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THE TENNESSEE JOURNAL OF BUSINESS LAW

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CORPORATIONS & SECURITIES, EMPLOYMENT LAW, ESTATE PLANNING,
PROPERTY LAW, TENNESSEE CONSUMER PROTECTION ACT



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BUSINESS FACULTY NOTES



Professor Iris J. Goodwin's article on *cy pres* reform, “*Ask Not What Your Charity Can Do For You*,” is appearing in the Spring issue of the *Arizona Law Review*. The article centers on a restricted purpose gift given decades ago to Princeton University by Charles and Marie Robertson. At that time, the gift was the largest of its kind given by an individual to a university; the gift was given in response to President Kennedy’s challenge to the nation to “ask not what your country can do for you.” Prof. Goodwin shared her scholarship on restricted purpose gifts in a lecture for University of Tennessee College of Law alumni on “The Law of Charitable Gifts: Recent Controversies Involving Higher Education.”

Prof. Goodwin was guest lecturer in English/Linguistics 490, Language and the Law. She offered a talk entitled “Legal Language and Poetic Language: Worlds Apart and Why.” Prof. Goodwin offered examples of good and bad legal writing and placed both beside poems of Emily Dickinson and T.S. Eliot in order to underscore the necessity of univocal meanings in the law. She also gave a presentation entitled “Charitable Mission and Democratic Theory” to the UT Philosophy Department. The presentation was based on a paper she is currently drafting.



Professor Joan Heminway participated in a continuing legal education seminar on “Corporate Investigations and White Collar Defense” for the Tennessee Bar Association in December. Her presentation covered key aspects of the Sarbanes-Oxley Act of 2002, the major federal securities legislation of the post-Enron era. Prof. Heminway was quoted in a *Washington Post* article on January 16 regarding recent public disclosures about the health of Apple CEO Steve Jobs and was also quoted in a March 9 Fox Business News story entitled “Can We Trust What CEO’s Say?”. In March, Prof. Heminway participated in a conference at Vanderbilt University Law School entitled “Future of Federal Regulation of Financial Markets, Corporate Governance and Shareholder Litigation,” and in April, Prof. Heminway presented a paper entitled “Common Roots, Divergent Evolution: Insider Trading Doctrine in the United States, Germany, and Japan” at the annual conference of the Midwest Political Science Association.

In addition, several works authored or coauthored by Prof. Heminway were released late in the winter or early this spring. Among these are a business associations textbook entitled *Business Enterprises: Legal Structures, Governance, and Policy* (with Douglas M. Branson, Mark J. Loewenstein, Marc I. Steinberg & Manning G. Warren, III) and several law review or journal pieces, including “Female Investors and Securities Fraud: Is the Reasonable Investor a Woman?,” published in volume 15 of the *William and Mary Journal of Women and the Law* (2008), and “WANTED: Female Corporate Directors” (a book review coauthored with 3L law student Sarah White), published in the Winter 2008 volume of the *Pace Law Review*. Prof. Heminway’s remarks entitled “The Best of Times, the Worst of Times: Securities Regulation Scholarship and Teaching in the Global Financial Crisis,” which Prof. Heminway delivered at a recent University of Maryland School of Law conference, will be published in an upcoming volume of the *Journal of Business and Technology Law*.

Prof. Heminway also recently accepted an invitation to become a Fellow at the UT Center for Business and Economic Research (CBER). The CBER, a department within the UT College of Business Administration, conducts research on national and state economic trends for UT, state agencies, and public and private organizations.

The UT Chancellor awarded Prof. Heminway one of two scholarships to attend the 2009 Summer Institute at Bryn Mawr College offered by the Higher Education Resource Services. The Institute is a month-long residential program presenting an intensive leadership and management development curriculum. Prof. Heminway will attend the Institute from June 20 through July 15, 2009.



Professor Amy Morris Hess is a visiting professor at the University of Alabama School of Law for the Spring 2009 semester. An essay based on her materials on estate planning for the baby boomer generation was published in the Winter 2009 issue of the ABA Section of Taxation News Quarterly. In March 2009, Prof. Hess will present a CLE seminar for the Trusts and Estates Section of the El Paso County, Colorado (Colorado Springs) Bar Association that will include an updated version of her baby boomer research as well as a section devoted to recent developments in trusts and estates law. Professor Hess has been appointed to the Legal Education Committee and the Professional Responsibility Committee of the American College of Trust and Estate Counsel.



