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Professor Michael Greenberger Provides Insight on Financial Reform Legislation

As former director of the Division of Trading and Markets at the U.S. Commodity Futures Trading Commission (CFTC) and recognized expert in financial regulation, Professor Michael Greenberger is an authority that lawmakers, stakeholders, and the media go to for cogent analysis of the ongoing economic crisis. Professor Greenberger frequently testifies before Congressional committees on dysfunctions within the economy caused by intricate and unregulated financial derivatives. While debate continues over proposed legislation that would overhaul regulation of big banks and other financial institutions, Professor Greenberger's sage insight is in high demand.

Professor Greenberger's recent commentary on financial regulation includes appearances on CNN, ABC, NBC, CBS, Fox Business News, MSNBC, PBS, and C-SPAN. Articles referencing Greenberger's financial expertise appear in USA Today, The New York Times, The Washington Post, and other publications. He has also been a guest on numerous national radio programs, including NPR's "The Diane Rehm Show."

In 2009 he testified before the CFTC and the U.S. House Committee on Agriculture on excessive speculation in energy markets and derivatives market transparency, respectively. In April 2010, Professor Greenberger joined Sen. Maria Cantwell (D-WA) on Capitol Hill for a press conference urging lawmakers to adopt rules for strict oversight and transparency of derivatives markets.

Full coverage of Professor Greenberger's testimony and recent media can be found at www.michaelgreenberger.com.

Professor Greenberger is currently serving as the Technical Advisor to the United Nations Commission of Experts on Reforms of the International Monetary and Financial System and as a member of the International Energy Forum's Independent Expert Group that will provide recommendations for reducing energy price volatility.

Professor Greenberger is the founder and director of the University of Maryland Center for Health and Homeland Security. He teaches courses in Homeland Security and The Law of Counterterrorism, Law and Policy of Emergency Public Health Response, Constitutional Law, and a seminar on Futures, Options and Derivatives.



Professor Michael Greenberger

The University of Maryland School of Law's Business Law Program focuses on innovative teaching, practical experience, research, and scholarship in the fields of business organization law, securities regulation, tax, business transactions, and related areas. The Program provides students with the legal, practical, and ethical skills necessary to advise and represent for-profit and not-for-profit businesses, as well as the opportunity to engage in critical and innovative thinking about cutting-edge issues in business law.

Managing Risk: A Director's Duty or Just Good Business?

Risk management is a frequently-cited cause of the economic crisis. Commentators and government officials have emphasized the failure of risk management practices in the period leading up to the crisis. At his address at the Federal Reserve Bank of Chicago's Annual Conference on Bank Structure and Competition on May 7, 2009, Federal Reserve Chairman Ben S. Bernanke stated that "Among other things, our analysis reaffirms that capital adequacy, effective liquidity planning, and strong risk management are essential for safe and sound banking; the crisis revealed serious deficiencies on the part of some financial institutions in one or more of the areas." Risk management failures alone obviously did not cause the crisis, but the crisis certainly highlighted weaknesses in firms' risk management practices.

As part of this renewed focus on risk management, commentators and organizations that promote corporate best practices are encouraging firms to implement a risk management technique called "enterprise risk management" (ERM). ERM is a holistic approach to risk management, integrating risk management throughout the firm and encouraging firms to create a "risk culture." The technique involves not only financial risk modeling, but also the human/governance side of risk management. To that end, many proponents of ERM encourage more board involvement in setting a firm's risk appetite and designing, implementing and monitoring the firm's overall risk management system.

Effective ERM will not solve all of a firm's problems or prevent the next economic downturn. Nevertheless, it may strengthen a firm's internal governance and help the firm and stakeholders better monitor and manage exces-

sive risk. At least one study suggests that financial institutions with more robust risk management practices performed better during the economic crisis than their peers.¹

A critical challenge, however, is convincing firms to adopt meaningful ERM programs. At present, any type of risk monitoring system may satisfy a board of directors' oversight responsibilities under applicable state and federal law. For example, the Delaware Chancery Court dismissed a claim against Citigroup basically alleging ineffective risk management in connection with the economic crisis.² Moreover, the Securities and Exchange Commission's new rules mandate only disclosure about risk management practices.³ Perhaps with more discussion and evidence on the effectiveness of ERM, firms will voluntarily (or involuntarily through shareholder or creditor pressure) implement more meaningful risk management practices.

