Cnty. v. Wis. Emp't Relations Comm'n*, 415 N.W.2d 839, 842 (Wis. Ct. App. 1987) (using fact-sensitive managerial analysis to determine whether an employee who submits the budget is part of management).

³ *See Point Park Univ. v. NLRB*, 457 F.3d 42, 50 (D.C. Cir. 2006) (using a managerial analysis to determine whether employees are part of management).

⁴ *See, e.g., supra* notes 1–3.

corporate decision making and planning.⁵ Therefore, judges, lawyers, and business managers need a more sensitive managerial analysis with law that uses modern business knowledge and analytical methods in the use of legal analysis and reasoning to apply legal rules. This more sensitive managerial analysis identifies and analyzes business situations that are subject to legal obligations and provides business opportunities in making business decisions. A managerial analysis with law is made sensitive by applying a business concept to a legal rule to identify a family of business situations in which one useful situation can eventually initiate business decision making (analytical methods) in order to make a lawful, business-savvy decision.

This Article consists of seven parts. Part I explains the need for and existence of a concept-sensitive (or theoretical) managerial analysis with law that incorporates legal and business knowledge and methodologies. Part II explains the nature of business concepts, legal rules, and managerial discretion theory, which are generally used to identify and limit business situations that contain both business opportunities and legal obligations. Part III describes the legal and business knowledge that explains and identifies business situations that contain business opportunities and that are subject to or free from legal obligations. Part IV describes the use of one particularly effective and useful business situation to aid business decision-making methodology that engages basic legal-analytical methods to determine and conform to legal obligations. Part V illustrates and explains the managerial analysis with law that applies a business concept to a legal rule, uses managerial discretion theory and analysis, and uses business decision making to engage legal-analytical methods. Finally, this Article concludes that business decision making would benefit from a concept-sensitive managerial analysis with law in order to better identify applicable legal

⁵ See Scott H. Bice, *Good Vision, Overstate Criticism*, 1 J. ASS'N LEGAL WRITING DIRECTORS 109, 111 (2002) (“[Law school] courses go far beyond the traditional ‘legal aid’ settings to include such topics as business planning ... and taxation.”). Many law school professors advocate for even more business-oriented instruction. See Victor Fleischer, *Deals: Bringing Corporate Transactions into the Law School Classroom*, 2002 COLUM. BUS. L. REV. 475, 481 (2002) (“Increasing numbers of law professors are paying attention to the problem of teaching transactional skills. Most often, the gap is addressed in the context of refining existing doctrinal courses in corporate and business law.”); Kamille Wolff Dean, *Teaching Business Law in the New Economy: Strategies for Success*, 8 MD. J. BUS. & TECH. L. 223, 225 (2013) (“Courses in economic justice, banking, and even poverty law could be offered and explored during these changing economic times.”); Afra Afsharipour, *Incorporating “Business” in Business Law Classes*, 8 U.C. DAVIS BUS. L.J. 1, 5 (2007) (“Business law faculty can emphasize in class that clients expect that their lawyer is up to date on recent business news, on the client, and on the client’s industry.”).

obligations in business situations and to yield legally compliant business decisions.

I. LAW AND USE OF BUSINESS KNOWLEDGE AND ANALYTICAL METHODS

Business theories and principles identify useful business situations while legal rules and principles determine lawful situations. We need a managerial analysis with law that uses business knowledge and analytical methods to find and analyze business situations that could raise legal issues or give rise to legal disputes when making business decision. The fact-sensitive managerial analysis is designed to analyze factual situations in the application of legal rules and principles. The fact-sensitive managerial analysis is not designed to apply business theories and principles (business concepts) or analytical methods in order to identify business situations that initiate business decision making.

A. Finding Business Situations to Identify and Explain Legal Issues

Both business and legal disciplines need to consider a more timely, extensive, and sensitive managerial analysis that combines business concepts, legal rules, and business and legal analytical methods. Business managers and organizations need this managerial analysis to identify a family of business situations that can aid and inform business decision making.

A more timely, extensive, and sensitive managerial analysis would identify a family of business situations. This family of situations would include those that raise legal issues prior to or concurrently with business decision making. Recognizing and solving these issues requires business decision making to engage legal analysis to determine and comply with legal obligations. An extensive, timely, and sensitive managerial analysis would identify and analyze a family of business situations with similar factual patterns. Lawfully compliant situations are useful for initiating business decision making and furthering organizational objectives. Unlike under traditional analysis, a timely managerial analysis with law does not take decades to create one family of slightly different situations.⁶ Rather, it

⁶ William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 250 (1976). Landes and Posner state that:

The rule created by a single decision will therefore tend to be extremely narrow in scope; a broader rule will generally require a series of judicial decisions—a string of holdings—for it is only from a series of decisions, each determining the legal significance of a slightly different set of facts, that a rule applicable to a situation common or general enough to be likely to recur in the future can be inferred.

Id.

broadly identifies a family of situations by using fact-sensitive legal rules and business concepts⁷ that cover the same or similar factual situations prior to or concurrently with business decision making. Next, the more extensive managerial analysis uses business concepts and legal rules to analyze and identify a domain of business situations that contain business opportunities and legal obligations. The concept and rule identify and analyze a kindred set of business situations where both business concept and legal rule are fact-sensitive or situation-sensitive statements and assertions describing unique or specific situations.⁸

⁷ *Eligibility Procedures and Accreditation Standards for Business Accreditation*, THE ASSOCIATION TO ADVANCE COLLEGIATE SCHOOLS OF BUSINESS, 1, 30–31 (2013), <http://www.aacsb.edu/~media/AACSB/Docs/Accreditation/Standards/2013-business-standards.aspx> [hereinafter *AACSB-Eligibility Standards*]. AACSB’s mission is to “advance[] quality management education worldwide through accreditation, thought leadership, and value-added services.” *About AACSB*, AACSB (last visited Oct. 2, 2014), <http://www.aacsb.edu/about/mission-statement.asp>.

AACSB Standard 9, discussing eligibility for accreditation, shows the business knowledge and skills expected of undergraduate and graduate students. *AACSB-Eligibility Standards* at 30–31. The AACSB standard includes the concepts and their uses that are taught in AACSB accredited colleges and schools of business throughout the world. *Id.* AACSB Standard 9 states that:

Standard 9: Curriculum content is appropriate to general expectations for the degree program type and learning goals

Definitions

Curriculum content refers to theories, ideas, concepts, skills, knowledge, etc., that make up a degree program

General Business and Management Knowledge Areas

...

Financial theories, analysis, reporting, and markets

Systems and processes in organizations, including planning and design, production/operations, supply chains, marketing, and distribution

Group and individual behaviors in organizations and society

Information technology and statistics/quantitative methods impacts on business practices ... between and across organizations including related ethical issues

Other specified areas of study related to concentrations, majors, or emphasis areas

General Business Master’s Degree Programs

...

Making sound decisions and exercising good judgment under uncertainty

...

Id.

⁸ See John G. Wacker, *A Definition Of Theory: Research Guidelines For Different Theory-Building Research Methods in Operations Management*, 16 J. OPERATIONS MGMT. 361, 364 (1998). The article rests or fails on the premise that many legal rules and business concepts that are applied to determine and guide business actions and decisions cover the same or similar facts or situations. *Compare id.* at 364, with Landes & Posner, *supra* note 6, at 250 (describing the nature of legal rules and business theories).

B. Needing a More Sensitive Managerial Analysis with Law

The application of a situation-sensitive business concept to a fact-sensitive legal rule identifies and analyzes a family or domain of business situations to inform legal and business disciplines of the impact of legal rules on business disciplines, their theories and principles, which are referred to as concepts. These situations contain both business opportunities and legal obligations that inform and aid business decision making and its consideration of legal rules. Straightforwardly, this application involves simply analyzing and then identifying situations likely to occur under both the business concept and legal rule. Finally, a more sensitive managerial analysis applies a situation-sensitive business concept to a fact-sensitive legal rule to analyze and identify a current domain of business situations in which a set of facts equals a situation. The use of a domain of business situations and their opportunities and legal obligations aids and informs business decision-making methodology. A more sensitive managerial analysis uses business decision making that engages legal methodology to resolve legal issues. Therefore, the more timely, extensive, and sensitive managerial analysis is a concept-sensitive managerial analysis with law.

C. Recognizing Situations to Initiate Business Decision Making

A concept-sensitive managerial analysis aids and informs business decision-making methodology of the effects of legal rules on business situations that contain business opportunities subject to legal obligations. The most useful and effective *business* situation is needed and selected by the business manager to support the *decisional* situation that initiates decision making to solve the business problem or need. Many situations are not actual factual patterns because they would be too numerous to list in the domain. However, the factual coverage of the legal rule and business concept establishes factual parameters that contain a highly descriptive domain of business situations.⁹ Some situations are unusable and unmanageable to solve

⁹ See *infra* Part III.C and accompanying notes (explaining the use of business concepts and legal rules to identify and explain business situations); *infra* Part IV.C.1. and accompanying notes (demonstrating the application of a business concept to a legal rule to identify and explain business situations).

An earlier article by the author was a primer on the need to create theory, practice, and pedagogy of law and business to study, use, and teach the impact of law on business and business disciplines. See James E. Holloway, *A Primer on the Theory, Practice and Pedagogy Underpinning a School of Thought of Law and Business*, 38 MICH. J.L. REFORM 587, 602–03 nn.55–61 (2005) [hereinafter *Holloway—Primer*] (using the efficient market hypothesis (concept) to demonstrate the impact of business theory on insider trading regulation (rule)).

business problems or provide business needs. These non-useful and ineffective situations cannot initiate business decision making and are not effective in furthering organizational objectives. These situations must be identified and subsequently removed from the domain of all business situations.

The removal of these situations requires managerial discretion theory and analysis¹⁰ to ascertain whether business managers possess the personal or organizational latitude to make business decisions under the legal rules and business concepts.¹¹ Simply, business managers lack the latitude to make unlawful decisions and may lack the latitude to use some lawful situations to initiate decisions. The unlawful decisions raise substantial ethical, public policy, and other concerns, and may create extreme business risks or uncertainties. The most useful and effective situation is selected and used by business managers who must use this situation and other information to find and support the decisional situation or problem that normally occurs in business transactions, organizational growth, and market conditions. The decisional situation must exist to initiate business decision making by managers to address a business need or market transaction involving both a legal

¹⁰ See Donald C. Hambrick & Sydney Finkelstein, *Managerial Discretion: A Bridge Between Polar Views of Organizational Outcomes*, in 9 RESEARCH IN ORGANIZATIONAL BEHAVIOR: AN ANNUAL SERIES OF ANALYTICAL ESSAYS AND CRITICAL REVIEWS 369, 371 (L. L. Cummings & Barry M. Staw eds., 1987).

¹¹ See Donald C. Hambrick & Eric Abrahamson, *Assessing Managerial Discretion Across Industries: A Multimethod Approach*, 38 ACAD. MGMT. J. 1427, 1429 (Oct. 1995). Hambrick & Abrahamson discuss one constraint that students of law can easily understand under managerial discretion theory. In the task environments, “relatively little ambiguity in means-ends relationships” ... [means that] “only a narrow range of options holds any plausibility in the eyes of powerful parties.” *Id.* In a means-ends relationship, the organization’s situation, purpose, and objectives constrain decisions or solutions to business problems. *Id.*

We need not do much to explain here the standard of review and its accompanying legal-analytical methodology to determine means-ends relationship of a regulation under the federal constitution. See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994). In *Dolan*, the United States Supreme Court establishes a stricter means-ends relationship under the Takings Clause by creating the rough proportionality test (standard of review) to determine the relationship between a land dedication condition and the government’s need to acquire a recreational easement on the owner’s expansion of her business facility. Chief Justice Rehnquist, writing for the majority, states that:

We think a term such as “rough proportionality” best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.

Id. In the concept-sensitive managerial analysis, the rough proportionality test would require a close (coordinated) relationship between the business situation and decision.

rule and a business concept.¹² This initiation eventually requires business decision-making methodology to engage legal methodology (analysis) to determine and comply with legal obligations. Therefore, the concept-sensitive managerial analysis with law shows the effects of legal rules on the substance (concepts) of business disciplines and aids and informs business decision-making methodology that must engage legal methodology to use legal rules.

