

# TRANSACTIONS

## THE TENNESSEE JOURNAL OF BUSINESS LAW

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### CASE COMMENTARIES

ARBITRATION, BUSINESS LITIGATION, CONTRACT LAW,  
EMPLOYMENT LAW, PATENT LAW, PROPERTY LAW & TAX LAW



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## BUSINESS FACULTY NOTES

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gifts.

**Professor Iris J. Goodwin** participated in a Congressional Roundtable sponsored by Senator Charles Grassley and Congressman Peter Welch. Held Sept. 8 in the Senate Finance Committee Hearing Room, the Roundtable explored the relationship between endowment value and college cost, the legal and accounting definitions of what an endowment is, and the potential impact of legislation requiring a mandatory payout from endowment funds for the purpose of making financial aid more readily available to students. Prof. Goodwin spoke on restricted

Prof. Goodwin's most recent paper, "Ask Not What Your Charity Can Do for You: Robertson v. Princeton Provides Liberal-Democratic Insights into the Challenge of Cy Pres Reform," will be coming out in the *Arizona Law Review* shortly. She also presented "Charitable Mission: A Private View of the Public Good" as part of a panel on Rights in Public and Private Settings at the Law & Society Association Annual Meeting in May 2008. Finally, before the Alabama game this fall, she offered a lecture for College of Law Alumni on "The Law of Charitable Gifts: Recent Controversies Involving Higher Education."



**Professor Joan Heminway** presented her paper "Female Investors and Securities Fraud: Is the Reasonable Investor a Woman?" as a part of a panel on Expanding the Boundaries of Feminist Legal Theory at the 2008 annual conference of the Southeastern Association of Law Schools in July. In addition, her article "Does Sarbanes-Oxley Foster the Existence of Ethical Executive Role Models in the Corporation?" was published by the *Journal of Business and Technology Law* over the summer, and she wrote a column for the September issue of the Knoxville Bar Association's monthly publication *Dicta* entitled "What it Means to Be a Lawyer: A Sense of Professionalism." Also in September, Prof. Heminway participated in The University of Washington School of Law's "Legal Education at the Crossroads" conference, subtitled "Ideas to Accomplishments: Sharing New Ideas for Integrated Curriculum." At that conference, she co-presented with Prof. George Kuney on the UT's innovative transaction simulation class that serves as one of two capstones for the Concentration in Business Transactions. Their presentation was entitled:

“Representing Enterprises—A Simulated Business Law Firm with Four (or more) Different Partners.”

Prof. Heminway also contributed an article to the *Encyclopedia of American Civil Rights and Liberties*, edited by (among others) Prof. Otis Stephens, which received a Choice Award in 2007 for Outstanding Academic Title, and she wrote a chapter in a recently released international book published by Taylor & Francis, *Insider Trading: Global Developments and Analysis*, edited by Paul Ali & Greg N. Gregoriou. Her chapter is entitled “Martha Stewart: Insider Trader?” In October, Prof. Heminway lectured on “The Peculiar Nature of Insider Trading Doctrine in the United States” at Bocconi University in Milan, Italy and offered a research forum on the same topic for The University of Tennessee Corporate Governance Center. In addition, Prof. Heminway and third-year student Sarah White recently co-authored a book review entitled “WANTED: Female Corporate Directors (A Review of Professor Douglas M. Branson’s *No Seat at the Table*).” The piece will be published in *Pace Law Review*’s Winter 2008 issue, which is dedicated to book reviews focusing on women and the law.



**Professor Amy Morris Hess** spoke on a panel at the Fall Joint CLE Meeting of the American Bar Association Sections of Taxation and Real Property Trust & Estate Law in San Francisco in September 2008 on the topic “What a Difference A Generation Makes: Estate Planning for Generations X, Y, and Beyond.” The panelists have been asked to prepare a teleconference on the same subject that the ABA will broadcast early next year. Her 2008 supplements for the multi-volume treatise, *Bogert & Hess, The Law of Trusts and Trustees*, were published in August. Professor Hess is the Vice-President and Program Chair of the Knoxville Estate Planning Council this year.

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**Professor Jeff Hirsch**, who recently received tenure, was one of four scholars selected to participate this October in the Seton Hall Employment and Labor Law Scholars' Forum. The Forum is designed to provide junior scholars with commentary and critique by their more senior colleagues in the legal academy. Prof. Hirsch presented his paper, "Regulatory Pragmatism at Work," which argues for a more simplified and exclusively federal governance of the workplace. He also gave a related presentation at the Annual Colloquium on Current Scholarship in Labor and Employment

Law.

