BUSINESS LAW BULLETIN

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Professors Robert Rhee and Michelle Harner

NEW DIRECTORS, NEW DIRECTIONS

In an answer to rising demand from employers for more practice-ready graduates, Professors Robert Rhee and Michelle Harner are preparing students for real-world Business Law.

The Business Law Program already has in place a varied curriculum taught by prominent scholars and accomplished practitioners. In addition to classroom work in the fields of corporate governance, business organization law, securities regulation, tax and other related areas, the Program will incorporate more experiential learning into the curriculum.

"We're very excited about these new developments," said Co-Director Michelle Harner. "We believe that they can only benefit our students and our community, and further the Program's mission of training tomorrow's business lawyers and leaders both inside and outside of the classroom."

Students who are interested in business law will attend a "Business Boot Camp" that will introduce students to business, finance, and accounting practices and language that they would not normally encounter in a traditional curriculum. Other learning opportunities will include allowing students to shadow business attorneys or financial advisers and participate in business law competitions, where students will compete in a "moot court" setting against other law schools in negotiating deals.

Maryland law professor Robert Rhee, the program's other co-director, said the business specialty requires lawyers to have a deep understanding of business and financial concepts.

"This is best done through a formal course of study, and that's what's motivating us," Rhee said. "Having basic foundational knowledge will provide our students with a leg up in the employment area."

IN THIS ISSUE:

CAN CREDITORS BRING DERIVATIVE LAWSUITS?

By Michelle Harner, Associate Professor of Law and Co-Director, Business Law Program

In the corporate context, shareholders often are the appropriate party to file a derivative lawsuit against a corporation. Shareholders commonly are described as the residual owners of the corporation. Their economic interests and agenda, at least in theory, align with those of the corporation. Accordingly, it seems logical to allow shareholders to step in and sue on behalf of the corporation when the board of directors is conflicted or otherwise prevented from assessing the alleged wrongs in a fair and objective manner.

The statutory provisions governing shareholder derivative lawsuits largely focus on the standing and procedural requirements that shareholders must satisfy to institute the action. For example, Section 7.41 of the Model Business Corporation Act provides that, "A shareholder may not commence or maintain a derivative proceeding unless the shareholder . . . was a shareholder of the corporation at the time of the act or omission complained of . . . and fairly and adequately represents the interests of the corporation in enforcing the right of the corporation." Likewise, Section 327 of the Delaware General Corporate Code provides, "In any derivative suit instituted by a stockholder of a corporation, it shall be averred in the complaint that the plaintiff was a stockholder of the corporation at the time of the transaction of which such stockholder complains or that such stockholder's stock thereafter devolved upon such stockholder by operation of law."

Courts generally have interpreted these provisions as governing when shareholders have standing to initiate derivative lawsuits but not as necessarily precluding other parties, such as creditors, from filing such actions. *See*, e.g., *Schoon v. Smith*, 953 A.2d 196, 204 (Del. 2008). In fact, in *N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92 (Del. 2007), the Delaware Supreme Court acknowledged that creditors are permitted to obtain standing to bring derivative lawsuits when the corporation is insolvent. Other courts have followed this approach in the corporate context. *See*, e.g., *Metcoff v. Lebovics*, 977 A.2d 285, 286–87 (Conn. Super. Ct. 2009) (adopting the reasoning of Gheewalla); *Christians v. Grant Thornton, LLP*, 733 N.W.2d. 803, 809 (Minn. Ct. App. 2007) (same); *In re* Vartec Telecom, Inc. No. 06-03506, 2007 WL 2872283, at *4 (Bankr. N.D. Tex. Sep. 24, 2007) (holding that "Texas . . . law recognize[s] a cause of action for breach of fiduciary duty against the directors or officers of a corporation may be brought by the creditors of a corporation . . . .").

Nevertheless, the result may be different with respect to unincorporated entities. Specifically, the Delaware Chancery Court recently held that creditors of a limited liability company (LLC) do not have standing to pursue derivative lawsuits against the LLC, even if the LLC is insolvent. See *CML V, LLC v. Bax*, No. 5373-VCL (Del. Ch. Nov. 3, 2010). The Delaware Chancery Court relied heavily on the language of the Delaware LLC Act, which provides in pertinent part, "In a derivative action, the plaintiff must be a member or an assignee of a limited liability company interest at the time of bringing the action." DEL CODE ANN. tit. 6, § 18-1002. The Court concluded that, contrary to corporate statutes, the language of the Delaware LLC Act expressly limited standing in the derivative context to LLC members or their assignees.

The Delaware Chancery Court in *Bax* performed a thoughtful analysis of the arguments for and against treating standing in derivative actions the same in both the corporate and LLC contexts. Ultimately, the Court determined that its holding was mandated by the plain language of the Delaware LLC Act. It will be interesting to see how other jurisdictions interpret standing in LLC derivative actions in light of the *Bax* decision.