II. EXISTENCE AND SCOPE OF A CONCEPT-SENSITIVE MANAGERIAL ANALYSIS OF LAW

The concept-sensitive managerial analysis with law is an integrated conceptual framework with three major components to demonstrate the impact of the legal rule on business and business disciplines. Foremost, well-established business concepts are applied to legal rules to explain and identify business situations that contain business opportunities and are subject to or free from legal obligations. Next, managerial discretion theory identifies business situations in which business managers and organizations lack the latitude under business concepts, legal rules, and other constraints to use business situations and their opportunities. Finally, the most useful and effective situations are used by business managers to recognize and analyze a decisional situation and thereafter to initiate decision making. The business decision-making methodology engages legal-analytical methodology to use legal rules (legal advice) in each decisional step, if needed, to determine and conform to legal obligations.

A. Fact-Sensitive Legal Rules and Legal Methodology

Business decisions can be curtailed by legal rules that apply to the business situation as well as other information and findings that enter the decisional steps of business decision making. Legal precedents are legal rules and principles that “attach[] a specific legal consequence to a detailed state of facts”¹³

¹² See John Collins, *Learning to Make Business Decisions in the Shadow of the Law*, 17 J. LEGAL STUD. EDUC. 117, 118 (1999) (discussing the use of law in the process of business decision making); Debra Dobray & David Steinman, *The Application of Case Method Teaching to Graduate Business Law Courses*, 11 J. LEGAL STUD. EDUC. 81, 82 (1993) (using business cases to teach business law in graduate legal studies in the school of business); *infra* Part V and accompanying notes (illustrating the use of concept-sensitive managerial analysis with law by applying organizational flexibility to criteria for determining the employment status of a worker).

¹³ *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 969–70 (3d Cir. 1979). In *Allegheny General Hospital*, the Third Circuit states that:

This “detailed state of facts”¹⁴ means that a legal rule is fact-sensitive and responsive to facts or to a particular dispute.¹⁵ A significant change to the set of facts or a specific situation could create the need for a different legal rule.¹⁶ Courts use legal rules to conduct a *fact-sensitive managerial analysis with law* that determines whether a business decision that was made on a specific set of facts or situation violates a legal rule.¹⁷ Courts apply fact-sensitive managerial analysis with the law to analyze business disputes. For example, a fact-sensitive managerial analysis has been used to scrutinize creditors’ claims in large bankruptcy¹⁸ and their attachment of property.¹⁹ It has also been used to determine accountability of business organizations and managers.²⁰ It can also be used to scrutinize claims arising under the business judgment rule,²¹ claims involving the allocation and

A judicial precedent attaches a specific legal consequence to a detailed set of facts in an adjudged case or judicial decision, which is then considered as furnishing the rule for the determination of a subsequent case involving identical or similar material facts and arising in the same court or a lower court in the judicial hierarchy.

Id. In this Article, the judicial precedent and legal rule are given the same meaning since both precedent and legal rule apply to the facts of a dispute. The precedent and legal rule serve the same purpose, though some precedents and legal rules are statutory interpretations and provisions, respectively. *See also* Landes & Posner, *supra* note 6, at 249–50.

¹⁴ *Allegheny Gen. Hosp.*, 608 F.2d at 969–970.

¹⁵ *Id.*

¹⁶ Landes & Posner, *supra* note 6, at 250 (finding that each decision leading to a precedent “determine[s] the legal significance of a slightly different set of facts”).

¹⁷ *See* Am. Fed’n of State, Cnty. & Mun. Emps. v. Ill. State Labor Relations Bd., 775 N.E.2d 1029, 1032–33 (Ill. App. Ct. 2002) (“utiliz[ing] the traditional, fact-[sensitive] managerial analysis to find that assistant public defenders were not managerial employees”); *Point Park Univ. v. NLRB*, 457 F.3d 42, 50 (D.C. Cir. 2006) (using a managerial analysis to determine whether employees are part of management); *Kewaunee Cnty. v. Wis. Emp’t Relations Comm’n*, 415 N.W.2d 839, 842 (Wis. Ct. App. 1987) (using managerial analysis to determine whether an employee who submits the budget is part of management).

¹⁸ *See* Christopher W. Frost, *Running the Asylum: Governance Problems in Bankruptcy Reorganizations*, 34 ARIZ. L. REV. 89, 132 (1992) (recognizing the need for managerial analysis of creditor’s claims in large bankruptcy).

¹⁹ *See* Erick Paul Smith, *The Uncertainty Of Community Property For The Tortious Liabilities Of One Of The Spouses: Where The Law Is Uncertain, There Is No Law*, 30 IDAHO L. REV. 799, 821–22 (1994) (describing managerial analysis based on a need to apply managerial approach to determine whether a creditor can attach community property to pay tort liability of a spouse when only one spouse committed a tort).

²⁰ *See* Jody Freeman, *The Private Role In Public Governance*, 75 N.Y.U. L. REV. 543, 633 (2000). The author notes the need to specify the accountability of both public and private organizations. *Id.* (citing Michael O’Hare et al., *The Privatization of Imprisonment: A Managerial Perspective in PRIVATE PRISONS AND THE PUBLIC INTEREST* 155–57 (Douglas C. McDonald ed., 1990)).

²¹ *See* Marcia Walter, *Aiding and Abetting the Breach of Fiduciary Duty: Will the Greenmailer be Held Liable?*, 39 CASE W. RES. L. REV. 1271, 1304 (1989) (“Since

use of resources,²² and the decisions of boards of directors.²³ Courts have used a fact-sensitive managerial analysis to address whether public and private employees were participating in the management of organizations or employers.²⁴ The fact-sensitive managerial analysis with law determines whether a business organization or manager has or should have complied with a legal obligation by applying a legal rule to a specific business situation.

The fact-sensitive managerial analysis is limited to a specific rule or precedent that is applied to a unique set of facts or situation. A precedent takes a number of years to establish a family, or domain, of business situations that contain legal obligations and business opportunities,²⁵ such as

retention of control was not the sole or primary cause for the payment of greenmail, the directors were protected by the business judgment rule. The lower level of scrutiny of the *managerial analysis* and judgment was easily satisfied.” (citing *Cheff v. Mathes*, 199 A.2d 548, 555–556 (Del. 1964)).

²² See Lester M. Salamon, *The New Governance And The Tools Of Public Action: An Introduction*, 28 FORDHAM URB. L.J. 1611, 1661–62 (2001). Professor Salamon states that:

As management theorist Regina Herzlinger has pointed out, “when resources are given to providers who in turn have the discretion to allocate the goods and services they produce ... [the] providers will try to attract consumers who will improve their measurable performance.” Regina Herzlinger & Nancy M. Kane, *A Managerial Analysis Of Federal Income Redistribution Mechanisms: The Government As Factory, Insurance Company, And Bank* 103 (Ballinger Pub. Co., 1979). In the process, however, redistributive goals may be sacrificed as producers engage in “creaming” to attract better-off clients. Although public agencies themselves are hardly immune from these pressures, the risks appear greater with indirect tools.

Id.

²³ See Larry W. Hunter, *Can Strategic Participation Be Institutionalized? Union Representation On American Corporate Boards*, 51 INDUS. & LAB. REL. REV. 557, 558 (1998). The author recognizes the role of the board of directors by stating how managerial analysis is used in business policymaking:

The board was not that interested in running the company. [Companies in this industry] today are sophisticated stuff; they're not going to be run by a quarterly board of directors meeting.

Like the outsiders of earlier studies, the interviewees in this study relied on management for information and analysis, and allowed the inside managers to set the board agenda. Directors did not perform or commission independent studies of company finances, product or labor markets, or merger opportunities. Rather, they saw the role of the board as overseeing managerial analysis in such areas.

Id. at 558.

²⁴ See *supra* notes 1–3.

²⁵ See Landes & Posner, *supra* note 6, at 250 (“[A] broader rule will generally require a series of judicial decisions—a string of holdings—for it is only from a series of decisions,

those business decisions that implicate the business judgment rule.²⁶ Under the fact-sensitive managerial analysis, it may take decades to develop a family of lawful situations. In a dynamic global marketplace, this lengthy development and reliance on precedent does not appear to minimize or avoid violations of the law. This slow development may prevent business organizations from seeking unique business situations that contain innovative and creative opportunities. These situations and opportunities call for a concept-sensitive managerial analysis with law that applies business concepts to legal rules to analyze and identify an orderly domain of business situations that contain business opportunities and are subject to or free from legal obligations.

1. Other Analytical Approaches Analyzing and Using the Law

Business disciplines would not be unique in using their concepts to evaluate legal rules and their uses and effects. Humanities, economics, and other social sciences apply their theories to legal rules to analyze and explain economics, social science, and other events.²⁷ Moreover, American and European business law scholars have been, and still are, studying the need to consider legal rules in making and using business strategies or a more proactive use of legal rules to create business advantages.²⁸ A concept-sensitive managerial analysis is not inconsistent with trends in social science and American and European approaches to study the use of law in business.

The concept-sensitive managerial analysis with law includes the use of the fact-sensitive managerial analysis as legal-analytical methods in business decision making to determine and conform to legal obligations. These methods

each determining the legal significance of a slightly different set of facts, that a rule applicable to a situation common or general enough to be likely to recur in the future can be inferred.”).

²⁶ See Walter, *supra* note 21, at 1271.

²⁷ Richard A. Posner, *The Decline Of Law As An Autonomous Discipline: 1962–1987*, 100 HARV. L. REV. 761, 764 (1987) (recognizing that the law and economics movement began in 1961 which is more than a half century ago). Business disciplines proffer no managerial analysis of law that relies on business concepts.

²⁸ See Robert C. Bird, *Law, Strategy, and Competitive Advantage*, 44 CONN. L. REV. 61, 63 (2011); George J. Siedel & Helena Haapio, *Using Proactive Law For Competitive Advantage*, 47 AM. BUS. L.J. 641, 641 (2010); Constance E. Bagley, *Winning Legally: The Value Of Legal Astuteness*, 33 ACAD. MGMT. REV. 378, 378 (2008); Constance E. Bagley, *What’s Law Got To Do With It?: Integrating Law And Strategy*, 47 AM. BUS. L.J. 587, 588 (2010); Robert C. Bird, *Pathways Of Legal Strategy*, 14 STAN. J.L. BUS. & FIN. 1, 2–3 (2008); David Silverstein & Daniel C. Hohler, *A Rule-of-Law Metric for Quantifying and Assessing the Changing Legal Environment of Business*, 47 AM. BUS. L.J. 795, 797–98 (2010); see generally Larry A. DiMatteo, *Strategies Contracting: Contract Law as a Source of Competitive Advantage*, 47 AM. BUS. L.J. 727 (2010).

enter and use fact-sensitive legal rules and fact-based legal advice in business decision making. They then use this advice to examine information, findings, and conclusions within business decision making. The legal-analytical methods recognize legal issues raised by the effects of new findings and information on fact-sensitive legal rules and fact-based legal advice in business decision making. These methods are basic parts of the traditional case analysis²⁹ that consists of and demonstrates legal analysis and reasoning in legal methodology.³⁰ Other analytical methods (statistical and operations research) also enter and use information, findings, and conclusions in business decision making.³¹ This entry and use may include statistical methods and findings (means, probabilities, etc.) to evaluate the feasibility of decisional alternatives.³²

Furthermore, legal-analytical methods should be taught in the same manner as other analytical methods and in the context of business decision making so that business managers learn to use these methods to enter, move, and use fact-sensitive legal advice and legal rules in business decision making.³³ Schools of business should teach legal-analytical methods to give managers more insight into bundled legal decision making that consists of discrete fact-sensitive methods to determine whether or not new information and findings create the need for new or additional legal advice. Prudently, law schools are teaching business analytical methods to law students to give more insight into business decision making by corporations.³⁴ Thus, legal advice should be accompanied by legal-analytical methods to enter and use this advice and determine if new findings and conclusions create the need for more legal advice (rule) in the process of business decision making.