For more on ERM, see School of Law Professor Michelle Harner's articles "Ignoring the Writing on the Wall: The Role of Enterprise Risk Management in the Economic Crisis," 5 *Journal of Business & Technology Law* 45 (2010); and "Barriers to Effective Risk Management," 40 *Seton Hall Law Review* (forthcoming 2010). Part of this essay also appears in Professor Harner's post "Risky Business" at the legal blog *Concurring Opinions*.

References

¹Grant Kirkpatrick, *The Corporate Governance Lessons from the Financial Crisis*, FIN. MARKET TRENDS, Feb. 2009, at 8.

²*In re Citigroup Inc. Shareholder Derivative Litig.*, 964 A.2d 106, 125 (Del. Ch. 2009).

³Final Rule: Proxy Disclosure Enhancements, available at <http://www.sec.gov/rules/final/2009/33-9089.pdf>.

SEC Inspector General Lectures on Madoff Scandal

On February 25, 2010, H. David Kotz, Inspector General of the Securities and Exchange Commission, delivered an insightful and thought-provoking public lecture to the law school community titled "The Madoff Scandal: Why the SEC Failed to Uncover It and How It Can Identify the Next One."

In his lecture, Mr. Kotz described the events leading up to the discovery of the extensive ponzi scheme orchestrated by Bernard Madoff, identified several weaknesses in the SEC's examinations, and discussed the red flags apparently overlooked in the process. For example, when the examinations revealed inconsistencies or troubling information, the examiners generally discussed the matters directly with Mr. Madoff rather than seeking to verify the information with independent third parties, such as the Depository Trust Company or the National Association of Securities Dealers.

In addition, although the New York and Washington, D.C. offices of the SEC conducted examinations of Mr. Madoff, the offices failed to communicate effectively or coordinate these examinations. Mr. Kotz finished his presentation by explaining several of the recommendations put forth by the Office of the Inspector General as a result of the Madoff investigation. He also entertained questions from several attendees both during the lecture and at the subsequent reception.

The Law School and the Business Law Program are continuing their efforts to strengthen their relationship with the Robert H. Smith School of Business, and this lecture marked the first formal event to bring together MBA students, JD students, and joint-degree students. The Business Law Society, who sponsored the lecture, is extremely grateful for the tremendous support it received for this event.

New International and Comparative Law Clinic Examines Microcredit Lending in China

This year, the School of Law has launched a new International and Comparative Law Clinic aimed at helping students develop the cross-cultural competencies they will need to practice law in today's global arena. Building on Maryland's groundbreaking LEAD Initiative, thirteen students are enrolled in the semester-long clinic, and are working on a variety of projects in China, Namibia, and Mexico. While in China, Clinic students will conduct fieldwork analyzing emerging microcredit programs, and will develop guidance documents on loan structures and programs as well as consumer education material.

Microcredit as a tool of poverty alleviation is new to China, but over the last several years, China's regulatory framework for microcredit programs has been developing at a rapid pace, taking different forms in China's myriad jurisdictions. As a result, microcredit in China is currently at a transformative stage, with a significant array of new microcredit regulations and public and commercial sector programs emerging over the past decade. This year's China clinical experience will uniquely focus on the preliminary research, feasibility studies, and document drafting. This research project is part of a broader, long-term goal to establish a jointly administered Legal Clinic for Microcredit, Microinsurance and Microsurety (Microcredit Clinic) with Maryland's partner school in China, The Law School of the Central University of Finance and Economics, Beijing (CUFE). The School of Law already cooperates with CUFE under an arrangement where Maryland students attend CUFE's "Beijing Autumn Semester Program in Comparative Business Law" and CUFE students visit Maryland in the spring (see article on page 4). School of Law Professor Shruti Rana is cooperatively supervising analysis of the developing legal framework in China for microcredit lending to Chinese citizens with CUFE Professor Daniel Mitterhoff.

After establishing the Microcredit Clinic, Professors Rana and Mitterhoff anticipate that Maryland law students will continue to work alongside CUFE students annually under the framework of this new clinical program. Moreover, Maryland and CUFE hope to expand the clinic by establishing an on-the-ground clinic at a regional law faculty at Hebei Northern College, which is about a two hour drive from Beijing. Eventually students from Maryland, CUFE, and Hebei Northern will, under the guidance of faculty and attorneys, assist local populations in fairly and efficiently accessing credit and implementing simple business plans.