Prof. Hirsch's article, "The Law of Termination: Doing More with Less," is scheduled to be published in the *Maryland Law Review*. The following essays by Prof. Hirsch were published this year: "Taking States Out of the Workplace" in the *Yale Law Journal Pocket Part*, "Rent to Own Unionism?" in the *Virginia Law Review In Brief*, "The True Irony of Workplace Law: Less is More" in the University of Pennsylvania Law Review, *PENNumbra*, and "Paper Rights or Real Rights?" also in *PENNumbra*. He also wrote the chapter "Employee Collective Action in a Global Economy," which is scheduled to appear in *Elgar Publishing's Encyclopedia of Labor and Employment Law and Economics*.

Prof. Hirsch serves as the Chair of the SEALS New Scholars Committee and gave a presentation on a panel called "Pedagogical Methods for Teaching Labor and Employment Law in the 21st Century" during this year's SEALS conference.



**Professor Becky Jacobs's** essay, "A Lexical Examination and (Unscientific) Survey of Expanded Clinical Experiences in U.S. Law Schools," appeared in the *Tennessee Law Review* as part of its Charles Miller Legal Clinic 60th Anniversary Symposium edition. Following her appearance on a panel addressing Coalition Building, Globally and Locally at the LatCrit VII in Miami in October 2007, Prof. Jacobs contributed an article entitled "Pareto Negativity: The Enemy of My Enemy is Not Necessarily My Friend—Latin Leadership, Coalition Building, and Predatory Globalization" to the collection that will appear in an upcoming symposium edition of the *St. Thomas Law Review*. Her article "Teaching and Learning Negotiation in a Simulated Environment" will appear in Volume XVIII, Issue 1 of the *Widener Law Journal*.

Prof. Jacobs appeared at the Legal Writing Institute's Biennial Conference in Indianapolis in July, and, with Prof. Joan Heminway, she participated in a workshop entitled "Cutting Edge Legal Theory: Jurisprudence in Context" at the annual SEALS conference in July 2008. Prof. Jacobs also participated again in the South African Black Lawyers Association Commercial Law training program in August. Her piece, "Unbound by Theory and Naming: Survival Feminism and the Women of the South African Victoria Mxenge Housing and Development Association," is scheduled for publication in the *UCLA Women's Law Journal*.

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**Professor George Kuney** spoke on two panels this summer regarding the teaching of transactional drafting and practice, the first at Emory University Law School's Transactional Practice Conference in May and the second at the SEALS Conference in July. He also conducted a two-day workshop for the DLA Piper firm on Venture Capital Transactional Practice in August. His book *Mastering Intellectual Property Law*, co-authored with UT Adjunct Professor Donna C. Looper, is being published by Carolina Academic Press and his articles "How Fast is 'Promptly'" and "Material Adverse Change Clauses" were published in The University of California CEB's *Business Law Practitioner*. Working with Prof. Lloyd, he also published the second edition of *Contracts: Transactions and Litigation*, and the 2009 supplement to *California Law of Contracts* which he and Professor Looper author for CEB.

In July, the United States Court of Appeals for the Federal Circuit ruled in Kuney's favor in *Kuney v. Bean (Baystate Technologies, Inc. v. Harold L. Bowers)*, a case involving access to documents in a long-running, detailed research project to produce a history of certain patent and copyright litigation concerning shrink-wrap licensed technology and a resulting chapter 11 case. On remand, the United States District Court for the District of Massachusetts capitulated and entered an order modifying the protective order at issue to allow Prof. Kuney access to publish the proceedings at trial and on appeal.

This fall, Prof. Kuney participated in The University of Washington School of Law's "Legal Education at the Crossroads" conference, subtitled "Ideas to Accomplishments: Sharing New Ideas for Integrated Curriculum." Prof. Kuney spoke about "Representing Enterprises—A Simulated Business Law Firm with Four (or more) Different Partners," based on the capstone course for the Concentration in Business Transactions.



**Professor Don Leatherman** will speak this December about current developments for consolidated groups at the Practicing Law Institute's (PLI) Los Angeles meeting on Mergers, Acquisitions, and Joint Ventures. The PLI also published Prof. Leatherman's article entitled, "Excluding the Selling Member's Gain — § 1.1502-13(c)(6)(ii) and § 1.1502-13T(c)(6)(ii)(C)," forthcoming in *Tax Strategies for Corporate Acquisitions, Dispositions, Spin-Offs, Joint Ventures, Financings, Reorganizations and Restructurings 2008*. Prof. Leatherman also joined Profs. Richard Doernberg and Howard Abrams in authoring a casebook entitled *Federal Income Taxation of Corporations and Partnerships*, which will be published in December 2008 or January 2009.

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**Professor Robert Lloyd**, with Prof. Kuney, has published the second edition of *Contracts: Transactions and Litigation* and is working with Prof. Kuney to publish two books on commercial law: *Secured Transactions: UCC Article 9 and the Bankruptcy Code* and *Sales and Payment Systems: UCC Articles 2, 3, 4, 4A, and 5*. The books are to be published by the Clayton Center for Entrepreneurial Law and should be priced at approximately \$50 each, a considerable savings over traditional commercial law texts.