²⁹ See *Holloway—Primer*, *supra* note 9, at 622–23 (making an earlier argument to unbundle legal methodology (analysis and reasoning) to teach MBA students legal-analytical methods); *infra* Part IV.B and accompanying notes (identifying analytical parts or methods of judicial case analysis).

³⁰ See *Holloway—Primer*, *supra* note 9, at 622–23; *infra* IV.B and accompanying notes.

³¹ See Howell E. Jackson, *Analytical Methods for Lawyers*, 53 J. LEGAL EDUC. 321, 321–22 (2003) (explaining the quantitative analytical skills that are used by corporate managers but should be known and understood by lawyers); ROBERT E. SCHELLENBERGER, *MANAGERIAL ANALYSIS* 8 (Robert B. Fetter, ed. 1969) (“[M]anagerial analysis is the systematic investigation, compilation, manipulation, and presentation of information to a decision maker in order to aid the decision-making process.”).

³² See *id.*

³³ See generally SCHELLENBERGER, *supra* note 31, at 8 (using managerial analysis to aid and inform business decision-makers); *AACSB-Eligibility Standards*, *supra* note 7, at 30–31.

³⁴ See Jackson, *supra* note 31, at 321–22; see also SCHELLENBERGER, *supra* note 31, at 8.

B. Situation-Sensitive Business Concepts and Decision-Making Methodology

Some business managers and organizations recognize and explain situations and their opportunities and advantages by using finance, management, and other business knowledge. This knowledge consists of business concepts that are an “ordered set of assertions about a generic behavior or structure assumed to hold throughout a significantly broad range of specific instances.”³⁵ This “broad range of specific instances”³⁶ means that a business concept is fact-sensitive or situation-sensitive and responds to specific instances and circumstances of business conditions, environments, or relationships.³⁷ Both business concepts and legal rules are situation-sensitive assertions or statements³⁸ that permit a concept-sensitive managerial analysis with law to analyze and identify a domain of shared business situations. A concept-sensitive managerial analysis uses a business concept’s “broad range of specific instances”³⁹ to evaluate and determine the presence and range of the legal rule’s “detailed set of facts.”⁴⁰ The concept’s specific instances and rule’s set of facts coexist in a domain that contains a kindred set of business situations.

Finance, management, and other business education include analytical and business tools and knowledge⁴¹ that are taught to business managers to define and respond to decisional situations that initiate business decision making. Analytical methods are qualitative and quantitative and aid business managers in finding and addressing business, economic, and other problems.⁴² These methods aid and inform business managers who must recognize a business need or problem that is a decisional situation to initiate business decision making.⁴³ In fact, some law students are taught

³⁵ Wacker, *supra* note 8, at 364. I do not argue that every business concept can be applied to a legal rule. The germane business concepts must be usable by scholars and managers to identify circumstances, instances and conditions. These concepts must have applied uses.

³⁶ *Id.*

³⁷ *See id.*

³⁸ *See id.*; *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 969–70 (3d Cir. 1979).

³⁹ Wacker, *supra* note 8, at 364.

⁴⁰ *Allegheny Gen. Hosp.*, 608 F.2d at 969–70.

⁴¹ *AACSB-Eligibility Standards*, *supra* note 7, at 30–31 (identifying quantitative and qualitative analytical knowledge and methods that must be provided by graduate and undergraduate curricula of colleges of business).

⁴² *See* SCHELLENBERGER, *supra* note 31, at 8; *see generally AACSB-Eligibility Standards*, *supra* note 7, at 30–31 (requiring AACSB members to teach analytical methods in graduate and undergraduate students).

⁴³ *See id.*

basic analytical knowledge and methods to aid in understanding corporate policymaking and decision making.⁴⁴ Lawyers present legal issues (or advice) on business situations and opportunities to well-educated business managers. Yet, it would be foolhardy for corporate managers to ignore the use of analytical methods and their findings (such as statistical methods and their mean and standard deviation)⁴⁵ to assess legal issues and public policy concerns. Inherently, legal rules and issues do not prohibit the use of business and other analytical methods and knowledge to evaluate or determine legal obligations.⁴⁶ Analytically, the concept-sensitive managerial analysis uses business knowledge, both concepts and methods, to aid and inform the use of legal rules and advice to determine and conform to legal obligations.

1. Using Business Concepts and Analytical Methods to Examine Law

One must ask whether business scholars, managers, and executives, either knowingly or unknowingly, use business concepts and analytical methods of their respective business disciplines to analyze and use legal rules and their applications. These analyses are more likely because business knowledge and analytical methods are more widely researched and taught in colleges and schools of business today.⁴⁷ Currently, this analytical

⁴⁴ See Jackson, *supra* note 31, at 321–22 (identifying quantitative analytical skills that law schools should teach corporate lawyers to understand corporate decision making).

⁴⁵ See generally *AACSB-Eligibility Standards*, *supra* note 7, at 30–31 (listing analytical knowledge and tools that prospective managers should be taught in colleges and schools of business).

⁴⁶ See Jackson, *supra* note 31, at 321–22 (identifying quantitative analytical skills that law schools should teach law students to understand corporate policy-making and decision making).

⁴⁷ See *AACSB-Eligibility Standards*, *supra* note 7, at 30–31 (establishing standards that require schools of business to teach analytical knowledge and tools to business students).

In a trade newsletter, a dean of a school of business describes the creation and use of business concepts that must exist in harmony in the schools of business. Hugh Courtney, *Dean's Corner: Rigor, Relevance, and Use-Inspired Research*, AACSB INTERNATIONAL, ENEWSLINE: GLOBAL BUSINESS EDUCATION NEWS AND INSIGHT, (Dec. 2013), <http://enewsline.aacsb.edu/deanscorner/courtney.asp> [hereinafter *AACSB-Inspired Research*]. Dr. Hugh Courtney, Dean, D'Amore-McKim School of Business, Northeastern University, states that:

Business schools have dual research missions. First, we must develop and disseminate cutting-edge research that shapes academic thought. Such research ensures that we are teaching timely, rigorous, and evidence-based concepts that advance management science. A business school that isn't built on a strong research foundation, on the other hand, may be too reliant on isolated "war stories," outdated theories and "collective wisdom" that is just plain wrong.

knowledge and these tools are also taught in schools of law to help lawyers better understand corporate decision making.⁴⁸ Moreover, in *The Path of the Law*,⁴⁹ Justice Holmes recognizes that economics and statistics would play a prominent role in studying the purpose of the law in our society.⁵⁰ More than a century later, business disciplines provide more business education that includes analytical methods and business knowledge, such as statistical methods and marketing knowledge.⁵¹ Yet, business disciplines have been and still are slow to share Justice Holmes's foresight that a discipline other than law can play a role in the study of law. Although business concepts may have foundations in economics and mathematics,⁵² the business disciplines seem not to know or understand the heavy analytical and intellectual impact of legal rules on business disciplines and their concepts. For example, employment-at-will and other legal rules may erode the use of or increase the risk of using rational business concepts (a legitimate allocation of resources) while business managers and scholars show interest only in the facts of the disputes, namely the discharge of the employee.⁵³ Business disciplines are left to defend the

Our second mission is to have a significant, positive impact on business practice. We must translate this cutting-edge and often arcane academic research into relevant concepts, tools and frameworks that our students, alumni, and the business community at large actually use.

Some argue that these two missions—producing rigorous research and having a profound impact on business practice—are in conflict ... [T]his is absolute nonsense.

Id.

⁴⁸ See Jackson, *supra* note 31, at 321–22.

⁴⁹ Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

⁵⁰ See *id.* In *The Path of the Law*, Justice Holmes recognizes that statistics and economics will become important to understand the law when he states that:

For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics. It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.

Id. More than a century later, the business disciplines put forth no concept or theory of law and business to explain or study the law and its impact on business and business disciplines.

⁵¹ See *AACSB-Eligibility Standards*, *supra* note 7, at 30–31.

⁵² See *infra* note 84 and accompanying text (describing modern portfolio theory).

⁵³ See, e.g., Ed Sentell & Randall Robbins, *Employment At-Will*, 11 J. LEGAL, ETHICAL AND REG. ISSUES 1, 1 (2008) (finding that the employment-at-will doctrine is confusing to employers); Robert C. Bird, *Rethinking Wrongful Discharge: A Continuum Approach*, 73 U. CIN. L. REV. 517, 519 (2004) (discussing the “rapid changes in employment at will between 1978 and 1988 ...”); Peter Stone Partee, *Reversing the Presumption of Employment At Will*, 44 VAND. L. REV. 689, 691 (1991) (discussing “the economic and moral

employment-at-will doctrine based on a specific set of facts or situation that rises and falls with litigation or regulation rather than on the continuity of logical or rational management, financial, and other concepts. Yet, economics and other social sciences use their analytical methods and knowledge (theories and principles) to examine and respond to the impact of legal rules on their respective concepts.⁵⁴ Thus, business scholars and managers need to consider a theoretical or conceptual approach that is more sensitive to the impact of law on business disciplines and professions.

C. Managerial Discretion to Remove Unusable and Unmanageable Situations

Business concepts and legal rules constrain or enable the latitude of managers and organizations who must select from the domain one situation that will be analyzed or defined to initiate business decision making. This latitude is managerial discretion⁵⁵ that “effect[s] resource allocation decisions and regulatory restraints [that] could alter profit-making behavior.”⁵⁶ Managerial discretion as economic and business theories are similar “as their focus on the same core construct might suggest.”⁵⁷ Our focus is managerial discretion of organization theory that “derives from environmental, organizational and individual sources, each of which can constrain or enable strategic action in organizations.”⁵⁸ The initial three levels of analysis of managerial discretion are environmental, organizational, and individual,

rationales for replacing the at-will doctrine with a general just cause dismissal standard and propos[ing] an alternative that fairly and efficiently balances all the interests involved”).

However, it seems as though few business concepts are used to support or justify this doctrine. An over-emphasis on a legal rule and not a business concept points to the statement made by Justice Holmes that “[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.” Holmes, *supra* note 49, at 469. The employment-at-will standard should rest on business concepts of the business disciplines that make and justify decisions to allocate and reallocate resources.

⁵⁴ See Shai Lavi, *Turning The Tables on “Law And ...”: A Jurisprudential Inquiry into Contemporary Legal Theory*, 96 CORNELL L. REV. 811, 837 (2011). Professor Lavi states that “[i]n matters of theory and methods, ‘law ...’ subordinates legal scholarship to other disciplines like economics, political science, history, sociology, statistics, philosophy, and literature. These disciplines provide the methods of analysis and the theory, while law becomes merely the subject matter of investigation.” *Id.* at 812 (citing Philippe Nonet, *In the Matter of Green v. Recht*, 75 CALIF. L. REV. 363, 363 (1987)).

⁵⁵ Hambrick & Finkelstein, *supra* note 10, at 371.

⁵⁶ Oliver E. Williamson, *Managerial Discretion and Business Behavior*, 53 AM. ECON. REV. 1032, 1032–33 (1963).

⁵⁷ Sydney Finkelstein & Margaret A. Peteraf, *Managerial Activities: A Missing Link in Managerial Discretion Theory*, 5 STRATEGIC ORG. 237, 238 (2007).

⁵⁸ *Id.* at 237.

and a fourth level is managerial activity, which was added later.⁵⁹ Managerial activity is “a discrete managerial function or task, involving a course of action that could be configured in a variety of ways.”⁶⁰ “Managerial activities are ... distinguish[able] from [managerial] actions in that they comprise *a set of actions* that may be narrowly or broadly circumscribed.”⁶¹ Managerial discretion constrains and enables managers and organizations to act in or react to business situations.