Under the guidance of Professor Mitterhoff, the student research team at CUFE is currently conducting an in-depth survey of the regulatory documents governing the use of microcredit throughout China. This research will form



Professor Shruti Rana (front) lectures on Microcredit to students in China

the foundation for onsite fieldwork studies conducted by Maryland clinic students this spring. The fieldwork module is extensive, and includes partnering with CUFE Law students to exchange data, engage in further research, and prepare for on-site interviews. Maryland and CUFE Law students will then visit organizations with experience in promoting microcredit in China or otherwise helping underserved populations obtain credit; and visit select jurisdictions to interview government officials, financial institution officers, non-profit organization representatives, and low-income borrowers to assess China's experience with microcredit, and the success or failure of China's various microcredit policy experiments. Fieldwork investigations will proceed in Beijing municipality, Hebei Province and Shandong Province.



Rural Village in Datong, Shanxi Province, China

In addition to designing research surveys and actively interviewing relevant actors, Maryland and CUFE students will produce a public research report as well as other documents, such as a handbook on microcredit practices in Hebei Province. Students will also help draft the next stage fundraising proposal for this innovative program and provide critical data for further assessments of China's microcredit experiments.

Throughout the semester, clinic students also receive rigorous training and education in international and comparative law, community and economic development, and the Chinese legal system. Before traveling to China, students participating in the clinic are required to attend Professor Mitterhoff's course, Introduction to the Chinese Legal System, and both

before and during their China trip, students also attend a seminar in International and Comparative Law co-taught by School of Law Professors Rana, Michael Millemann, and Barbara Olshansky.

This multi-faceted program offers students a valuable learning opportunity helping Chinese citizens access their rights and obligations associated with microcredit, as well as providing an unparalleled opportunity for U.S. and Chinese law students to learn and work collaboratively. It also demonstrates the School of Law's ongoing commitment to encourage students to help underserved and vulnerable populations—a hallmark of Maryland's nationally renowned clinical programs.

Law School's China Program Continues to Grow

The University of Maryland School of Law continues to provide students the opportunity to attend the Beijing Autumn Semester Program in Comparative Business Law at the Law School of The Central University of Finance and Economics, Beijing (CUFE), Maryland's strategic partner school in China. This program brings Maryland and CUFE students together for an entire year of study, and allows students a number of opportunities to study contemporary issues in comparative business law in a variety of classroom and simulated-practice settings.

In the fall, Maryland students attend CUFE's English language law courses, such as Comparative Law, Comparative Commercial Law, Foreign Direct Investment in China, and Comparative Government Procurement Law. In addition, Maryland students are paired with Chinese students to write research papers on topics of Chinese and/or comparative law. A moot court competition of mixed nationality teams arguing issues applying the Vienna Convention on the International Sale of Goods is another hallmark of the program. In the spring, CUFE students attend Maryland Law's diverse course offerings in both domestic and international business law. This semester, Maryland is hosting eight visiting students from China.

A number of Maryland Law Professors are active participants in the program, and have visited Beijing as part of the exchange program to teach courses collaboratively with Chinese law professors and other international and comparative law experts. Associate Dean and Professor Michael Van Alstine visited CUFE in Fall 2007 and co-taught a course on Comparative Foreign Direct Investment Law. Professor Shruti Rana co-taught Comparative Commercial Law (Fall 2008) and a new course, Comparative Law of Credit and Guarantee (Fall 2009) with Professor Martha Ertman.

In 2009, the program received a grant from the U.S.-China Legal Cooperation Fund. The grant enabled Maryland and CUFE to expand the program by jointly launching the new course on the Comparative Law of Credit and Guarantee, as well as begin research into establishing a China-based law clinic to help Chinese citizens get access to credit (see previous story).

The program is managed by CUFE Law Professor Daniel J. Mitterhoff, who teaches an Introduction to the Chinese Legal System seminar at both CUFE and Maryland. "The program's key ingredient is the diverse learning environment," says Professor Mitterhoff. "The students learn as much from each other as they do from CUFE and Maryland's renowned faculty."



Professor Daniel Mitterhoff

STUDENT NEWS

Journal of Business & Technology Law Reflects on the Financial Crisis in its Current Issue

The *Journal of Business & Technology Law* has just published the first issue in its fifth volume. In its first issue of 2010, “Early Reflections on the Financial Crisis,” the *Journal* features several different viewpoints on what contributed to and lessons to be learned from the global financial crisis.

In “The Decline of Investment Banking: Preliminary Thoughts on the Evolution of the Industry 1996–2008,” School of Law Professor Robert Rhee presents financial analysis on five of the pre-crisis, major investment banks, offering preliminary explanations for why some of these financial institutions survived the economic crisis while others did not. Professor Jena Martin Amerson, of the West Virginia University College of Law, also looks to the SEC’s role in contributing to the crisis in her article, “In Praise of Process: Examining the SEC, Rule 14a-8(i)(8), and *AF-SCME v. AIG*.”