Professor Jeff Hirsch recently gave a presentation entitled “Collective Action in a Global Workplace” as part of a faculty exchange program at West Virginia University College of Law. He gave a similar presentation at St. Louis University School of Law’s symposium, entitled “Competition in the Global Workplace: The Role of Law in Economic Markets.” In addition, Prof. Hirsch’s article, “Revolution in Pragmatist Clothing: Nationalizing Workplace Law,” will be published in a forthcoming issue of the *Alabama Law Review*.

Prof. Hirsch also recently finished editing the book *Proceedings of the N.Y.U. 57th Annual Conference on Labor* and wrote “Introduction to Balls or Strikes: Are Economic Weapons Finding the Zone,” which is scheduled to appear in the book *Reversing Field: Examining Commercialization, Labor, Gender, and Race in the 21st Century*.

Finally, Prof. Hirsch has been quoted in numerous media outlets recently over issues including a major labor settlement with Smithfield Foods, possible changes at the National Labor Relations Board, and labor issues at various Starbucks stores.



Professor Becky Jacobs has been focusing her attention on service projects. With Prof. Carl Pierce, she serves as co-Parliamentarian of the UT Faculty Senate and is now the Chairman of the Board of Directors of the Knoxville Community Mediation Center (the “CMC”). The CMC is a non-profit that was established through the collaboration of the Knoxville Bar Association, Legal Aid of East Tennessee, the University of Tennessee College of Law, and the Knox County General Sessions Court that collaborates with the College of Law’s Mediation Clinic, a clinic that Professor Jacobs directs.

Professor Jacobs’ essay, “Pareto Negativity: The Enemy of My Enemy is Not Necessarily My Friend—Latin Leadership, Coalition Building, and Predatory Globalization” now appears in the *St. Thomas Law Review*, and her article “Teaching and Learning Negotiation in a Simulated Environment” was published in the *Widener Law Journal*. Prof. Jacobs organized several panels for the 2009 annual SEALS Conference, one of which she will moderate. She also continues her volunteer work with the South African Black Lawyers Association Commercial Law training program.



Professor George Kuney's and Donna Looper's new book, *Mastering Intellectual Property*, was published by Carolina Academic Press ("CAP"). The book covers trade secret, copyright, moral rights, patents, and trademarks and is part of CAP's Mastering Series of books designed to provide students and attorneys with a tool that will enable them to easily and efficiently "master" the substance and content of law school courses. Current 3Ls Patrick Hawley, Walt Siedentopf, Rob Whitfield, and especially Chris Sherman contributed substantially to production of the manuscript.

Prof. Kuney's article "Material Adverse Change Clauses" was published in the *California Business Law Practitioner* by The University of California's Continuing Education of the Bar. The article reviews the applicable law and practical use of material adverse change clauses in delayed closing deal structures and compliments his work on contract law with Donna Looper contained in their treatise *California Law of Contracts*, a new edition of which is being published this spring.

Prof. Kuney and a group of law professor have submitted their amicus curiae brief to the United States Supreme Court in *Travelers v. Bailey (In re Johns-Manville)*. The brief argues that the scope of a bankruptcy court's "related to" jurisdiction under 28 U.S.C. § 1334(b) is not so broad as to allow the court to enjoin creditors from pursuing independent, direct claims against a non-debtor party. In the alternative, if that jurisdiction does exist, the brief takes the position that such injunctions constitute a taking without compensation in violation of the Fifth Amendment and a denial of the right to a jury trial provided for by the Seventh Amendment. The case has been argued and submitted and a decision is expected later this term.

Prof. Kuney's and Michael St. James's proposal for enactment of a new Chapter 10 to improve the Bankruptcy Code is being published by *The American Bankruptcy Journal*. The proposed Chapter 10 would be tailored to the needs of so called "too big to fail" debtors by allowing payment of ordinary course prepetition vendor and employee debts, thereby avoiding the specter of a cascading chain of bankruptcies should General Motors, for example, file for relief under the Bankruptcy Code. Essentially, this would extend so-called "critical vendor" first day motion practice developed in jurisdictions such as Delaware and the Southern District of New York nationwide. This would, in turn, allow these "too big to fail" companies to use the Bankruptcy Code's other restructuring tools in an effort to reorganize.