Professor Michelle Harner's current research interests include shareholder and creditor activism and its impact on corporate value; legislative responses to serial business failures and related implications for discrete industries; and the ethical implications of insolvency for directors, officers and other fiduciaries. In addition, in March 2009, Professor Harner received a research grant from the American Bankruptcy Institute Endowment Fund to study the role of creditors' committees in chapter 11 business bankruptcies. Professor Harner previously was in private practice in the business restructuring, insolvency, bankruptcy and related transactional fields, most recently as a partner at the Chicago office of the international law firm Jones Day.

BONDING LIMITED LIABILITY

By Robert Rhee, Professor of Law and Co-Director, Business Law Program

This is an excerpt from Professor Rhee's article "Bonding Limited Liability," 51 William & Mary Law Review 1417 (2010). The full article can be found at http://digitalcommons.law.umaryland.edu.

This Article seeks a middle ground in the debate on the propriety of limited liability as to tort creditors. This issue is important because the ordinary operation of the rule can lead to inequitable results.

Most corporate law scholars have not only accepted limited liability as a standard term in the law of business organizations, but have forcefully justified it cost-benefit grounds. But some scholars have argued with equal force that the balance of the cost-benefit analysis favors greater personal liability for tort claims. The merits of the theoretical arguments cannot be empirically confirmed. Without such proof, the academic debate has largely been engaged in abstract, absolute terms of defending the rule or arguing for its abolition. Pragmatism requires the acknowledgement of an important baseline: at this point in time and society, it is hard to imagine the abrogation of limited liability as a political possibility. The belief in the efficiency of limited liability is generally accepted.

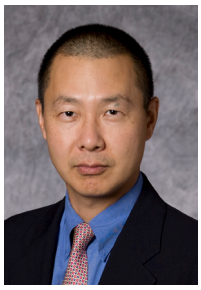
Although limited liability is a practical reality, the concept is still troubling. No one disputes that corporations should ideally internalize the cost of their activities. With perfect information, no reasonable society would grant the right of limited liability if a particular firm would produce merely a transfer payment with a private gain to the shareholder and an equal private loss to the tort victim, or worse, the firm's activity would impose a net social cost. Such a society would be morally or economically bankrupt.

Limited liability marches in tandem with the driving force of enterprise—the expectation of profit after satisfaction of all liabilities. A good faith belief that one will not invoke the rule is implied. Society confers limited liability to mitigate the well-known, generally accepted understanding of the costs associated with imposing unlimited personal liability. The implied social bargain is clear.

A middle ground on the debate is feasible. Can we capture the undeniable benefits of limited liability, while curtailing its negative effects? This Article advances a simple financing solution: a firm should internalize more cost and risk of its tortious activities through a mandatory bonding of limited liability. The bond serves as an additional asset reserved to satisfy liability. Under this scheme, the liability calculus changes only slightly: the scope of liability is expanded from a claim on corporate assets to a claim on corporate assets plus bond and fund earnings. With mandatory participation, the bond principal can be set low so as not to deter enterprise, and the earned surplus can substantially, if not fully, compensate tort victims. Similar to insurance, limited liability is a backstop against unexpected business failure, and just as most policyholders are fortunate to not claim on the insurance, most firms are either profitable or dissolve before excess liability accrues and they do not invoke the rule of limited liability. For them, the bond is essentially a mandated return-free capital, and the true cost of bonding limited liability for most firms is the opportunity cost of capital on the principal.

The idea of bonded limited liability is supported by sound theoretical principles from tort law and insurance, specifically enterprise liability and mandatory risk retention arrangements. Bonding limited liability preserves the essential benefit of limited liability, but it internalizes the cost of accidents more. It is middle ground in the debate on limited liability.

Professor Robert Rhee's legal experience includes positions as a law clerk on the U.S. Court of Appeals for the Third Circuit, and a trial attorney in the Honors Program of the U.S. Department of Justice. He also has significant investment banking experience. He was a vice president in financial institutions investment banking at Fox-Pitt, Kelton (a unit of Swiss Re) in New York, and an M&A investment banker at UBS Warburg in London. He has worked on public and private M&A assignments, private equity funding, and debt and equity issuances. His scholarly interests include risk-focused economic analyses of legal and social problems.The subjects of study have included torts, insurance, corporations, bargaining and procedure.



A NEW APPROACH TO BUSINESS PLANNING

By Michelle Harner, Associate Professor of Law and Co-Director, Business Law Program

A traditional law school Business Planning seminar exposes students primarily to the tax considerations pertinent in the entity choice and reorganization decisions of business ventures. As part of the Business Law Program's ongoing efforts to enhance transactional course offerings for students, Professors Michelle Harner and Dan Goldberg co-taught a revamped Business Planning seminar to third year law students in the fall. Professors Harner and Goldberg started from this traditional platform, but then expanded the scope of the seminar to consider the various issues confronted by transactional lawyers in the life cycle of business clients.