Identifying another contributing factor to the crisis, School of Law Professor Michelle Harner evaluates financial firms’ underutilization of Enterprise Risk Management in “Ignoring the Writing on the Wall: The Role of Enterprise Risk Management in the Economic Crisis.” Also making observations regarding lessons to be learned from the financial crisis are University of Illinois College of Law Professor Nicola Faith Sharpe and Wake Forest University School of Law Professor Omari Scott Simmons in “Re-thinking Board Function in the Wake of the 2008 Financial Crisis.”

Offering insights in a slightly different context, UC Davis School of Law Professor Afra Afsharipour and Professor Joan MacLeod Heminway, of the University of Tennessee

College of Law, discuss how the financial crisis has affected the classroom in “Integrating the Financial Crisis in the Business Associations Course: Benefits and Pitfalls.”

The *Journal* will continue its exploration of the aftermath of the crisis by focusing on government reform efforts in its second issue, “Examining Government Reform in the Wake of the Financial Crisis,” set for publication in May 2010. Visit the *Journal’s* website for a complete listing of past issues, or to subscribe to the *Journal*.

Since its inception in 2006, the *Journal of Business & Technology Law* has been cited by federal district courts, the Delaware state courts, and the Maryland Court of Appeals. It has also been cited in more than 80 law reviews, including:

- *Boston University Law Review*
- *Columbia Law Review*
- *Cornell Law Review*
- *Duke Law Journal*
- *Emory Law Journal*
- *Fordham Law Review*
- *Harvard Journal of Law and Technology*
- *University of Illinois Law Review*
- *University of Pennsylvania Law Review*
- *Stanford Law Review*
- *Vanderbilt Law Review*
- *Virginia Law Review*
- *William and Mary Law Review*.

Business Law Society Co-Hosts Panel Discussion on Counseling Business Clients

Last November, the Business Law Society co-hosted the panel discussion “Counseling Business Clients in a Global Recession: Stories from the Front Lines,” giving students a chance to hear some “war stories” about the issues and challenges facing many corporations in the current economic climate.

Panelists included Chief Judge Duncan W. Keir, U.S. Bankruptcy Court for the District of Maryland; Denise Clayton, Vice President and Assistant General Counsel, XO Communications; James J. Hanks, Jr., Venable LLP; and Kevyn Orr, Jones Day.

The Business Law Society sponsors or co-sponsors several events throughout the academic year, including panel discussions, a Meet-the-Professors Night, a billable-hours discussion (co-sponsored with the Career Development Office), networking events, career-shadowing days.

FACULTY NOTES

Martha Ertman

Visiting Professor, Central University of Economics and Finance, Beijing, China co-teaching “Comparative Law of Credit and Guarantee” (December 2009).

Michelle Harner

“Corporate Control and the Need for Meaningful Board Accountability,” 94 *Minnesota Law Review* 541(2010).

“Ignoring the Writing on the Wall: The Role of Enterprise Risk Management in the Economic Crisis,” 5 *Journal of Business & Technology Law* 45 (2010).

Speaker, “The Search for an Unbiased Fiduciary in Corporate Reorganizations,” Debtors and Creditors Rights Section, AALS Annual Meeting, New Orleans, LA (January 2010).

Speaker, “Activist Distressed Debtholders: The New Barbarians at the Gate?,” Visiting Scholar in Residence Lecture, Widener Institute of Delaware Corporate and Business Law (November 2009).

Speaker, “Risk Management, Corporate Insolvency and the Economic Crisis, Securities Regulation and the Global Economic Crisis: What Does the Future Hold?,” Seton Hall University School of Law (October 2009).

Shruti Rana

“Teaching Amidst Transformation: Integrating Global Perspectives on the Financial Crisis Into the Classroom,” 5 *Journal of Business & Technology Law* (forthcoming 2010).

Visiting Professor, Central University of Economics and Finance, Beijing, China co-teaching “Comparative Law of Credit and Guarantee” (December 2009).

Co-principal Researcher, Competitive Grant from the U.S.-China Business Council Legal Cooperation Fund to establish a legal education clinical project on China’s developing microcredit system (May 2009 – May 2010).

Presentation, “Integrating Comparative Perspectives into Contracts Courses,” at *New Approaches to Teaching Contracts: A “Teach-In,”* AALS Annual Meeting, New Orleans, LA (January 2010).

William Reynolds

“Electronic Contracting Cases 2008-2009,” 65 *Business Lawyer* 317 (2009) (with Juliet M. Moringiello).