Managerial discretion theory and analysis have made contributions to business organizations by explaining happenings and the latitude available in some activities, transactions, and relationships. Managerial discretion limits the domain to business situations that are useful and effective for managers to initiate business decision making. “Predictions from the theory have proved useful in explaining a host of organizational phenomena.”⁶² “[S]ome types of activities circumscribe discretion more than others, just as some types of environments, organizations and personal characteristics limit managerial discretion more than others.”⁶³ Managerial discretion includes constraints and benefits of environmental, organizational, personal, and managerial activity levels.⁶⁴ Specifically, the task environment includes quasi-legal constraints, product differentiation, capital intensity, market growth, and other factors.⁶⁵ The “[q]uasi-legal constraints [are imposed on] [o]rganizations [that] in industries subject to heavy regulation or deriving their resources from government agencies, such as public hospitals, universities, and defense contractors, have less discretion than those in industries that do not face such restrictions.”⁶⁶ Legal, business, and other constraints make business situations less useful and effective (unusable or unmanageable) as decisional situations that initiate business decision making.⁶⁷ The analysis of managerial discretion or latitude begins with the constraints and benefits imposed by the business concept and legal rule on the domain of business situations and their opportunities.

1. Identifying the Less Useful and Ineffective Business Situations

Managerial discretion has some disadvantages but remains the better theory and analysis to identify and remove business situations that should

⁵⁹ *See id.*

⁶⁰ *Id.* at 239.

⁶¹ *Id.*

⁶² *Id.* at 238.

⁶³ *Id.*

⁶⁴ *See id.*

⁶⁵ Hambrick & Abrahamson, *supra* note 11, at 1429–30.

⁶⁶ *Id.* at 1429 (“Hambrick and Finkelstein specified seven industry-level (or task environment) factors that determine managerial discretion.”).

⁶⁷ *Id.*; Finkelstein & Peteraf, *supra* note 57, at 238.

have been identified but should not have been used to support the initiation of business decision making or make a business decision. Legal and business scholars and practitioners will face challenges to determine useful and effective business situations of the domain. One challenge is that managerial “discretion is a multifaceted, highly abstract concept that, by its very nature, cannot be directly observed.”⁶⁸ Notwithstanding this challenge, basic managerial discretion remains the better theory and analysis to determine legal, conceptual, and other kinds of constraints on, and benefits of, business situations.⁶⁹ These constraints make some situations unusable and unmanageable to initiate business decision making and further organizational objectives.⁷⁰ These situations that are subject to legal, business, and other constraints must be identified and removed from the domain. Ultimately, business managers and organizations can select the most effective and useful situation and then define or analyze this situation to determine if it fits the specific decisional situation (organizational problem or need) to initiate business decision making.

The concept-sensitive managerial analysis identifies a domain of business situations. One situation is most effective to further the desired organizational objective⁷¹ and is most useful to solve the organizational problem under the legal rule and business concept. This most useful and effective business situation is the *decisional* situation that initiates business decision making that identifies and evaluates alternatives and makes, implements, and follows up on a business decision. Consequently, this domain must be limited to only usable and manageable situations that contain known risks and uncertainties, and known unlawful and lawful opportunities. Every business situation is not capable of providing business opportunities and conforming to legal obligations to initiate business decision making. Other situations may not be able to further organizational objectives, and thus do not serve as a means to a desired end. Yet, some legal rules and business concepts may enable or provide benefits to a business situation, such as ERISA and its impact on individual retirement planning.⁷² ERISA imposes

⁶⁸ Hambrick & Abrahamson, *supra* note 11, at 1438.

⁶⁹ See *infra* Part V.C. and accompanying notes (discussing the actual application of managerial discretion theory to analyze a domain of business situations involving a legal rule and business concept).

⁷⁰ *Id.*

⁷¹ See Peter Drucker, *Theory of Business*, HARV. BUS. REV., Sept.–Oct. 1994, at 95, 102–03 (commenting that managers should pursue original objectives). The late Professor Drucker states that: “[t]o diagnose problems early, managers must pay attention to the warning signs. A theory of the business always becomes obsolete when an organization attains its original objectives. Attaining one’s objectives, then, is not cause for celebration; it is cause for new thinking.” *Id.*

⁷² See Daniel A. White, *How to Provide Retirement Financial Planning Advice to Employees*, 66 EMP. BENEFIT PLAN REV. 1, 2 (2012) (“Bringing in experienced financial

manageable constraints on the administration of employee benefit plans and their assets,⁷³ but ERISA expands the need for personal financial advice to provide existing business opportunities, such as individual retirement planning.⁷⁴ Legal, business, and other constraints on business situations may not allow managers the latitude to select a specific situation to initiate business decision making or further business objectives to make a decision.

III. LEGAL AND BUSINESS KNOWLEDGE OF THE CONCEPT-SENSITIVE MANAGERIAL ANALYSIS

The concept-sensitive managerial analysis with law recognizes that statements or assertions of a legal rule and business concept show sensitivity to a similar situation or set of facts. Both law and business contain distinct bodies of knowledge that are fact-sensitive or situation-sensitive statements or assertions and describe a set of facts, happenings, or circumstances. Legal rules impose obligations on business managers and organizations that utilize business concepts to identify business opportunities. Most significantly,

advisors is a proactive step; a way to affordably provide perspective, information and advice for employees who are struggling to understand a sometimes confusing array of [investment] options.”); John K. Eason, *Retirement Security Through Asset Protection: The Evolution of Wealth, Privilege, and Policy*, 61 WASH. & LEE L. REV. 159, 188 nn.102–03 (2004). Professor Eason states that:

[O]ne might emphasize the congressional authorization of the § 401(k) plan as important in the wealth accumulation/asset protection dynamic, but that focus would be too narrow. See Revenue Act of 1978, Pub. L. No. 95-600, § 135, 92 Stat. 2763, 2785-2787 (codified at I.R.C. § 401(k)) (amending I.R.C. § 401 and authorizing new § 401(k)). The broader and more significant view reveals that congressional concern for the security of workers' retirement savings prompted the 1974 adoption of pervasive new pension legislation, popularly known as ERISA, which today serves as the foundation of the private pension system. ERISA, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 26 U.S.C. and 29 U.S.C.).

Id. at 188.

⁷³ See *infra* Part II.A.1 and accompanying notes (discussing restrictions imposed by the Employee Retirement Income Security Act (ERISA) on the investment of employee benefit plan assets).

⁷⁴ See White, *supra* note 72, at 6 (using financial planning to educate and advise participants of employee retirement plan); Eason, *supra* note 72, at 188 nn.102–03 (recognizing that ERISA allows employees to save for retirement). For comments on the use of IRAC (Issue, Rule, Application, and Conclusion) to teach abstract analysis, see Jane Kent Gionfriddo, Daniel L. Barnett, & E. Joan Blum, *A Methodology for Mentoring Writing in Law Practice: Using Textual Clues to Provide Effective and Efficient Feedback*, 27 QUINNIPIAC L. REV. 171, 188 n.71 (2009) (recognizing that IRAC does not teach students abstract analysis of law).

managerial discretion theory and analysis can be used to determine the latitude of business managers and organizations under business concepts, legal rules, and other factors.

A. Fundamental Characteristics of Legal and Business Knowledge

Fact-sensitive legal and business knowledge support the existence of a concept-sensitive managerial analysis with law. As stated in Part II.B, business knowledge includes operations research and is underpinned by many economic theories that provide continuity, predictability, and validity⁷⁵ to individual and organizational behavior. Legal knowledge describes transactions, circumstances, and relationships that have been studied by social science disciplines,⁷⁶ and provides continuity and predictability to private relationships and transactions, such as employment, contract, sales,

⁷⁵ See ARTHUR A. THOMPSON, *ECONOMICS OF THE FIRM: THEORY AND PRACTICE* 11 (4th ed. 1985) (stating that economic theory provides continuity and predictability); see also Wacker, *supra* note 8, at 364 (using operations research to defining business theory that provides continuity and predictability).

“[A]cademics point to a theory as being made up of four components” Wacker, *supra* note 8, at 363. Professor Wacker states that a theory consists of “(1) definitions of terms or variables, (2) a domain where the theory applies, (3) a set of relationships of variables, and (4) specific predictions [of]factual claims” *Id.* (citing, SHELBY D. HUNT, *MODERN MARKETING THEORY: CRITICAL ISSUES IN THE PHILOSOPHY OF MARKETING SCIENCE* (Southwestern Publishing, 1991); MARIO BUNGE, *SCIENTIFIC RESEARCH 1: THE SEARCH FOR SYSTEM* (Springer-Verlag, 1967); PAUL REYNOLDS, *A PRIMER IN THEORY CONSTRUCTION*, (Bobbs-Merrill Educational Publishing, 1971)).

Professor Wacker also states that a definition of theory should answer questions. Wacker, *supra* note 8, at 364. He states that:

In short, any definition of theory should answer common questions that researchers face. First, theory defines all variables by answering the common questions of who and what. The domain specifies the conditions where the theory is expected to hold by using the common questions of when and where. The relationship-building stage specifies the reasoning by explaining how and why variables are related. And last, the predictive claims specify the whether “Could a specific event occur?”, “Should a specific event occur?”, and “Would a specific event occur?” In short, the definition of theory provides guidelines to answer the common questions that occur in natural language. From the pragmatic perspective of operations managers, the predictive claims from theory answer the could, should, and would questions which are quite critical for managers’ future success. Consequently, the should, could and would questions are very important for theory to be considered useful to managers.

Id.
⁷⁶ See Lavi, *supra* note 54, at 812–15.

and securities.⁷⁷ Thus, business and legal knowledge that include situation-sensitive or fact-sensitive statements and assertions should be able to analyze and identify kindred business situations or sets of facts.

Many decisions should be based on business concepts that include financial, management, and other theories and principles. These concepts are learned in schools and colleges of business by prospective business managers to guide and operate the various business functions, such as finance and marketing.⁷⁸ Business concepts can identify and analyze business situations that contain business opportunities.⁷⁹ Finally, finance, management, and other business concepts add predictability and continuity⁸⁰ to both the analysis and identification of business situations that are subject to or free from legal obligations and that contain useful and effective business opportunities.

1. Impact of Losing Business Concepts Based on Legal Rules

A concept-sensitive managerial analysis with law is based on established business concepts⁸¹ that can be less useful and effective due to legal obligations constraining business situations. Still, much attention is often given to the loss of business situations (set of facts) under precedents and regulation, such as the facts of a discharge of an employee under the employment-at-will doctrine.⁸² Moreover, when business situations are not based on business concepts, business disciplines can unknowingly suffer full or partial loss of their substance (business concepts) that once could aid managers in analyzing and identifying business situations.⁸³ Business

⁷⁷ See Landes & Posner, *supra* note 6, at 250 (recognizing that precedents apply to situations likely to recur).

⁷⁸ AACSB-Eligibility Standards, *supra* note 7, at 30–31.

⁷⁹ See *infra* Part V.C. and accompanying notes (applying a business concept to the legal rule to identify business situations).

⁸⁰ See Thompson, *supra* note 75, at 11 (stating that economic theory provides continuity and predictability); Wacker, *supra* note 8, at 364 (using operations research to define business theory that provides continuity and predictability).

In *The Path of the Law*, Justice Holmes describes the need for and value of prediction to determine the limits of law. Holmes, *supra* note 49, at 457. Justice Holmes describes the need for prediction by stating that “[p]eople want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.” *Id.*

⁸¹ See AACSB-Eligibility Standards, *supra* note 7, at 30–31 (listing business concepts that should be taught to prospective business managers).

⁸² See Sentell & Robbins, *supra* note 53, at 3–5.

⁸³ See *infra* Part II.B.1 and accompanying notes (explaining the use of finance theory that is no longer used but was replaced by another theory).

disciplines need to measure or evaluate the analytical strength of a business concept when a specific legal rule has the potential or ability to cause its loss. When business concepts are applied to legal rules, they identify the unlawful, irrational, and irrelevant business situations that are unusable and unmanageable to initiate decision making. Legal rules, business concepts, and other factors are constraints on the latitude of business organizations and managers and do not permit use of all business situations.⁸⁴ To illustrate, applying the portfolio management theory to employee benefit plan asset management rules identifies portfolio management situations that contain investment opportunities and obligations to invest employee benefit plan assets.⁸⁵ These asset management rules permit plan managers to define and use only lawful portfolio management situations that contain investment opportunities and ERISA obligations.⁸⁶ If a business portfolio management situation is unlawful under employee benefit asset management rules, plan asset managers have no managerial discretion to use this particular situation to select investment opportunities.⁸⁷ In this instance, the portfolio management theory is constrained by asset management rules. A concept-sensitive managerial analysis with law shows that business concepts can be constrained by legal rules, which leave business managers

⁸⁴ See David Schaengold, *Decade of Change: Revising Trust Investment Law to Coordinate with Modern Portfolio Theory*, 26 TAX MGMT. EST. GIFTS & TR. J. 258, 260 (2001) (explaining how modern portfolio theory replaced prudent investor rule to make investment decisions).