Professors Harner and Goldberg structured the Business Planning seminar to simulate a small law firm, playing the role of the corporate and tax partners, and the students playing the role of corporate associates. The seminar started with one of the law firm's long-time individual clients seeking assistance in structuring a new business venture with two other individuals. The students confronted the ethical issues presented by this request and then helped the individuals evaluate their entity choice options from tax, governance and general business perspectives. This exercise introduced students to business plans, balance sheets and organizational documents. The hypothetical law firm and student associates served as counsel to the newly-formed business entity during the remainder of the semester, and they helped this hypothetical client work through liquidity and growth issues, an unsolicited purchase offer and an initial public offering.

As part of the seminar, students worked in teams and drafted parts of key documents relevant to a transactional law practice. These documents included a limited liability company operating agreement, an asset purchase agreement and a registration statement. Students also reviewed sample documents from public transactions and participated in strategy and counseling sessions with the hypothetical client during the seminar meetings.

Professors Harner and Goldberg enjoyed giving third year law students an opportunity to try their hand at transactions before having to do it for real clients after graduation. As Professor Goldberg often reminded the students, a deal is much easier to do the second, and then the third and then the fourth time around.

Professor Daniel Goldberg's research interests include tax policy issues, with recent focus on the prospects of transition from the income tax to a consumption tax. He has published several articles on aspects of this transition as well as other tax policy issues in scholarly journals including the Tax Law Review and the Tax Lawyer. Professor Goldberg's research interests also extend to issues under the current income tax primarily related to business and real estate transactions. He has published several articles in law reviews in these areas as well.

While on the faculty of the Law School, Professor Goldberg has done consulting with law firms in Washington, D.C. and Baltimore, and served as Professor in residence in the National Office of the Internal Revenue Service during the academic year 1982-83. Prior to joining the faculty in 1978, he practiced full time for law firms in New York and Washington, D.C.

INTERNATIONAL LAW CLINIC EXPLORES MICROCREDIT LENDING IN CHINA

By Shruti Rana, Associate Professor of Law

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.

In the spring of 2010, the School of Law launched a new International and Comparative Law Clinic that allowed students to work on a variety of projects in China, Namibia, and Mexico. This year's China clinical experience focused 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). 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 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 onsite 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.

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.

Professor Shruti Rana currently teaches Contracts, Legal Writing and Analysis, and International and Comparative Commercial Law. In December of 2008 and 2009, Professor Rana was a Visiting Professor at the Central University of Finance and Economics in Beijing, China, where she presented lectures on Comparative Commercial Law and the Comparative Law of Credit & Guarantee. Her research focuses on the intersection of administrative law, international and comparative commercial law, business and technology, and international women's rights issues. She has also been extensively involved in policy and advocacy efforts in the areas of gender equity, welfare reform and immigration law.

In the spring of 2010, Professor Rana helped launch and co-taught the law school's new International and Comparative Law Clinic. Students in the clinic are currently working on a variety of projects in China, Mexico, and Namibia. Professor Rana is currently co-supervising the Clinic's China project, which focuses on analyzing the developing legal framework in China for microcredit lending to Chinese rural citizens.

Prior to joining the University of Maryland, Professor Rana was a Social Affairs Officer at the United Nations, where she worked for the Committee on the Elimination of Discrimination Against Women During the Committee's 38th and 39th sessions. Prior to that, she was in private practice, focusing primarily on commercial and administrative law.

IS OUR ECONOMY SAFE?

A Proposal for Assessing the Success of Swaps Regulation Under the Dodd-Frank Act

By Michael Greenberger, Law School Professor and Director, Center for Health and Homeland Security

This is an excerpt from Professor Greenberger's chapter in The Future of Financial Reform: Will It Work? How Will We Know? (Roosevelt Institute 2010). The full chapter may be found at http://digitalcommons.law.umaryland.edu

Dodd-Frank has been hailed as important and comprehensive financial reform. But like many reforms before it, proof of its success lies not in the text of the law, but in how it changes the status quo. Imagine a world five years from now: How will we know if the Act has successfully changed the landscape of the U.S. financial system? How will we know if we, as consumers, are better protected against another economic meltdown?

1) 90% of standardized over-the-counter derivatives will be cleared and exchange traded, and just 10% will be exempt based on the end-user exclusion.

The basic rule of the Dodd-Frank Act is that swaps must be cleared and exchange traded. One of the few exceptions is for end users. As CFTC Chairman Gary Gensler has said, the "exception should be narrowly defined to include only nonfinancial entities that use swaps as an *incidental part of their business* to hedge actual commercial risks. Even though individual transactions with a financial counterparty may seem insignificant, in aggregate, they can affect the health of the entire system."