Professor Don Leatherman's textbook, *Federal Income Taxation of Corporations and Partnerships*, was published. Prof. Leatherman co-authored the book with Howard Abrams and Richard Doernberg. In December, he also appeared on a panel in Los Angeles for the Practicing Law Institute discussing current developments for consolidated returns.



Professor Robert Lloyd's essay "Why Every Law Student Should Be A Gunner" appears in the most recent issue of the *Arizona State Law Review*. He and Professor Kuney published *Secured Transactions: UCC Article 9 & Bankruptcy* through the Clayton Center for Entrepreneurial Law and are working on a second text covering sales and payment systems, due out next year. These texts, which are intended to serve as the basis for a Commercial Law course, are priced at approximately \$40 each—a substantial savings to students in comparison to many other texts on the subjects. All proceeds go to benefit the Clayton Center for Entrepreneurial Law.



Professor Alex B. Long recently presented his paper, "Whistleblowing Attorneys and Ethical Infrastructures," at the Third Annual Colloquium on Current Scholarship in Labor and Employment Law in San Diego. This article was recently accepted for publication in Volume 68 of the *Maryland Law Review*.

Also Prof. Long's article, "Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008," has been published at 103 *NW. U. L. REV.* Colloquy 217 (2008). Prof. Long also wrote an opinion piece for the Perspective section of the Knoxville News Sentinel, Sunday, Nov. 23, 2008, under the headline "Amending the ADA law—it's about time."

Prof. Long recently participated in a conference at the American University Washington College of Law in Washington, DC entitled "Assisting Law Students with Disabilities in the 21st Century: A New Horizon" He moderated a panel that discussed potential implications of the ADA Amendments Act of 2008 for law

schools and law students with disabilities. Other panelists included the president of the National Conference of Bar Examiners and the president of the American Association for People with Disabilities.



Professor Carl Pierce recently presented a CLE program on proposed ethics rules affecting multi-jurisdictional practice by in-house corporate counsel at the Corporate Counsel Forum sponsored by the Corporate Counsel Section of the Tennessee Bar Association. He has been named the Interim Director of the Howard Baker Center for Public Policy at The University of Tennessee.



Professor Thomas Plank, in December 2008, published an article titled *Sense and Sensibility in Securitization: A Prudent Legal Structure and a Fanciful Critique*, 30 *CARDOZO L. REV.* 617 (2008), responding to Kenneth Kettering, “Securitization and Its Discontents: The Dynamics of Financial Product Development,” 29 *CARDOZO L. REV.* 1553 (2008), which argued that securitization was a legally shaky financial product that succeeded only because it became too big to fail. Kettering argues that, because securitization avoids the costs that the Bankruptcy Code imposes on secured creditors of operating companies, like originators of mortgage loans and other receivables, it is a type of fraud on the creditors of those originators. Prof. Plank’s article argues that the case law does not support Kettering’s fraud thesis, and that Kettering failed to demonstrate that securitization’s avoidance of the effects of the Bankruptcy Code harms the creditors of originators.

On January 10, 2009, Prof. Plank presented a proposed article, *The Mortgage Market, Securitization and The Bankruptcy Code: A Proposal For Reform*, 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 2009 annual meeting of the Association of American Law Schools. This paper explains that the separation of ownership of mortgage loans from both the origination of the loans and the servicing of the loans required by securitization, a source of criticism of securitization, is a direct result of the structure of the Bankruptcy Code. The paper proposes a revision of the Bankruptcy Code that permits the issuance of long

term debt secured by mortgage loans that would not be subject to acceleration upon the commencement of a bankruptcy case or to the automatic stay of investor remedies in the event of default.



Professor Gary Pulsinelli's article "Harry Potter and the (Re)Order of the Artists: Are We Muggles or Goblins?" has been accepted for publication in the *Oregon Law Review*. Prof. Pulsinelli is currently working on completing his article "New Matter Isn't Always Bad: Overcoming the International Best Mode Problem by Liberalizing Patent Amendment Practice," which proposes a fix for the international "best mode" problem in patent law (the U.S. has such a requirement while the rest of the world does not, which can create hardships for foreign inventors desiring to file their patent applications in the U.S.) by relaxing the "new matter" prohibition in patent applications to permit later addition of disclosure of the inventor's best mode. The Saul Lefkowitz Trademark Moot Court team that Professor Pulsinelli co-coaches with Professor Carol Parker won the South Regional this spring and competed in the National Finals in March, finishing as second best oralists.