⁸⁵ See W. Scott Simon, *Illuminating the "Broad Range" Requirement of ERISA Section 404(c) with the Language of Modern Portfolio Theory Found in the Uniform Prudent Investor Act and the Restatement 3rd of Trusts (Prudent Investor Rule)*, J. PENSION BENEFITS, Autumn 2005, at 87, 88; Schaengold, *supra* note 84, at 260. Mr. Simon states that:

ERISA, long before promulgation of the Restatement or the Act, was actually first to apply key tenets of modern portfolio theory to the management of assets by investment fiduciaries. "[I]n Labor Reg. § 2550.404a-1 (42 FR 54122, 1977), the DOL determined that ERISA redefined the investment duties of fiduciaries to require [them] ... to act as a prudent investment manager under the modern portfolio theory." [See "Legal Memorandums for Prudent Investment Practices," written by Fred Reish and Bruce Ashton for the Foundation for Fiduciary Studies.] "[B]oth the [United States Department of Transportation] ... and the courts have found that ERISA's investment provisions are based on ... modern portfolio theory." [See "A Prudent Process for Selecting 401(k) Investment Options (Part I)" by Fred Reish, July 2003.]

Simon, *supra*, at 88.

Although plan administrators and asset managers are fiduciaries under ERISA, they make financial investment or asset management decisions that require the use of business and financial concepts. *Id.*

⁸⁶ See Simon, *supra* note 85, at 88; see also Schaengold, *supra* note 84, at 260.

⁸⁷ *Id.*

and organizations with less latitude to use business situations that contain business opportunities but are subject to restrictive legal obligations.

B. Concept-Sensitive Analysis to Describe the Effects of Law on Business

The application of business concepts to legal rules creates the need to define and describe the conceptual area between law and business disciplines, actually a legal-managerial relationship. This conceptual area can be described by a taxonomy that explains the effects of law on business at the level of the legal rule and business concept. This taxonomy includes assertions that describe: (1) the cause of regulation created by organizations making the same or similar inadequate decisions; (2) the nature of a legal rule diminishing the utility of business concepts; and (3) the quality of a legal rule hindering the ability to implement a business decision. The conceptual area rests on the use of managerial discretion theory and analysis as a continuous measure of the cumulative effects caused by legal rules on business powers and rights at any one time, such as the employment-at-will doctrine's effects on the need to reallocate resources within business organizations. The cumulative effects include the legal restrictions imposed on a business organization needing to make a decision, such as legislative acts and judicial precedents restricting the employment-at-will doctrine.

Business concepts can identify business situations that contain business opportunities and are free of legal obligations. These business situations can still cause substantial harm to important public interests, such as retirement security and employee welfare, though they are not subject to a legal obligation.⁸⁸ The most harmful situations amount to a *managerial failure*. Some business situations are subject to very few, if any, legal obligations but still need to be sensitive to public policy to avoid undermining an important public interest, such as retirement security.⁸⁹ Although a business concept may identify and analyze useful and effective business situations,⁹⁰ business organizations may need to consider limiting organizational and individual latitude of these particular situations in order to minimize harm to an important public interest. Simply, these organizations may want to avoid these situations or better manage existing business situations and their business opportunities. A managerial failure is a conceptual area between business concepts and public policy that requires regulation in order to alleviate substantial harm to an important public interest. Simply, a

⁸⁸ See, e.g., 29 U.S.C. § 1001 (2012) (establishing federal employee benefit regulation to protect retirement security by requiring plan administration, vesting and other requirements).

⁸⁹ See 29 U.S.C. § 1003(a) (2012) (stating that ERISA covers employee benefit plans but does not mandate employers to grant employee benefits).

⁹⁰ See Schaengold, *supra* note 84, at 258.

managerial failure triggers the making of regulation that imposes obligations on business managers and organizations to restrict harmful business situations and their opportunities, such as discriminatory employment practices or manufacturing practices harming environmental quality.

1. Conceptual Description of the Decline or Effectiveness of Concepts

Legal rules can cause a substantive loss to or decline of business disciplines by eliminating business situations that were specified by a business concept. A concept-sensitive managerial analysis identifies business concepts that can contain few or no business situations and opportunities. A fact-sensitive managerial analysis identifies a business situation that may violate a legal rule, such as asset management rules, and contain no business opportunities.⁹¹ The loss of useful and effective situations that had been, or could have been, identified by a business concept shows the elimination or decline of the business concept.⁹² The elimination or decline of a business concept under a fact-sensitive managerial analysis of a legal rule is a managerial loss to the business discipline. A managerial loss identifies business concepts that can no longer form a domain of usable and manageable situations. An example that adds some light to a managerial loss is the demise of the value approach under ERISA. The value approach to asset management had been used to perform investment or asset management under federal employee benefit asset management rules.⁹³ These rules no longer permit the value approach⁹⁴ to identify and analyze asset management situations that contain investment or asset management opportunities and employee benefit management obligations.⁹⁵ The value approach was replaced by modern portfolio theory that was adopted by federal employee benefit asset management rules.⁹⁶ The value approach is an invalid business concept under ERISA asset management rules and a managerial loss to the finance discipline, namely trust management, to manage employee benefit plan assets.⁹⁷ Business intellectuals and organizations that rely entirely on a fact-sensitive managerial analysis may be using outdated or declining business concepts.⁹⁸ Unknowingly, business intellectuals that do not replace outdated business concepts may depend on state and

⁹¹ *See id.* at 260.

⁹² *See id.* (showing that the value approach is no longer an acceptable business concept under ERISA).

⁹³ *See id.*

⁹⁴ *See id.*

⁹⁵ *See id.*

⁹⁶ *See id.*

⁹⁷ *See id.*

⁹⁸ *See id.*

federal criminal and civil attorneys to incrementally cull outdated business concepts by removing business situations and taking managerial discretion.

Legal rules may permit business concepts to analyze and identify the fewest business situations and may further only one or two organizational objectives. When the legal rule is broader than the business concept, lawful situations or highly restrictive situations do not exist under this concept. When business disciplines offer no concept to guide the manager, the unlawful business situation is merely the loss of a situation or a set of facts. The application of the business concepts to legal rules may analyze and identify only the fewest business situations that contain few business opportunities and are subject to strict legal obligations, such as ERISA restrictions on the plan sponsor's use of plan assets.⁹⁹ The business concept that furthers the fewest objectives lacks managerial effectiveness. These situations and opportunities further the fewest organizational objectives, such as the management of employee benefit plan assets,¹⁰⁰ but are not managerial losses. Moreover, some situations may be extremely risky due to narrow opportunities and strict legal obligations. A legal rule that is broad enough to cover much of the concept's circumstances limits the ability of the concept to further financial, management, and other objectives, such as making profits and increasing market share.

C. Business Concepts to Describe the Managerial Nature of Situations

Business concepts are applied to legal rules to analyze and identify business situations that may cause or contain a policy conflict between a business situation and public interest, or may lead to a dispute requiring an interpretation of the rule. Some situations may harm or undermine a public interest, such as employee welfare, when business managers repeatedly use those situations that are free from legal obligations, for instance, the discharge of an employee under the at-will doctrine.¹⁰¹ Business situations that are harmful to an important or fundamental public interest may force legislative policymakers to consider whether business organizations can use these situations and one or more business opportunities to make decisions, such as discharge of employees on any grounds.¹⁰² Some situations that are governed by ambiguous legal rules must wait for courts to decide whether the application of the concept to the ambiguous rule can identify and analyze lawful business situations and their business opportunities.¹⁰³

⁹⁹ See *id.* at 261.

¹⁰⁰ See *id.*

¹⁰¹ See Sentell & Robbins, *supra* note 53, at 1–2.

¹⁰² See *id.* at 2.

¹⁰³ See, e.g., *id.* at 1 (discussing Mississippi court decisions involving employment at-will doctrine).

Some business situations that were used as decisional situations to initiate business decision making still could lead to regulation or cause litigation to address a public policy concern or legal issue, respectively.¹⁰⁴ The concept-sensitive managerial analysis presents a greater probability of identifying and removing those unlawful and harmful situations.

The domain of business situations is either descriptive or actual in the application of a business concept to the legal rule. The domain is placed in categories or classes to show the multiplicative nature of a rule or concept with multiple elements and parts. This nature allows managers to make creative and innovative decisions by identifying more feasible alternatives, that is, business opportunities, under a concept-sensitive managerial analysis. On one hand, descriptive domains contain too many situations to analyze and identify. These domains are likely to occur when the application of the concept to the rule is not restricted by either the concept or rule, for instance, applying organizational flexibility¹⁰⁵ to criteria for determining employee status. Normally, applied business concepts should be broader than the legal rule in a free enterprise system. The descriptive domain lists or outlines situational or factual parameters that permit managers to later find and identify a group of business situations.¹⁰⁶ On the other hand, the actual domains identify and analyze business situations that are restricted in number by the business concept or legal rule (or lack thereof), for example, no ERISA obligation requiring employers to grant an employee benefit plan.¹⁰⁷ An actual domain permits a more immediate selection of a business situation to support a decisional situation that fits the organization's business problem or need. Thus, a concept-sensitive managerial analysis analyzes and identifies a domain of business situations that can be either concisely described as situations or broadly described as factual parameters depending on the breadth of the rule or concept.

1. Rules and Concepts as Major Constraints on Business Situations

A business concept applied to a legal rule informs business managers of a domain of business situations that contain business opportunities. These managers want or need business opportunities to make profits and other advantages and further specific organizational objectives that include

¹⁰⁴ See *id.* at 2.

¹⁰⁵ See Martin R. Fellenz, *Flexibility in Management Theory: Towards Clarification of an Elusive Concept*, J. STRATEGIC MGMT. EDUC., at 65, 78 (2008) (explaining the use of organizational flexibility theory to create a flexible organization).

¹⁰⁶ See *infra* Part V.C.3 and accompanying notes (illustrating a domain that contains factual parameters to establish business situations to create a flexible workforce).

¹⁰⁷ See 29 U.S.C. § 1003 (2012). ERISA covers employee benefit plans but does not mandate that employers grant employee benefits.

increasing profits, market share, and employee welfare.¹⁰⁸ For example, the business concept of organizational flexibility¹⁰⁹ applied to the criteria for determining employee status identifies and analyzes the domain of employment situations that contain employment relationships (opportunities). Managers want various employment relationships to increase organizational flexibility in some employment situations.¹¹⁰ The application of the organizational flexibility concept to another legal rule, such as the employment-at-will doctrine,¹¹¹ identifies and analyzes another domain of employment situations and employer (business) opportunities. These situations may or may not be useful to support the initiation of business decision making or effective to further an organizational objective. Thus, a concept-sensitive managerial analysis aids business managers to analyze and identify business situations that may or may not be useful and effective to support a decisional situation that initiates business decision making.

Managerial discretion is business knowledge and analysis that jointly determines whether business concepts, legal rules, and other factors constrain or enable managers and organizations to find and select business situations and their opportunities. Business situations constrained by these concepts, rules, and other factors deny managers and organizations the use of some situations. For example, the criteria for determining employee status are legal rules that govern the creation of employment relationships.¹¹² These criteria are applied to determine whether business managers and organizations created an employer-employee or principal-independent contractor relationship with a worker.¹¹³ These criteria can be constraints when their use creates an employment relationship that either limits or prohibits organizational flexibility. Thus, the domain of business situations is subject to constraints that reduce or eliminate managerial discretion of some situations to initiate business decision making.

¹⁰⁸ See Drucker, *supra* note 71, at 102–03 (explaining that business organizations need objectives and should modify or change their objectives with successful performance).