To achieve this end, regulators should carefully consider how they define hedging for commercial risk. A model for doing so may come from proposed regulations from January 2010, which would have imposed potential speculative position limits on futures contracts for certain energy commodities. Suggesting an exemption for bona fide hedging, the CFTC relied on a definition from regulation 1.3(z), under which bona fide hedging includes "transactions or positions [that] normally represent a substitute for transactions to be made or positions to be taken at a later time *in a physical marketing channel*, and where they are economically appropriate to the reduction of risks in the conduct and management of a *commercial enterprise*." Further, the CFTC emphasized that "[u]nder the proposed regulations, traders holding positions pursuant to a *bona fide* hedge exemption would generally be prohibited from also trading speculatively. This definition limits the end-user exemption to those whose intent is, ultimately, to purchase or sell a physical commodity, rather than a bank." Such an approach would be sufficiently narrow to limit the ability of entities to circumvent regulation.

2) Swap dealers or major swap participants will have no more than 20% ownership of any derivative clearing organization ("DCO"), board of trade ("BOT"), or swap execution facility ("SEF").

One of the main principals shaping derivatives regulation under the Dodd-Frank Act is to provide free and open access to clearing and exchange trading by financial institutions. Simply put, clearing and exchange trading are designed to reduce risk by providing price transparency, requiring that investors set aside adequate capital in case of default, and producing public information on who is involved in trading and to what extent. But if large numbers of trading institutions are excluded from clearing organizations or exchanges, the protections otherwise contributed by these protections will be undermined.

Michael Greenberger is the Founder and Director of the Center for Health and Homeland Security (CHHS) at the University of Maryland and a professor at the School of Law. In 1997, Professor Greenberger left private practice to become the Director of the Division of Trading and Markets at the Commodity Futures Trading Commission (CFTC). He also served on the Steering Committee of the President's Working Group on Financial Markets, and as a member of the International Organization of Securities Commissions' Hedge Fund Task Force. Professor Greenberger has recently served as the Technical Advisor to the United Nations Commission of Experts on Reforms of the International Monetary and Financial System and the International Energy Forum's Independent Expert Group on Reducing Worldwide Energy Price Volatility. He testified often before committees in both Houses of Congress in the run-up to the passage of the Dodd-Frank Act.

ELECTRONIC CONTRACTING TODAY

By William L. Reynolds, Jacob A. France Professor of Judicial Process

The internet began to be widely used for commercial transactions about fifteen years ago. Commentators soon began predicting that a new legal regime would have to be created to deal with the new way of doing business. At first, there were some signs that such a regime would be put in place. Although there was little caselaw on point, academics and some language in a few opinions tried to establish the outlines of that new order. That effort was especially notable in the area of offer and acceptance where terms like "browsewrap" and "clickwrap" became quite common in some circles.

It is now clear that those predictions were wrong. The common law of contracts proved more than resilient enough to handle the problems of the new era with ease. In contract formation, for example, the courts quickly discarded efforts to develop new categories based on where contract terms are placed on the screen. Instead, the courts' focus is where it always has been: Did the buyer have a reasonable opportunity to learn of the terms?

To be sure, the courts received a little legislative help. In particular, the Uniform Electronic Contracting Act ("UETA") made clear that electronic signatures satisfy the Statute of Frauds. But other legislative initiatives in the area have had little or no impact. The fluidity of the world of electronic contracting has resisted legislative attempts to pin it down. But that same fluidity proved perfectly suited to the very malleability of the common law. That result should not be surprising: An institution, contract law, that has survived for half a millennia must be both tough and supple.

William Reynolds is a widely-published authority on conflict of laws and appellate courts. He has written four books and many law review articles, including papers in the Chicago, Columbia, Cornell, Duke, and Texas Law Reviews. Professor Reynolds writes in a wide range of areas; at present, he is working on topics as diverse as the staffing of federal courts, the origins of baseball's antitrust exemption, electronic contracting, and the role of Maryland in the development of the Constitution.

Professor Reynolds has taught many courses. In the last few years, he has taught Antitrust, Art Law, Civil Procedure, Comparative Public Policy, Conflict of Laws, Constitutional Law, Electronic Commerce, and European Union Law.

Professor Reynolds was educated at Dartmouth College and Harvard Law School and then clerked for Judge Frank Kaufman (D. Md.). He joined the Maryland faculty in 1971, and he has also visited at the Brooklyn, Southern Methodist, and West Virginia Law Schools. Professor Reynolds is a life member of the American Law Institute and of the American and Maryland Bar Foundations. He is Of Counsel to the international law firm of DLA Piper, where his primary focus is appellate litigation.

ECONOMY MAY BE OFF TO THE RACES

By Anirban Basu '03, CEO of Sage Policy Group

This is an excerpt from Mr. Basu's article that appeared in *The Business Monthly.* The full article can be found at *http://www.bizmonthly.com/1_2011_focus/f_3.shtml.*

A combination of ongoing stimulus and recent economic momentum has induced many economists to ratchet up their 2011 forecasts. The latest stimulus takes the form of a compromise reached between Congress and the Obama Administration to extend unemployment benefits, reduce payroll taxes for a year and keep the Bush tax cuts in place another two years.

This will cost the U.S. Treasury another $900 billion, and while that will create another 900 billion issues in the future, the short-term economic outlook improves. Just a few weeks earlier, the Federal Reserve System announced that it would boost money supply by $600 billion through the purchase of federal securities.