Professor Paula Schaefer's essay "Protecting a Business Client from Itself through Loyal Disclosure" was published in the *Yale Law Journal Pocket Part's* Legal Ethics Symposium. The symposium features commentaries and essays on confidentiality and the attorney-client relationship. Her article "Inadvertent Disclosure in 2009 and Beyond: The Lingering Need to Revise Professional Conduct Rules" will be published in the 69th volume of the *Maryland Law Review*.



Professor Gregory M. Stein has been appointed the College of Law's Associate Dean for Faculty Development. His primary responsibilities are to promote and support faculty scholarship, increase collaborations with other parts of the university, and encourage teaching excellence.

Prof. Stein recently participated in a two-day meeting of the Drafting Committee for the Uniform Partition of Tenancy-in-Common Act, held in Portland, Oregon. This Act is being drafted to address the problem of land loss by rural African-American families. Prof. Stein serves as the Committee's observer from the American College of Real Estate Lawyers. He also has been invited to serve on the Member Selection Committee of the American College of Real Estate Lawyers.

Prof. Stein recently contracted with Ashgate Publishing to author a book about Chinese real estate law and practice. In addition to contrasting China's new written property laws with actual practice in that nation during the past two decades, the book will also examine the question of how a country can produce a sophisticated real estate industry while its property laws remain undeveloped.



Professor Maurice E. Stucke's article, "Does the Rule of Reason Violate the Rule of Law?," which will be published in the 42nd volume of the *University of California-Davis Law Review* (forthcoming May 2009), was recently cited by competition scholars as among the best antitrust articles published in 2008. This is the second consecutive year that Prof. Stucke's scholarship has been so recognized.

His essay, "New Antitrust Realism," was published in *Global Competition Policy* ("GCP") magazine's January 2009 symposium on competition policy in the Obama administration. GCP's symposia generally involve competition policy experts drawn from academia, competition authorities, courts, and law firms around the world. Prof. Stucke's essay, which is also available at <http://ssrn.com/abstract=1323815>, outlines the needed transformative change in today's competition policy and how behavioral economics can assist in this new antitrust realism.

Prof. Stucke chaired the American Antitrust Institute's media committee, which contributed a chapter to the AAI's transition report for the incoming administration.

The chapter “Diversity in the Media Sector” and the transition report American Antitrust Institute, *The Next Antitrust Agenda: The American Antitrust Institute’s Transition Report on Competition Policy to the 44th President of the United States* (2008) are available at <http://www.antitrustinstitute.org/Archives/transitionreport.ashx>.

Prof. Stucke and Allen P. Grunes also completed a new working paper titled, “Toward a Better Competition Policy for the Media: The Challenge of Developing Antitrust Policies that Support the Media Sector’s Unique Role in Our Democracy.” The paper (which is available at <http://ssrn.com/abstract=1330681>) discusses the role of competition policy with respect to the media industry.

Prof. Stucke spoke at the “Antitrust Law for the New Administration,” in Boulder, Colorado. The conference was hosted by the American Antitrust Institute and the Silicon Flatirons, a Center for Law, Technology, and Entrepreneurship at the University of Colorado. Prof. Stucke joined current and former U.S. competition authorities on the panel in discussing strategic planning, institutional strategies, and a proposed research agenda for competition policy in the Obama administration.

Finally, Prof. Stucke recently presented an issue paper (which is available at http://www.luc.edu/law/academics/special/center/antitrust/marathon/stucke_paper.pdf) at an antitrust conference in Boston. The conference, a roundtable discussion concerning competition policy and the rule of law from a comparative E.U.-U.S. perspective, was sponsored by British Consulate-General for Boston, the Institute for Consumer Antitrust Studies, and the British Institute of International and Comparative Law. Conference attendees included competition authorities, lawyers, and professors from the E.U. and U.S. The issues papers and an edited transcript of the conference will appear in the *Loyola Consumer Law Review* later this year.



Professor Paulette J. (Paula) Williams teaches the Business Clinic in both the Fall and Spring Semesters. Her essay “Cross-Cultural Teaching” in the Business Clinic will be published in a forthcoming issue of the *Tennessee Law Review*. She is on the planning committee of the Association of American Law Schools’ Clinical Conference which is being held in Cleveland, Ohio in May 2009. In the Fall of 2009, Prof. Williams will become the Executive Editor of the American Bar Association’s Journal on Affordable Housing and Community Development.