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**Professor Alex B. Long's** essay, "Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008," which describes the new changes President Bush signed into law on September 25, will appear in volume 103 of the Northwestern University Law Review Colloquy. Prof. Long also moderated the New Scholars Workshop on Constitutional Law at the annual SEALS Conference.

Prof. Long spoke at the Third Annual Colloquium on Current Scholarship in Labor and Employment Law in San Diego October 24, where he presented a paper entitled "Whistleblowing Attorneys and Ethical Infrastructures." On November 19, he spoke at a Continuing Legal Education seminar sponsored by Lorman Education Services entitled "Legal Ethics." He also moderated the New Scholars Workshop on Constitutional Law at the annual SEALS Conference.

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**Professor Carl Pierce** is working with Professor Judy Cornett to complete their Professional Responsibility course book for publication by West Publishing Company. The course book addresses many of the issues that arise in connection with the representation of organizational clients and transactional practice. He recently presented a CLE program for the Corporate Counsel Section of the Knoxville Bar Association that focused on issues of special interest to in-house counsel—including proposed new rules governing multi-jurisdictional practice in Tennessee. He has also been actively involved as a co-reporter in the Tennessee Bar Association’s project to review and revise the Tennessee Rules of Professional Conduct in light of the revisions in 2002 and 2003 to the American Bar Association’s Model Rules of Professional Conduct.

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**Professor Thomas Plank**, on March 3-5, 2008, attended a Federal Judicial Conference educational program, “The Current State of the Capital Markets: an FJC Program for Bankruptcy Judges,” in New Orleans, LA and gave a presentation entitled “Sales of Mortgage Loans and Securitizations” on Wednesday, March 5.

During the Spring and Summer of 2008, in his role as Of Counsel to McKee Nelson LLP, Prof. Plank worked with a team of lawyers from McKee Nelson that represented JPMorgan Chase & Co., which had agreed to acquire Bear Stearns Companies Inc., in the acquisition by the Federal Reserve Bank of New York of \$30 billion of financial assets from Bear Stearns Companies Inc.

Prof. Plank wrote an article, “Sense and Sensibility in Securitization: A Prudent Legal Structure and a Fanciful Critique,” which is to be published in the *Cardozo Law Review*, volume 30, issue 2, this fall, responding to Kenneth Kettering’s fanciful criticism of securitization in “Securitization and Its Discontents: The Dynamics of Financial Product Development,” 29 *Cardozo L. Rev.* 1553 (2008).

In response to a call for papers, Prof. Plank proposed an article, “The Mortgage Market, Securitization and The Bankruptcy Code: A Proposal For Reform,” which was selected last summer for presentation at the Joint Program of the Section on Creditors’ and Debtors’ Rights and the Section on Real Estate Transactions, “Real Estate Transactions In Troubled Times,” at the January 2009 annual meeting of the Association of American Law Schools.

On October 24, 2008, Prof. Plank attended a Symposium at the South Carolina Law Review, “1.9 Kids and a Foreclosure: Subprime Mortgages, the Credit Crisis, and Restoring the American Dream,” and made a presentation entitled “Regulation of Mortgage Market and the Nature of Mortgage Loans.” This presentation is scheduled to be published in the spring of 2009.



**Professor Gary Pulsinelli** presented a talk entitled “New Matter Isn’t Always Bad: Overcoming the International Best Mode Problem by Liberalizing Amendment Practice” at the Intellectual Property Scholars Works in Progress Conference at Stanford Law School. He also moderated a panel organized by Prof. Jacobs at the SEALS Conference entitled “Not a Moot Point: The Nuts and Bolts of Moot Court Programs.” His paper “Harry Potter and the (Re)Order of the Artists: Are We Muggles or Goblins?” was recently accepted for publication. He presented a talk based on this paper at Cumberland School of Law at Samford University, at the Gordon Ford College of Business at Western Kentucky University, and at the University of Tennessee College of Law, the last as part of a series organized by the Students for Study of Law and Culture.



**Professor Paula Schaefer** joined the UT law faculty this fall. For seven years, Prof. Schaefer practiced in the area of commercial litigation in two international law firms, Shook, Hardy & Bacon L.L.P. and Bryan Cave LLP. From 2004-2008, she was a member of the business school faculty at the University of Central Missouri where she taught undergraduate and graduate business law courses, including a popular graduate level business ethics course that she developed.