¹⁰⁹ See Fellenz, *supra* note 105, at 78. Organizational flexibility is a business theory or concept, though one business scholar notes that organizational flexibility has no clear definition or statement of theory: “specific flexibility constructs are often ill-defined, and the frequent use of such constructs has propagated conceptual confusion This paper reviews and discusses the use of flexibility in three areas of the management literature” *Id.*

¹¹⁰ See *infra* Part V.C. and accompanying notes (applying the business concept to legal rule to determine a domain of business situation).

¹¹¹ See Sentell & Robbins, *supra* note 53, at 1 (finding that the employment-at-will doctrine is confusing to employers).

¹¹² See, e.g., RESTATEMENT (SECOND) OF AGENCY § 220 (listing the factors or criteria for determining whether a worker is an employee or independent contractor).

¹¹³ *Id.*

IV. BUSINESS DECISION-MAKING METHODOLOGY TO
ENGAGE LEGAL METHODOLOGY

Business decision-making methodology engages legal methodology to determine and conform to legal obligations in the process of business decision making. Legal obligations can constrain the latitude of managers and organizations to initiate and make business decisions.¹¹⁴ Business decision making is the dominant methodology, and the first step of business decision making is to define or recognize the decisional situation that is actually the problem or need.¹¹⁵ Moving from the domain of business situations to business decision making requires business managers to find or recognize the business problem (a decisional situation). Next, these managers find their most useful and effective situation within the domain that matches and supports the decisional situation. This first step takes place once a manager recognizes or determines that the business need or problem (may be referred to as situation) is in the domain of predetermined business situations. The manager selects the most useful and effective business situation to aid or inform the initiation of decision making by recognizing or finding the decisional situation (organizational need or problem).¹¹⁶ Other steps in business decision making engage basic legal methodology to aid and inform managers to enter and use a specific legal rule (legal advice) and legal-analytical methods to analyze facts and find the legal issue to determine legal obligations.

A. Business Decision Making to Define Situations and Make Decisions

A concept-sensitive managerial analysis uses business decision-making methodology that engages legal-analytical methods in each stage of the process of business decision making. Business decision-making methodology defines or analyzes each useful and effective situation to determine the need for a decision and actually recognize a decisional situation. The other stages identify alternatives, evaluate alternatives, select the best alternative, implement the chosen alternative (decision), and follow up and evaluate results.¹¹⁷ Each step or stage is a decisional or analytical mechanism to perform a specific analytical function that must enter and

¹¹⁴ Hambrick & Abrahamson, *supra* note 11, at 1429 (explaining that managerial discretion involves quasi-legal constraints).

¹¹⁵ See Earnest R. Archer, *How To Make a Business Decision: An Analysis of Theory and Practice*, 69 MGMT. REV. 54, 55 (1980) (recognizing that managers use decision-making processes that include multiple steps).

¹¹⁶ *See id.*

¹¹⁷ *See id.*

use legal, business, statistical, and other information and findings. The other steps evaluate and select a business opportunity to create or identify alternatives, and make a decision.¹¹⁸ These steps or stages also engage legal methodology to determine and conform to legal obligations and recognize legal issues. Business decision making illustrates the practical use of the concept-sensitive managerial analysis with law.

1. Illustrating the Use of the Process of Business Decision Making

Business decision-making methodology must engage legal and other analytical methods to enter and use legal information, findings, and conclusions. Business managers must select from the domain one useful and effective business situation. This specific situation supports the decisional situation, fits the organization's need or problem, and involves the business concept and legal rule, though other information and findings may be needed to make the decision. The first step of decision making defines and analyzes the decisional situation (finds a problem) to initiate decision making.¹¹⁹ The decisional situation would be supported by the most useful and effective business situation that contains business opportunities and is free from or subject to legal obligations. Other decisional steps identify and select business opportunities that are used to identify and select business alternatives.¹²⁰ Each step engages legal analytical methods¹²¹ that enter, move, and use legal information, findings, and conclusions (advice) to determine and conform to legal obligations.¹²²

Other analytical methods and tools also provide financial, statistical, accounting, and other information, findings and conclusions to determine and evaluate alternatives.¹²³ These methods may add information and findings that could raise legal issues regarding the legality of a decisional alternative or alter the original decisional situation, such as a proposal to outsource work rather than use a flexible workforce. Legal-analytical methods may need to recognize other findings and information to determine whether these findings and information change existing, or create new, legal obligations. The manager evaluates and selects one alternative that is

¹¹⁸ See *id.*; RICKY W. GRIFFIN, MANAGEMENT 269–74 (6th ed. 1999) (explaining business decision making in an older edition of a basic management textbook and demonstrating that that textbook could be used by business managers and policymakers who have not studied management).

¹¹⁹ See Archer, *supra* note 115, at 59.

¹²⁰ See *id.* at 58–61.

¹²¹ See *id.* at 55.

¹²² See *id.* at 55–58.

¹²³ See *id.* at 59–60.

the decision,¹²⁴ such as the use of a contingent workforce of independent contract workers. Managers may need to forego alternatives that had appeared earlier to be feasible, i.e., when the managers enter and weigh new legal and other information, findings, and conclusions, and the information and findings alter the original decisional situation and create new constraints and legal obligations.¹²⁵

The manager implements and performs follow-up to the business decision. These final steps may still engage legal-analytical methods to provide findings, information, and conclusions on legal issues of the results of this decision,¹²⁶ such as labor law and workplace safety issues in the use of a contingent workforce. Within this process, legal methodology is a fact-sensitive analysis that analyzes results to determine new facts and any new legal issues that may impose legal obligations. A concept-sensitive managerial analysis provides a useful and effective situation and depends on business decision making to use a useful and effective business situation to support analysis and recognition of the decisional situation. Business methodology engages legal-analytical methods to enter and use legal information, findings, and conclusions in any step of the process of business decision making where a legal issue or concern could arise or occur under a legal rule.

B. Legal Methodology to Determine and Conform to Legal Obligations

Legal-analytical methods must enter and use legal rules that are fact-sensitive information in the process of business decision making. Legal methodology is normally not usable by business managers as a one-piece analytical method. Legal methodology must be converted to fundamental or basic legal-analytical methods that can be more effectively used by business managers and intellectuals to enter, move, and use legal rules (advice) in the process of business decision making.¹²⁷ Simply, a legal rule is not self-moving or self-executing. Each method performs one of the following analytical functions: analyze facts, find the legal rule, recognize the issue, make a legal conclusion, and give a reason for the conclusion.¹²⁸

¹²⁴ See *id.* at 60–61.

¹²⁵ See *id.*

¹²⁶ See *id.* at 61.

¹²⁷ See *id.*

¹²⁸ See Judith B. Tracy, “*I See and I Remember; I Do and I Understand*” *Teaching Fundamental Structure in Legal Writing Through Use of Samples*, 21 *TOURO L. REV.* 297, 301 n.9 (2005) (recognizing that students need to learn skills incrementally); Louis N. Schulze, Jr., *Alternative Justifications for Law School Academic Support Programs: Self-Determination Theory, Autonomy Support, and Humanizing the Law School*, 5

Simply, they are recognizable analyses or parts of a judicial decision and currently taught to analyze judicial decisions in American business law courses by business law professors.¹²⁹ The concept-sensitive managerial analysis uses the legal rule to identify the domain of business situations and thereafter uses legal-analytical method(s) to determine and conform to legal obligations of each decisional situation and other steps of the process of business decision making.

1. Legal Methods to Use Legal Rules in Business Decision Making

A concept-sensitive managerial analysis aids and informs business managers and scholars of the use of legal rules that impose legal obligations. As stated above, legal-analytical methods are single-purpose tools or mechanisms, such as recognition of the issue.¹³⁰ Legal advice or rules are not fully self-executing or self-moving in a business decision-making process and business managers are required to enter, move, and use legal rules or advice in the process of business decision making.¹³¹ New statistical, financial, marketing, and other findings and information enter one or more steps in the process of business decision making, such as finding feasible alternatives. This entry requires business managers to consider how these findings and information relate to the decisional situation or a prior decisional step, such as to evaluate the alternatives.¹³² Once the situation had been defined or analyzed by the manager, the information or findings entering the decision-making process could create or find an illegal alternative, make an unlawful decision, or cause an unlawful implementation. For instance, the decision to increase growth by increasing sales or market

CHARLESTON L. REV. 269, 301 n.116, 302 (2011); Richard B. Cappalli, *The Disappearance of Legal Method*, 70 TEMP. L. REV. 393, 393–94 (1997).

When students read the judicial decision, they are “forced to learn the legal-analytical method of arguing two sides of a legal problem.” Schulze, *supra*, at 301 n.116. In contrast, a student who expects to only learn what the law is encounters “a flood of tasks focused more on rewiring the student’s analytical methodology.” *Id.* at 302. Legal-analytical methodology exists but its nature and use differ in academic programs, such as law and business. The most basic legal-analytical methods will suffice for schools of business that teach managers another process of decision making.

¹²⁹ See generally *Academy of Legal Studies in Business Strategic Plan*, ACADEMY OF LEGAL STUDIES IN BUSINESS, 1, http://alsb.mobi/wp-content/uploads/2012/05/Strategic_Plan.pdf (last visited Aug. 29, 2014). Business law professors are members of a national business law association that was founded in 1924.

¹³⁰ See *supra* Part IV.B and note 115.

¹³¹ See Archer, *supra* note 115, at 55 (recognizing that managers use decision-making models but these models may consist of several steps, unlike the traditional model).

¹³² See *id.*; Jackson, *supra* note 31, at 321–23 (stating that a few law schools are teaching basic analytical methods to allow lawyers to better understand the findings and information entering corporate decision making).

share is lawful, but the implementation of the decision by using a fraudulent accounting practice that records operating expenses as capital expenditures (that are amortized over the life of an asset) solely to increase annual profits could be unlawful. The legal rule must eventually be accompanied by one or more legal-analytical methods to inform and aid managers in recognizing the legal issue (need for more legal advice) in any step of business decision making.

New or additional information or findings can cause a substantial factual difference in the original situation or a preceding step. Let me illustrate. A business organization defines or recognizes a decision situation that creates a need to hire independent contract workers in order to respond quickly to changes in economic conditions. It identifies several alternatives using independent contract workers and permanent, full-time employees. The business concept of organizational flexibility asserts the use of a flexible workforce to create a more responsive organization. The criterion for determining employee status is a legal rule that does not permit employers to exercise control over independent contract workers.¹³³ Yet, new findings that enter the decision-making process to evaluate alternatives show that the use of independent contract workers includes an increased risk of low productivity and morale.¹³⁴ The organization must weigh these findings to evaluate its decisional alternatives and determine whether more control over workers must be exercised to maintain productivity and morale. This organization may need more legal advice to determine if it could exercise more control over these workers or should reconsider the employee classification. Therefore, new findings and information may create the need to reconsider the legal rule and thereafter request more legal advice.

C. Similar Analytical Properties of Legal and Business Methodologies

Business decision making is the dominant methodology and initially recognizes or defines the decisional situation or problem that identifies the need to make a decision. The definition or recognition of the decisional situation and other steps of business decision making determine the need for a legal rule to determine and comply with legal obligations. Although

¹³³ See Stephen F. Befort, *Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent Work*, 24 BERKELEY J. EMP. & LAB. L. 153, 172–73 (2003).

¹³⁴ See Patricia Ball, *Comment, The New Traditional Employment Relationship: An Examination of Proposed Legal and Structural Reforms for Contingent Workers from the Perspectives of Involuntary Impermanent Workers and Those Who Employ Them*, 43 SANTA CLARA L. REV. 901, 916–17 (2003) (citing Baker & Daniels LLP, *Risks and Benefits of Using Contingent Workers*, 11 INDIANA EMPLOYMENT LAW LETTER 1 (October 2001), LEXIS, News & Bus. Library).

the dominant methodology for performing or conducting a business transaction or action is business decision-making methodology, legal methodology is engaged or needed to enter, move, and use legal rules (advice) throughout the process of business decision making.¹³⁵ Again, law is not self-executing or self-moving. Legal methodology analyzes factual situations, finds legal issues, and applies legal rules to make a legal conclusion or determine legal obligations.¹³⁶ Judges and lawyers use legal methodology to make decisions and give legal advice. Business methodology must engage a basic legal methodology to enter and use legal rules (advice) to identify alternatives or other steps or stages of business decision making.