Robert Rhee

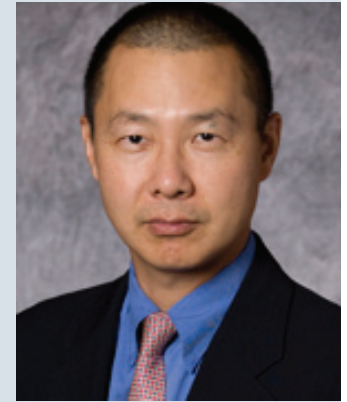
“A Production Theory of Pure Economic Loss,” 104 *Northwestern University Law Review* (forthcoming 2010).

“Bonding Limited Liability,” 51 *William & Mary Law Review* (forthcoming 2010).

Prof. Rhee Teaches New Course on Corporate Responsibility

Drawing on his wealth of experience in investment banking, executive leadership, legal scholarship, and law practice, Professor Robert Rhee is teaching a core MBA course on corporate social responsibility and ethics at the Robert H. Smith School of Business during the spring semester. Specific topics include the expectations of shareholders, employees, customers and governments as well the relationships between businesses and their various constituencies. Classes are held in Baltimore at the new UM BioPark.

Prior to joining the Maryland Law faculty in 2007, he was a former investment banker in London and New York, and before that he was a trial attorney at the U.S. Department of Justice. At Maryland, Professor Rhee teaches a variety of courses, including Business Associations, Corporate Ethics Seminar, and Corporate Finance.



Professor Robert Rhee

“The Madoff Scandal, Market Regulatory Failure, and the Business Education of Lawyers,” 35 *Journal of Corporation Law* (forthcoming 2010).

“Nationalization of Board Governance and Corporate Purpose During Crisis,” 17 *George Mason Law Review* (forthcoming 2010).

“The Decline of Investment Banking: Preliminary Thoughts on the Evolution of the Industry 1996–2008,” 5 *Journal of Business & Technology Law* (forthcoming 2010).

Michael Van Alstine

Presentation, “Maryland Contract Law,” New Trial Judge Orientation at the Maryland Judicial Institute (October 2009).

Presentation of book chapter, “Treaties and the Court, 1900-1945,” Santa Clara University School of Law (November 2009).

ALUMNI SPOTLIGHT



JAMES J. HANKS, JR.

Class of 1967

James J. Hanks, Jr. is a partner with the 550-lawyer firm of Venable LLP, with offices in Baltimore, New York, Los Angeles and Washington. He received his A.B. from Princeton University; his LL.B. from the University of Maryland Law School, where he was an editor of the *Maryland Law Review*; and his LL.M. from Harvard Law School. For a year after receiving his LL.B., Hanks was law clerk to Judge Charles Fahy of the United States Court of Appeals for the District of Columbia Circuit.

In private practice, Hanks represents publicly- and privately-held corporations and other entities in securities offerings and other financing transactions. He has advised buyers or sellers in more than 250 mergers or acquisitions, including many valued at more than one billion dollars, most recently advising Stanley Works in its proposed acquisition of Black & Decker Corporation. He has also represented parties in cross-border mergers and acquisitions, joint ventures and other transactions. Hanks regularly serves as independent counsel to the boards of directors and board committees of major U.S. corporations and as an expert witness in connection with major transactions, stockholder litigation, conflicts of interest and corporate governance issues. Hanks also advises foreign governments on revision of their corporate and securities laws. He worked with the South African government from 2001-2009 to rewrite its Companies Act, and the legislation was signed by President Zuma last year.

Hanks is an Adjunct Professor of Law at Cornell and Northwestern Law Schools, where he has taught courses in securities regulation, mergers and acquisitions and corporate governance. He has also taught classes in corporation law at various law schools in the United States, the Republic of South Africa, China, Spain, and Germany. He is the author of the definitive 600-page treatise *Maryland Corporation Law* and the co-author of the third edition of *Legal Capital* (with former Stanford Law School Dean Bayless Manning). He is also the author of several law review articles and is a frequent speaker on corporation law issues. Hanks has been actively involved in the revision of the Maryland General Corporation Law, the Model Business Corporation Act, the Corporate Director's Guidebook and the Fund Director's Guidebook. He is a member of The American Law Institute, and serves on the University of Maryland School of Law's Board of Visitors.

Hanks appears in the current edition of *The Best Lawyers in America* in the categories of Corporate Governance and Compliance Law, Corporate Law, and Mergers and Acquisitions Law. In 2008, Hanks was awarded the inaugural Lifetime Achievement Award by the Section of Business Law of the Maryland State Bar Association.

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