That's a lot of stimulus. But even before the latest round of stimuli, there were plenty of reasons to be optimistic regarding near-term economic prospects.

Consumer spending has been rising, with retail and food services sales up 7.3% between October 2009 and October 2010. Auto sales also have been edging higher, including among America's Big Three automakers. And the holiday shopping season was the best in several years.

Markets Up

It also helps that financial markets have been recovering. On March 9, 2009, the Dow Jones Industrial Average sank to 6,469.95 intraday; as of this writing, it stands at well above 11,000. Since financial market performance often foreshadows broader economic performance, the implication is that the economy is in for some better times ahead.

There are now of plenty of economists who believe that the U.S. economy is poised to expand well beyond 3% next year, which would represent above average performance.

But while it is true that 2011 is very likely to be a year of growth, it is possible that members of the dismal science have become a bit too optimistic in their projections in recent months; there are (at least) 10 factors that could act as speed governors on the U.S. economy next year. Collectively, these factors could render 2011 below average.

1. Consumers tap their brakes after suffering buyer's remorse as credit card statements arrive early in 2011.
2. Housing market recovery scrubs much of its speed.
3. Concerns regarding the ballooning national debt shake confidence and further diminish momentum.
4. State/local tax increases become a source of slippage.
5. The low-interest rate turbocharger cuts off.
6. European debt crisis is no formula for success.
7. State and local government spending further deflates aggregate demand.
8. Government spending cuts in other parts of the world puts global expansion into neutral.
9. Small business confidence fades.
10. Private job growth does not pick up sufficiently, causing unemployment to rise above 10% and stay there.

In recent months, another factor has emerged that threatens the 2011 outlook: rising energy and food prices. As of this writing, oil prices have risen above $90 per barrel.

Anirban Basu is Chairman & CEO of Sage Policy Group, Inc., an economic and policy consulting firm in Baltimore, Maryland. A 2003 graduate of the School of Law, Mr. Basu is one of the Mid-Atlantic region's most recognizable economists, in part because of his consulting work on behalf of numerous clients, including prominent developers, bankers, brokerage houses, energy suppliers and law firms. On behalf of government agencies and non-profit organizations, Mr. Basu has written several high-profile economic development strategies.

In recent years, he has focused upon health economics, the economics of education and economic development. He currently lectures at Johns Hopkins University in micro-, macro-, international and urban economics.

In 2007, Mr. Basu was selected by The Daily Record as one of Maryland's 50 most influential people. The Baltimore Business Journal named him one of the region's 20 Most Powerful Business Leaders in 2010.

CLERKING ON BOTH SIDES OF THE TABLE

By Marie Maas 2L

Second year student Marie Maas was selected to serve as a law clerk for the United States Attorney's Office for the District of Maryland (USAO) for the Fall 2010 semester. During her clerkship, she has immersed herself in litigation practice, with involvement in cases ranging from white collar crime prosecution to defense of wrongful discharge employment claims.

I spent the first part of the semester writing a complete Fourth Circuit appellate brief addressing a sentencing issue of first impression. I worked independently on the initial researching and writing stages of the brief, and an Assistant United States Attorney (AUSA) provided detailed feedback and editorial guidance. This was an excellent way for me to gain appellate brief writing experience while acquiring techniques from a seasoned prosecuter.

In addition to brief writing, I had the opportunity to learn practical skills by shadowing AUSAs in the USAO's fraud and money laundering division. I was able to follow a major fraud and money laundering case. I observed meetings with U.S. Immigration and Customs Enforcement agents and learned about the investigation and prosecution of such cases, and attended warrant hearings in the federal district court, at which the USAO successfully obtained subpoenas to freeze targeted domestic and foreign bank accounts. As a result, more than $9 million was seized from the money laundering operation.

I also attended courtroom proceedings and meetings involving fraud and money laundering cases. One of the highlights was sitting second chair at the counsel table for a money laundering proceeding in the federal district court. I also participated in proffer meetings with a defendant who was indicted by a federal grand jury for fraud. We met with the defendant and their attorney on several occasions, and I had the opportunity to question the defendant, probing for any knowledge of other money laundering operations. As as result of the leads generated in these meetings, the Drug Enforcement Administration and the USAO have launched a joint investigation into an international money laundering operation.

I had the chance to see the other side of the table by assisting in the defense of a wrongful discharge claim made by an employee against the United States. I assisted an AUSA in preparing for oral argument in the Fourth Circuit by conducting research to update case law and providing an analysis of the defendant's arguments to assist in trial preparations.

Marie Maas is a Board Member Elect of the Moot Court Team and Student Editor for The Authority law journal. Prior to entering law school, Ms. Maas served as a research manager for an entrepreneurial think tank, and later as an executive for a public relations firm.