These decision-making stages do not match precisely the legal-analytical methods of the judicial application of legal rules. These legal-analytical methods enter, move, and use legal rules (advice) in business decision making to find and comply with legal obligations.¹³⁷ To illustrate, the analysis or definition of a decisional situation, which is the first step, initiates decision making. Other steps that use findings and information may cause the need to consider other legal rules that raise one or more legal issues. Simply, it would be irrational or illogical to attempt to find a legal issue when the business manager does not know of the need for a business decision.¹³⁸ A concept-sensitive managerial analysis with the law applies a business concept to a legal rule to analyze and identify a domain of business situations that support finding a decisional situation involving the business concept and legal rule.

1. Shared Properties of Legal Methods and Decision Stages

Both legal and business decision-making methodologies are multistep processes to make decisions that contain and use similar analytical properties and decisional objectives. These similar properties are to find the problem, coordinate or evaluate outcomes to insure consistency, and solve the problem.¹³⁹ One or more of these properties exist in both the decisional stage and the legal-analytical method, which perform similar analytical functions within legal and business decision making.¹⁴⁰ Foremost, legal

¹³⁵ See *infra* Part IV.B and accompanying notes (explaining basic legal-analytical methods that are basic methods or tools of the judicial decision-making process).

¹³⁶ See *id.*

¹³⁷ See *id.*

¹³⁸ See *Holloway—Primer*, *supra* note 9, at 615.

¹³⁹ See *id.* at 616.

¹⁴⁰ See *supra* note 115 and accompanying text (listing the steps and their uses in business decision making).

and business methodologies use analysis to define the decisional situation and recognize the legal issue, respectively, by analyzing circumstances, happenings, and events.¹⁴¹ These uses of *analysis* to find business and legal problems are factual or situational.¹⁴² Factual analysis seems not too obvious in legal decision making, but the lawyer and judge must understand the situation or dispute to find the issue or apply law to the facts. Both legal and business decision-making methodologies provide decisions that address or solve the legal and business problems, respectively.¹⁴³ Judicial decisions decide the specific legal issues of disputes to determine the violation of a legal rule,¹⁴⁴ but business decisions address a specific business problem or decisional situation to determine a course of action.¹⁴⁵ Both legal and business decision making use factual analysis and are also a means to an end: the decision.

Finally, coordination insures the continuity, consistency, and stability of the decisions, though it differs in business and legal decision making. Precedents bind many judicial decisions establishing continuity and stability when these decisions follow prior decisions that possess similar factual patterns.¹⁴⁶ Other judicial decisions are not based on precedents, but are still decided by the application of law to facts. These decisions establish continuity by the court's logic, or rationale, and its consistency with public policy, and the purpose of the rule.¹⁴⁷ Business decision making creates continuity by monitoring the implementation and analyzing the results of decisions to determine consistency with organizational objectives.¹⁴⁸ These steps allow managers to evaluate the usefulness or validity of the concept in legal, business, and other environments. These steps allow the organization to measure continuity and consistency by determining whether the decision furthers desired organizational objectives and increases organizational performance.¹⁴⁹ Thus, the concept-sensitive managerial analysis uses business

¹⁴¹ See *supra* notes 115–32 and accompanying text (listing the steps and their uses in legal decision making).

¹⁴² Holloway—Primer, *supra* note 9, at 617.

¹⁴³ See *supra* notes 115–132 and accompanying text (identifying legal methodology as essential parts or methods of business decision making).

¹⁴⁴ See *supra* notes 13–17 and accompanying text (explaining basic nature of fact-sensitive legal rules and their uses in legal decision making).

¹⁴⁵ See *supra* notes 35–44 and accompanying text (explaining basic nature of analytical methods and situation-sensitive business concepts and their uses in business decision making).

¹⁴⁶ See Landes & Posner, *supra* note 6, at 250.

¹⁴⁷ See *id.* at 249.

¹⁴⁸ See THOMPSON, *supra* note 75, at 11; Wacker, *supra* note 8, at 364.

¹⁴⁹ See THOMPSON, *supra* note 75, at 11; Wacker, *supra* note 8, at 364.

decision-making methodology to engage legal decision-making methodology when both methodologies share similar qualities in order to find problems (situations and issues) and make a decision to solve the problem.

V. DEMONSTRATING A CONCEPT-SENSITIVE MANAGERIAL ANALYSIS WITH LAW

A concept-sensitive managerial analysis with law can be either a *pre-analysis*, *current analysis*, or *post analysis* to determine the nature of business situations and their business opportunities and legal obligations. Planning for organizational growth and expansion, establishing more certainty and less risk in current business markets, or establishing a closer fit between business decisions and organizational objectives can trigger the current application of a concept-sensitive managerial analysis. Other pre- and post-analyses are decided and conducted by researchers who identify and analyze a domain of business situations to learn more about the impact of legal rules and business concepts on likely decisional situations and business disciplines. The most useful and effective situation is the closest fit to the actual decisional situation that was analyzed or defined to initiate decision making that concurrently engages legal-analytical methods to analyze existing and new legal obligations.

A. Applying Business Concepts to Legal Rules to Identify Situations

A concept-sensitive managerial analysis identifies and explains useful and effective business situations that contain business opportunities and legal obligations. The domain may not consist of business situations because these situations are too numerous to list in a domain. This domain may be described or outlined by factual parameters of the elements or criteria of the rule and concept, and these parameters permit managers and researchers to create a smaller domain of business situations.¹⁵⁰ Moreover, every business situation is not useful for aiding in initiating business decision making and not effective (manageable) to further an organizational objective. The unusable and unmanageable situations are removed from the domain by showing a lack of managerial discretion. These situations can include unlawful, unprofitable, or other undesirable opportunities that provide little, or no,

¹⁵⁰ See *supra* notes 101–03 and accompanying text (explaining the use of business concepts and legal rules to identify and explain business situations); *infra* Part V.C.1 and accompanying text (demonstrating the application of business concepts to legal rules to identify and explain business situations that contain business opportunities and legal obligations).

managerial discretion or latitude to permit the initiation of business decision making.¹⁵¹ For example, business organizations that want to create more flexible employment relationships would be interested in the application of the organizational flexibility concept to the criteria for determining employee status to identify a domain of employment situations. One such employment situation would be the employer-employee relationship and its opportunities. However, this employment relationship and its opportunities lack managerial discretion by not providing flexibility under legal obligations to manage employees when business organizations need to quickly change the numbers and types of workers in order to respond to product demands or other economic conditions.¹⁵² The employment situations consisting of this relationship would be removed from the domain of business situations so that these organizations gain organizational flexibility under the criteria for determining employee status.¹⁵³ The concept-sensitive managerial analysis uses a business concept and a legal rule to analyze and identify business situations that are useful and effective to find and select business opportunities that comply with legal obligations.

1. Business Situations Harming Public Interests and Causing Regulation

Some business situations are not subject to enforceable obligations imposing restrictions on the use of business situations and their opportunities. This lack of enforceable obligations increases managerial discretion, but could lead to managerial failure¹⁵⁴ for business managers who continuously define or analyze the same or similar situations and make the same or similar decisions. These decisions harm the same important public interests, such as providing employee welfare or protecting retirement security.¹⁵⁵ Business managers and intellectuals who analyze and study, respectively, business situations causing substantial harm to important public interests can

¹⁵¹ See *supra* notes 55–67 and accompanying text (explaining basic nature of analytical methods and situation-sensitive business concepts and their uses in business decision making).

¹⁵² See Befort, *supra* note 133, at 159–60 (describing the contingent workforce and its labor market benefits and advantages).

¹⁵³ See *id.* at 166–67.

¹⁵⁴ See *supra* notes 115, 129 and accompanying text (describing assertions or statements that explain relationship between business and policymaking).

¹⁵⁵ See 29 U.S.C. § 1001(a) (2012) (“Congress finds ... that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce”).

encounter a managerial failure. Business organizations must decide whether they should avoid a known managerial failure or perhaps later accept regulation that simultaneously eliminates business situations and curtails a business concept, if a concept exists. For example, organizational flexibility theory applies to the criteria for determining employee status in order to identify employment situations that contain employer opportunities using independent contract workers. Gaining greater organizational flexibility by severely denying employment and labor rights, concurrently, may undermine employee welfare and other public interests and point to a managerial failure.¹⁵⁶ Moreover, new employment regulation that would impose a legal obligation on the use of these workers denies broader use of contingent workers and causes a full or partial loss of the organizational flexibility concept. Business organizations may need to limit the use of some business situations that a business concept identified, but harm important public interests. The managerial failure eventually amounts to more regulation that denies the profits or other advantages of business situations.

B. Loss of Business Concepts as the Discipline-Specific Impact of Law

The conceptual effects of legal rules on finance, management, and other business disciplines are a full or partial loss of a business concept. These effects are a managerial loss and may go unnoticed by business managers and scholars who rely on a fact-sensitive managerial analysis to explain the impact of a legal rule on business organizations, transactions, or relationships.¹⁵⁷ These managers and scholars may not have comprehended the magnitude of these losses when they lack a concept-sensitive managerial analysis with law to analyze and identify business situations that are products of business concepts. To illustrate, employee benefit regulation restricts management, finance, accounting, and other concepts,¹⁵⁸ but these concepts cover or identify business situations and their opportunities, such as financial investments.¹⁵⁹ Some legislatures and courts have declared

¹⁵⁶ See *supra* notes 88–90 and accompanying text (explaining that business disciplines may be overlooking events that trigger the cause of regulation).

¹⁵⁷ *Id.*

¹⁵⁸ See 29 U.S.C. § 1003 (2012) (covering employee benefit plans that require finance, accounting and other business theories and principles to manage these plans); James E. Holloway, *The Practical Entry And Utility of a Legal-Managerial Framework Without the Economic Analysis of Law*, 24 CAMPBELL L. REV. 131, 153 (2002) (“ERISA is the regulation of plan administration and management that involves accounting, finance, management and other business functions and that affects both the subject matter of decisions and the process of making decisions.”).

¹⁵⁹ See Simon, *supra* note 85, at 88 (discussing use of modern portfolio theory to manage assets of employee benefit plans); *supra* note 101 and accompanying text

situations and opportunities to be harmful or unlawful.¹⁶⁰ Simply, when business concepts cannot be used to identify business situations that contain business opportunities, these concepts are a full or partial managerial loss to business disciplines.

1. Impact of Business Concepts on Business Situations and Opportunities

Declining employment situations and employer opportunities demonstrate that business managers have made business decisions that led to more legal obligations, but may have ignored business concepts or good business decision making, or both.¹⁶¹ Organizational behavior and other business scholars developed management (business) concepts to explain and inform managers and organizations of the impact of employment situations and their opportunities on managers and business organizations.¹⁶² For example, organizational flexibility is a management concept that asserts the need for business organizations to create flexible workforces and organizations to better manage labor resources in a dynamic global economy.¹⁶³ The organizational flexibility concept supports circumstances that create more flexibility in employment, or business situations that contain employer opportunities, and must comply with employment law obligations.¹⁶⁴ These flexible employment situations contain employer opportunities to create a flexible workforce or organization that can quickly respond to the economic demands of the global economy.¹⁶⁵ Business concepts must be consistent with or fit within federal and state employment (legal) rules to identify usable and manageable employment situations that contain employer opportunities and conform to legal obligations. Thus, legal obligations constrain business concepts by limiting the managerial discretion to use business situations to aid in initiating decision making and use business opportunities to identify decisional alternatives.

C. Illustrating the Use of a Concept-Sensitive Managerial Analysis

Below, Corporation A, a fictitious organization, demonstrates a current analysis of an organizational need or problem under a specific business

(explaining that business disciplines may overlook impact of law on business concepts and their effectiveness).