Prof. Schaefer’s article entitled “Overcoming Noneconomic Barriers to Loyal Disclosure” was published in volume 44 of the *American Business Law Journal* and received the journal’s Hoeber Award. Earlier this year, she presented “Fraud as a Theme for Teaching Business Law” at the Midwest Academy of Legal Studies in Business Annual Conference. She was a co-presenter at the Institute of Supply Management on the topic “Ethics and Social Responsibility in Supply Management.”

Prof. Schaefer teaches Business Associations, Legal Profession, and a seminar on legal and ethical decision making for lawyers.



**Professor Gregory M. Stein**, with co-authors Morton Fisher and Marjorie Fisher, recently completed the second edition of *A Practical Guide to Commercial Real Estate Transactions: From Contract to Closing*, published by ABA Publishing. The book is designed to help lawyers who are new to the real estate field learn how to conduct their first transactions. Prof. Stein also participated in a “Meet the Authors” event at the ABA Annual Meeting in New York that coincided with the book’s release in early August. Professor Stein’s article, “Mortgage Law in China: Comparing Theory and Practice,” was recently republished by the *ICFAI Journal of Banking Law*, an academic journal published by the Institute of Chartered Financial Analysts in Hyderabad, India. Prof. Stein’s article originally appeared in the *Missouri Law Review*.

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**Professor Maurice E. Stucke** contributed to a recently published book on competition policy. On October 6, the American Antitrust Institute (AAI) published *The Next Antitrust Agenda: The American Antitrust Institute’s Transition Report on Competition Policy to the 44th President of the United States*. The 415-page transition report outlines both the AAI’s philosophy and policy agenda, and offers specific suggestions for legislation and enforcement priorities to the next administration. The book is the result of a year-long effort undertaken by eleven committees of the AAI Advisory Board. Prof. Stucke chaired the AAI’s media committee, which drafted the chapter entitled “Diversity in the Media Sector.”

In October, Prof. Stucke also spoke at the sixteenth annual Conference on Markets and Politics. This Berlin conference provides a forum for international researchers to present and discuss works concerning deterrence effects in competition policy. Prof. Stucke critiqued two economics papers on the scope of criminal law and sanctions. The conference was hosted by the Research Network on Innovation and Competition Policy (which brings together eight leading European research institutes and universities to establish an international and interdisciplinary research network on European competition policy) and the Wissenschaftszentrum Berlin für Sozialforschung (the largest EU institution to conduct basic social science research in selected problem areas).

Prof. Stucke was also named UT’s Quest Scholar of the Week. Quest is the University’s comprehensive research communication initiative showcasing the vitality of its multidisciplinary research enterprise and highlighting the faculty’s scholarly pursuits and creative achievements.

In August, Prof. Stucke presented his paper, “Does the Rule of Reason Violate the Rule of Law?” at the SEALS 2008 Annual Conference. The article, which the *U.C. Davis Law Review* will publish in May 2009, attracted the OECD’s attention. It analyzes the significant deficiencies of the Supreme Court’s rule-of-reason antitrust standard, and how these deficiencies adversely affect antitrust enforcement and competition policy generally.

In July, the *St. John’s Law Review* published Prof. Stucke’s article, “Better Competition Advocacy.” In June, Prof. Stucke received the 2007 Jerry S. Cohen Memorial Fund Writing Award for the best antitrust article. It was for his piece, “Behavioral Economists at the Gate: Antitrust in the Twenty-First Century,” published in the *Loyola University Chicago Law Journal*. While in Washington, D.C., Prof. Stucke participated in the Behavioral Economics Keynote and Panel Discussion at the AAI’s Tenth Anniversary Conference. He also presented the transition report for the next administration on antitrust and the media. Finally, Prof. Stucke was asked to assist the Tennessee Secondary School Athletic Association in a decade-long case that has gone twice before the Supreme Court. He provided antitrust advice and drafted a successful summary judgment motion on the antitrust issues. See *Brentwood Academy v. Tennessee Secondary School Athletic Association*, No. 3-97-1249, 2008 WL 2811307 (M.D. Tenn. July 18, 2008).



**Professor Paulette J. (Paula) Williams** teaches the Business Law Clinic. Prof. Williams’s students represent for-profit and non-profit organizations, serving the dual purposes of educating law students in transactional practice as well as providing much needed legal services to the community.

Prof. Williams’ essay, “Cross-Cultural Teaching in the Business Law Clinic,” will be published in the Winter 2009 issue of the *Tennessee Law Review*. She is also working on articles concerning affordable housing and financial counseling for low-income people.

Prof. Williams has been an active member of a national group of law professors who teach in Transactional Clinics. She is active in clinical legal education serving as the immediate Past President of the Clinical Legal Education Association and on the Executive Committee of the Clinical Section of the Association of American Law Schools. Prof. Williams is on the Planning Committee for the 2009 AALS Clinical Conference, and is co-chair of the Legal Educators Committee of the Forum on Affordable Housing and Community Development of the American Bar Association.