Clerking for the U.S. Attorney's Office is one of the best educational experiences I have had in law school. By working closely with seasoned litigators, I gained practical skills and insights that cannot be taught in a classroom. This was also also a fantastic way to shape my career path. Throughout the semester, I had the opportunity to explore diverse practice areas ranging from employment law to white collar crime. I highly recommend that students take advantage of the Business Law externship program for unparalleled opportunities to gain real world career training.

MULTIDISCIPLINARY TEAM WINS VENTURE CAPITAL COMPETITION, ADVANCES TO REGIONAL ROUND

By Wes Demory 3L

School of Law student Wes Demory teamed with four MBA students to win the latest Venture Capital Investment Competition hosted at Maryland's Smith School of Business. The competition casts student teams in the role of a venture capital firm soliciting investment opportunities. The teams, consisting mostly of MBA students, are presented with several growing businesses seeking funding. Teams have two days to conduct due diligence on the prospective investment opportunities, scrutinize business plans, and analyze future exit strategies. Teammates leverage their business, legal, and technology backgrounds to construct business valuations and investment terms for each presenting business. Finally, the teams negotiate a term sheet with one business they feel has the greatest potential for success. All the while, venture capital judges are evaluating the teams' performance and how well they match the thought process and behavior of a sophisticated investor.

This competition highlights real-world scenarios where lawyers work hand-in-hand with business professionals to solve multidisciplinary problems. According to MBA Entrepreneur Club President Reneida Leon, bringing together students from different University of Maryland programs helps create stronger teams that will be competitive nationally. "The Smith round of the VCIC was a success this year thanks in part to the diversity of the teams formed. The fact that we were able to form mixed groups of MBA, Engineering and Law school students carrying a variety of backgrounds and industry knowledge, raised the bar of the competition and with it, the probabilities of sending a winning team to the VCIC Regionals and even the Final International Round."

The UM team moves on to compete in the regional round at Carnegie Mellon University in February. To learn more about the competition, visit http://www.vcic.unc.edu.

LEAH BARTELD 2L JOINS BLOGGING RANKS

In addition to her responsibilities as a law student, Leah Barteld 2L is a contributor to the Maryland State Bar Association Section of Business Law's blog, "Business Law Developments." Started last year, the blog aims to be a "one-stop shop" for business law practitioners to check daily to keep abreast of the latest decisions from the Maryland Court of Appeals, the U.S. Court of Appeals for the Fourth Circuit, the U.S. District Court for the District of Maryland, and the Maryland Tax Court.

Three editors work with a team of writers to monitor the courts for business related decisions. Each day, the writer "on call" will read through the decisions handed down, and if pertinent, write a short summary to post on the blog. When a case is covered, the writer discusses the holding, a brief summary of facts, and a summary of the courts analysis. The posts use a consistent style and do not include any editorial comments from the writers. After a writer drafts their post, ideally within a day of the opinion, one of the editors reviews and publishes the post to the blog.

On the first day Leah was assigned to monitor the courts, the *Pease v. Wachovia* opinion was handed down by the Maryland Court of Appeals. The opinion related to the Maryland Credit Agreement Act, and whether the court could hear claims of negligence, fraud and breach of fiduciary duty. The court found that the purpose of the Maryland Credit Agreement Act was to act as a statute of frauds for a loan agreement. However, the court held that as long as the claims were not asserted in an attempt to enforce an existing oral agreement or orally modify an existing loan agreement, that the evidence could be heard.

The blog can be found at *http://www.marylandbusinesslawdevelopments.com/*.

UMDLAW TO COMPETE IN TRANSACTIONAL LAWYERING MEET

By Robert Wojcicki 2L

The Business Law Program is excited to announce that the University of Maryland will compete this year in the Second Annual Transactional Lawyering Meet at the Earle Mack School of Law at Drexel University in Philadelphia. The Meet is the first and only competition for law students interested in transactional practice, and requires teams of students to draft a transactional agreement and to negotiate its provisions against other teams.

The Meet will include up to 30 teams, each team consisting of two students. Teams are judged by a panel of practice experts who will evaluate the teams' success in achieving the goals of parties involved in the transaction. The competition presents exemplary challenges in transactional problem solving, which will require students to combine lawyering and drafting skills; knowledge of contracts, corporate and securities law; and business sense to create innovative solutions.

The Business Law Program will be hosting an internal competition before the start of the spring term to select Maryland's team. Four students will be selected; two to compete at the Meet and two to serve as alternates to help prepare the competing team for the Meet. The team will work under the supervision of Professor Michelle Harner and other Business Law faculty.

"I am excited about the expansion of Maryland's Business Law Program," said Curriculum Chair of the Business Law Society and 2L Robert Wojcicki. "Participation in Drexel's Lawyering Transactional Meet this spring is sure to be a stepping stone for future opportunities."

Two preliminary rounds, featuring all teams, will begin on Thursday, March 31, 2011. Teams will face a different team in each round. Teams with the best performances in the preliminary rounds will advance to the semi-final round on Friday. The teams selected as the best entrepreneur team and the best investor team will compete on the afternoon of Friday, April 1 for the Best Overall Team Prize.