¹⁶⁰ See 29 U.S.C. § 1001(a) (2012) (listing findings that Congress used to support the enactment of ERISA).

¹⁶¹ See *id.*

¹⁶² See Fellenz, *supra* note 105, at 78.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

concept and legal rule. The business concept is organizational flexibility theory, and the legal rule is the criteria for determining employee status. Organizational flexibility theory asserts advantages and benefits of a flexible workforce and structure of a business organization.¹⁶⁶ The criteria for determining employee status set forth factors to determine the existence of employment relationships in the organization's workforce.¹⁶⁷ The current analysis is performed to analyze a concern, problem, or need that arises under a business concept and legal rule and, eventually, leads to business decision making to solve the problem or address the concern.

1. Applying a Concept to a Rule to Identify a Domain of Situations

The concept-sensitive managerial analysis applies business concepts to legal rules to analyze and identify business situations to initiate business decision making. The need for or problem of decisional situations can be planning for organizational growth or responding to a business or market condition. For example, national economic conditions slow the growth of the economy and threaten Corporation A's productivity, profits, market share, and workforce structure. Corporation A's management must determine whether a market or business need exists, among others, to change or adjust its workforce structure to respond to these conditions. Corporation A finds an employment or labor workforce need or problem and wants to know more about the workforce need under the relevant legal rule and business concept. In a current analysis, Corporation A applies the organizational flexibility concept to the criteria for determining employee status to identify and analyze workforce structure situations that contain workforce opportunities to design or create a flexible workforce and are subject to or free of employment law obligations.

When the business concept or legal rule consists of numerous elements, characteristics, or criteria, the application of the concept to the legal rule identifies factual parameters that can be used to select workforce structure situations. These parameters permit the identification of workforce structure situations that contain workforce opportunities, such as contingent employment (principal-independent contractor) relationships. This application identifies factual parameters that can be used to identify and analyze a group of workforce structure (business) situations that can be used

¹⁶⁶ *See id.*

¹⁶⁷ *See Befort, supra* note 133, at 172–73 (citing *Lilley v. BTM Corp.*, 958 F.2d 746, 750 (6th Cir. 1992) (“The economic realities test, like the common law standard, consists of a multi-factor formula in which the right to control the manner of work is a significant factor.”)).

to support a decisional situation to initiate business decision making.¹⁶⁸ These parameters are based on the rule's criteria for determining employee status and the concept's characteristics for establishing organizational flexibility.¹⁶⁹ Concept characteristics include kinds, numbers, and compositions of workers and employees.¹⁷⁰ The application of the rule's criteria to the concept's characteristics identifies workforce structure parameters that contain workforce structure situations, such as classifying professional and skilled workers as independent contractors. Thus, the concept-sensitive managerial analysis analyzes and identifies workforce structure situations that contain workforce opportunities in order to respond to business demands and comply with employment law obligations.

2. *Using Managerial Discretion to Remove Unusable Situations*

The concept-sensitive managerial analysis uses the managerial discretion and analysis to examine constraints and benefits of business concepts, legal rules, and other factors that are unique to an organization, industry, or manager. The severity of legal, conceptual, and other constraints determine whether workforce structure situations and their respective workforce opportunities are useful and effective to permit the design of a flexible workforce.¹⁷¹ To illustrate, Corporation A's concept-sensitive analysis finds workforce structure situations that are both traditional employer-employee and atypical contingent work relationships.¹⁷² These workforce situations

¹⁶⁸ See *supra* Part I and notes 150–53 and accompanying text (demonstrating application of a business concept to a legal rule to identify and explain business situations that contain business opportunities and legal obligations).

¹⁶⁹ See Fellenz, *supra* note 105, at 78 (“Flexibility refers to a system’s capacity for variability of one or more of its characteristics. This definition of flexibility is congruent with the conceptions found in the reviewed literatures, with the common usage of flexibility in everyday language.”); RESTATEMENT (SECOND) OF AGENCY, § 220 (1958) (listing factors or criteria for determining employee status that is applied to determine whether a worker is an employee or independent contractor).

¹⁷⁰ See Ball, *supra* note 134, at 903 (“Most employers are drawn to contingent workers because they enhance workplace flexibility; as the need for labor fluctuates, an employer can alter his staff accordingly without experiencing severe disruption.” (citing Katherine M. Forster, *Strategic Reform of Contingent Work*, 74 S. CAL. L. REV. 541, 552 (2001))). See generally Susan N. Houseman, *Why Employers Use Flexible Staffing Arrangements: Evidence from an Establishment Survey*, 55 INDUS. & LAB. REL. REV. 149 (2001); Karin Schill Rives, *Castaways: During Sluggish Economic Times, Temp Workers Are Often the First to Go—And the First to Be Rehired*, VENTURA COUNTY STAR, Jul. 15, 2001, at D03 available at <http://www.highbeam.com/doc/1N1-0FF678AE5D208039.html>.

¹⁷¹ See *supra* notes 55–67 and accompanying text (explaining the nature of managerial discretion and its use to identify and remove unusable and unmanageable situations).

¹⁷² See *supra* Part V.C.1. (describing application of a business concept to a legal rule to identify and explain business situations).

consist of employment relationships between Corporation A and its workers under the criteria to establish employee status and the organizational flexibility characteristics, such as the sizes, kinds, and compositions of workers in the workforce.¹⁷³ The workforce situations contain workforce structure opportunities that consist of various combinations of criteria and characteristics to create a flexible workforce or organization. On one hand, the concept can enable and restrain workforce situations. The organizational flexibility concept constrains workforce situations by not allowing Corporation A to use a more flexible workforce when Corporation A uses permanent, full-time employees.¹⁷⁴ Yet, this concept creates a benefit by permitting Corporation A to use a workforce situation that contains an opportunity to use contingent workers to gain organizational flexibility.¹⁷⁵ On the other hand, the legal rule is a constraint and benefit to the organization. The legal rule that permits Corporation A's use of independent contract workers¹⁷⁶ is a benefit by enabling Corporation A to avoid numerous legal obligations of the traditional employer-employee relationship.¹⁷⁷ However, the legal rule is a restriction that limits the latitude of Corporation A by not allowing the most effective business situation to increase organizational flexibility. Rather, the legal rule causes Corporation A to undermine employment, civil rights, and other policies.¹⁷⁸ Business concepts, legal rules, and other factors can constrain and provide benefits under specific business situations to initiate business decision making.

3. *Using Business Decision Making to Engage Legal Methodology*

Business situations contain business opportunities (decisional alternatives) and legal obligations (employment law) to aid and inform business decision making that engages legal methodology to determine legal obligations and issues. A concept-sensitive managerial analysis has been performed above to initiate decision making. Business managers recognize a need or

¹⁷³ See Befort, *supra* note 133, at 172–73 (recognizing that employer opportunities include various combinations of professional and skilled workers or less skilled and clerical workers and various sizes and percentages of contingent workers and traditional employees in total workforce).

¹⁷⁴ See *id.* at 160–61.

¹⁷⁵ See *id.*

¹⁷⁶ See *id.* (recognizing that the right to control factor could be the determinative factor in classifying an employee).

¹⁷⁷ See *id.* at 166 (recognizing that the right of control does not normally exist in contingent work relationships that consist of principal-independent contractor relationship).

¹⁷⁸ See *infra* Part V.C.3. (using business situations and their opportunities in business decision making that must also engage legal analytical methods to determine lawful obligations).

problem involving both the legal rule and business concept. These managers must select the most useful and effective business situation that involves the business concept and legal rules, contains the business problem or need, and is consistent with the organization's ends or objectives.

Business situations are products of the concept-sensitive managerial analysis and support the initiation of business decision making by helping managers to recognize or define the decisional situation. The useful and effective business situations of a domain possess legal, conceptual, and other characteristics that fit a business organization's need to make a decision or solve a problem. To demonstrate, Corporation A recognizes that its business need or problem involves the workforce structure.¹⁷⁹ Within the domain, Corporation A would identify the most useful and effective workforce or business situation that would help to recognize and solve a specific problem or decisional situation. Corporation A initiates business decision making when it recognizes that the most useful and effective workforce situation fits or supports the specific decisional situation (business problem). Within the domain, the most useful and effective workforce situation that aids the decisional situation contains one or more business opportunities and legal obligations. Corporation A continues decision making by identifying and selecting one or more business opportunities and considers other facts and information that must be used to identify and evaluate decisional alternatives, such as various combinations of criteria to establish an employee classification.¹⁸⁰ Thus, the most useful and effective business situation supports the initiation of business decision making by aiding in the recognition of the decisional situation, and other steps in the process of business decision making.

This decisional situation initiates, and other steps complete, business decision making that must eventually engage legal methodology to determine and address legal obligations and issues. Corporation A uses legal advice and legal-analytical methods to enter and use legal information, findings, and conclusions to determine and conform to legal obligations in each decision-making step or stage.¹⁸¹ It uses other analytical methods and

¹⁷⁹ See *supra* Part V.C.3 (explaining how business managers can identify a domain of business situations that can be used to find the most useful and effective situation to initiate decision making).

¹⁸⁰ See Befort, *supra* note 133, at 172–74.

¹⁸¹ See *supra* Part III (explaining how legal rules and business concepts should be used in a concept-sensitive managerial analysis). Remember, some schools of law teach basic analytical methods to help law students understand corporate decision making. See Jackson, *supra* note 31, at 321–22. Colleges of business teach common law and regulation (business law) to graduate students. See ALSB, *supra* note 129. Each discipline's school or college teaches a basic knowledge and methodology of other discipline.

tools to provide financial, statistical, accounting, and other information, findings, and conclusions to each decisional step.¹⁸² Corporation A uses business opportunities and other information and findings to identify feasible decisional alternatives to continue decision making on the decisional situation. Next, it evaluates the decisional alternatives by using legal and other information and findings and dismisses those alternatives that do not further labor or workforce objectives. Corporation A selects one alternative as the decision. This alternative is a workforce structure that consists of specific criteria to establish an independent contract worker's classification and considers various combinations of numbers, kinds, and compositions of these workers. Finally, Corporation A implements the decision and follows up on the results of the decision. This implementation and follow-up engages legal and other analytical methods to make findings on the organization's productivity, profit, and morale regarding the use of contingent workers. The follow-up includes results on any difficulties maintaining the employment classification of contingent workers, effects of contingent worker's productivity and morale, federal obligations under the employment relationships, and labor and other organizational costs. The concept-sensitive managerial analysis of law provides the most useful and effective business situation and its opportunities to support the need in order to initiate and continue business decision making that engages legal-analytical methods to enter and use a legal rule to determine and conform to legal obligations.

CONCLUSION

The fact-sensitive managerial analysis with law applies legal rules to specific factual circumstances to resolve business disputes that create a domain, or set, of litigated business situations, such as a set of cases involving employment-at-will. The identification of a domain may take decades and may not use a business theory or principle (concept) to establish this domain of cases. The fact-sensitive managerial analysis does not account for the usefulness of these situations in business decision making or test the effectiveness of these situations to further desired organizational objectives. Consequently, one must consider whether a domain of business situations

When well-educated corporate lawyers discuss the outcome of a specific legal issue with well-educated business managers to address a specific business problem that is explained by the business manager using a financial, marketing, or other business concept, a business concept may be applied to legal rules (first part) of a concept-sensitive managerial analysis with law.

¹⁸² See *supra* Part III (explaining how legal rules and business concepts are used in a concept-sensitive managerial analysis).

can be analyzed and identified by the application of business concepts to legal rules to create a concept-sensitive managerial analysis with law. This analysis yields a domain of business situations that contain both business opportunities and legal obligations. The concept-sensitive managerial analysis uses managerial discretion theory and analysis to ascertain the latitude of business managers and organizations to make a business decision that implicate business concepts, legal rules, and other factors. Finally, the concept-sensitive managerial analysis provides useful and effective business situations to guide business decision making that engages legal analysis in the process of business decision making. In sum, the concept-sensitive managerial analysis removes those less useful and ineffective business situations within the established domain. The most useful and effective business situation supports decisional situation that must exist to initiate business decision making that, in turn, uses or engages legal-analytical methods to determine legal obligations and find legal issues.