BUSINESS LAW PRACTITIONERS DISCUSS ROLE OF LAWYERS IN MERGERS & ACQUISITIONS

By Arun Paradkar 2L

"One key to being an effective lawyer is communicating strategically," said David Eberhart to a standing room only crowd of School of Law students and faculty. "Think about the mindset of your audience and couch your communication in terms that will resonate with your audience, while getting across your message." Mr. Eberhart, a principal at Miles & Stockbridge, was one of five panelists discussing the challenges of corporate lawyers at "The Role of Lawyers in Mergers & Acquisitions" event on Nov. 11. Sponsored by the Business Law Program and the Business Law Society, the panelists shared their most memorable M&A transactions, as well as how they acquired the skills to be successful in their field. William Schwitter, a partner at Paul Hastings, noted the challenges in obtaining financing as a major hurdle for M&A transactions, while Kelly Hardy, a partner at DLA Piper, highlighted the increasingly global nature of the M&A markets. As a litigator, Ava Lias-Booker, Managing Partner of McGuireWoods's Baltimore office, observed that most M&A litigation resulted from vague language in the original contracts. "Commonly litigated issues could be avoided by addressing unclear provisions in the initial agreement," she said

The panelists concluded the discussion by outlining the characteristics necessary for young lawyers entering the field and the types of responsibilities generally assigned to first-year associates. While the panelists agreed that a math or economics background was unnecessary, all believed that a willingness to learn was essential. Panelists suggested law school courses such as business associations and commercial law as essential to developing a strong foundation. According to the attorneys, first-year responsibilities include drafting, due diligence, and observing negotiations. Robin Weyland, Legal Counsel for Stanley Black & Decker, Inc., observed that directness in written and verbal communications were crucial traits.

The Business Law Program and the Business Law Society are grateful to the panelists and Prof. Harner for their attendance at this thought-provoking event. A number of the students commented on the enlightening nature of the panel. We look forward to a similarly energetic discussion at future events.

FALL SYMPOSIUM DISCUSSES DODD-FRANK LEGISLATION

By Justin Redd 2L

Calling it "the greatest restructuring of our financial markets since the New Deal," Professor Michael Greenberger and experts from the financial and legal sectors hosted a one-day discussion on the recently-passed Dodd-Frank Wall Street Consumer Protection Act on November 5, 2010. Practitioners closely involved in drafting, passing, and implementing Dodd-Frank examined both the immediate and long-term impacts of this monumental legislation.

Professor Greenberger began the day by setting the financial scene in the wake of Dodd-Frank's passing. He called the 2400-page bill, which increases government oversight and requires greater transparency in many complex financial areas, a "surprising, beneficial accomplishment." The four morning panelists, Barbara Roper of the Consumer Federation of America, Wallace Turbeville of Better Markets, Joshua Rosner of Graham Fisher & Co., and Lisa Lindsley of AFSCME, focused on how the financial markets before Dodd-Frank became necessary and how the bill seeks to correct the damage. Roper, who supported derivatives issues addressed in the bill, called the current financial crisis "fractal in its complexity, like a Mandelbrot set—as you zoom in . . . every answer to every question has its implications . . . . Each question has a title or subtitle of this bill, which is why it's so long." Though hopeful that the bill could fundamentally change financial markets for the better, Roper expressed concern that proper implementation depends on Wall Street and others "doing things right, exactly what they failed to do leading up to this crisis." In a witty talk, Turbeville, a lawyer and longtime veteran of the financial advising profession, advocated for a transparent clearing system that would use statistics to bring trades "into the light of day," allowing better management of risk on both sides. Rosner, who has written extensively in the fields of housing, structured securities, and rating agencies, described how the increased speculative role of banks over the past half-century and rating agencies' inability to consistently assess new asset classes led to today's state of affairs. Rosner believes that Dodd-Frank fails to hold the "too big to fail" banks accountable, calling it "a legacy that will haunt us." Lindsley closed out the morning remarks by boiling the Dodd-Frank down for her fellow capitalists/non-lawyers: "'No casino economy' is the message."

Wallace Turbeville and Lisa Lindsley

A brief question and answer session addressed the impact of the Republican victories in the most recent election, and how a House now largely hostile to regulation will affect the bill's implementation. Panelists cited several challenges to implementation, including technical amendments to the bill that could surreptitiously undermine its regulatory force, lack of adequate data and funding, and the need for "enforcement culture," the will to hold institutions accountable for violating the bill's provisions.

The afternoon panel comprised economist and author Simon Johnson,

AFL-CIO Legal and Policy Advisor Heather Slavkin, University of Maryland School of Law Visiting Professor Peter Holland, and Executive Director of Americans for Financial Reform

(from l to r) Peter Holland, Lisa Donner, Michael Greenberger, Lisa Slavkin and Simon Johnson

Lisa Donner. Johnson, a professor of entrepreneurship at MIT and senior fellow at the Peterson Institute for International Economics, also stressed the need to fix "too big to fail," identifying a cross-border resolution mechanism as the solution. Johnson excited the audience with his impassioned remarks. AFL-CIO's Heather Slavkin delivered an equally passionate message on the role of labor unions in the financial markets and the human consequences of the "profound breakdown." Slavkin stressed readiness for another financial crisis so that her constituents, "the middle," are not left to foot the bill again. Holland, who teaches the Consumer Advocacy Clinic at the University of Maryland School of Law, took the banking industry to task for investment practices, such as "robo-signing," that he said violated several first-year law school concepts. Professor Holland intimated his exasperation that consumers are getting lost in many layers of impropriety. Donner stressed the School of Law's "invaluable" role in educating her organization on derivatives so they could "talk to people on the street and on the Hill." The day's discussion concluded with Johnson's challenge to the White House to fight on the Consumer Agency's side, in light of the losses on the horizon from put-backs.

The Symposium was sponsored by the *Journal of Business and Technology Law* and the Business Law Society. "We were fortunate to have an incredible group of panelists," said *Journal* Executive Symposium Editor and organizer Helen Dalphonse 3L. "I can't thank them and the Managing Director of the Business Law program, Hilary Hansen, enough. I only wish we could have more time to keep the discussion going."

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FACULTY PUBLICATIONS AND PRESENTATIONS

Martha Ertman

"Reference re: Constitutionality of S. 293 of Criminal Code of Canada," Expert Report for Canadian Case in British Columbia Supreme Court (October 2010).

"The Heart of the Deal", Faculty Workshop, Loyola Law School Los Angeles, Los Angeles, CA (September 30, 2010).

Daniel Goldberg

"E-VAT - An Electronically Collected Progressive Consumption Tax," 128 *Tax Notes* 1351-1374 (September 2010).

Michael Greenberger

"Overwhelming a Financial Regulatory Black Hole with Legislative Sunlight: Dodd-Frank's Attack on Systemic Economic Destabilization Caused by An Unregulated Multi-Trillion Dollar Derivatives Market," 6 *Journal of Business & Technology Law* (forthcoming 2011).

"Derivatives in the Crisis and Financial Reform," in *The Political Economy of Financial Crises* (Gerald Epstein & Martin Wolfson eds.) (Oxford University Press, forthcoming 2011).

Speaker, "The Impact of Financial Reforms on Energy Markets," New York Energy Forum, New York, NY (September 16, 2010).

Written Testimony, *Hearing Before the Financial Crisis Inquiry Commission Regarding The Role of Derivatives in the Financial Crisis* (June 30, 2010).

Michelle Harner

"The Search for an Unbiased Fiduciary in Corporate Reorganizations," 86 *Notre Dame Law Review* 101 (forthcoming 2011).

"Barriers to Effective Risk Management," 40 *Seton Hall Law Review* 1323 (2010).

"Committee Capture? An Empirical Analysis of the Role of Creditors' Committees in Business Reorganizations," Michigan State University College of Law Workshop, East Lansing, MI (October 1, 2010).

"Committee Capture? An Empirical Analysis of the Role of Creditors' Committees in Business Reorganizations," Villanova University School of Law Workshop, Villanova, PA (September 24, 2010).

Shruti Rana

Presentation, "Micro-Innovation: Philanthropic Entrepreneurialism and the For-Profit Charity," Business/Corporations Work-in-Progress Workshop, Conference of Asian Pacific American Law Faculty (CAPALF), University of Hawai'i School of Law, Honolulu, HI (December 12, 2010).

Moderator and Presenter, "The International Law Clinic Re-Imagined" Panel, Conference on Re-imagining International Clinical Law, University of Maryland School of Law, Baltimore, MD (November 18, 2010).

Panelist, "Asian Americans in the Law," APALSA (University of Maryland School of Law Asian-Pacific American Law School Association) Career Panel, Baltimore, MD (October 21, 2010).

Panelist, Mentoring Circle for South Asian Women Attorneys and Law Students, South Asian Bar Association, Washington, DC (October 19, 2010).

William Reynolds

"What's Software Got to do With It? The ALI Principles of the Law of Software Contracts," 84 *Tulane Law Review* 1541 (2010) (with Juliet Moringiello).

"Survey of the Law of Cyberspace: Electronic Contracting Cases 2008-2009," 65 *Business Lawyer* 317 (2009) (with Juliet Moringiello).

"Law Reform Commissions," *Business Law Today* 28 (Jan./Feb. 2009) (with Laila Said).

Robert J. Rhee

"A Production Theory of Pure Economic Loss," 104 *Northwestern University Law Review* 49 (2010).

Presentation, "The Tort Foundation of the Duty of Care and Business Judgement," St. Louis University School of Law, St. Louis, MO (February 9, 2011).

"The Future of Law and Economics," Faculty Workshop, University of Maryland School of Law, Baltimore, MD (October 21, 2010).

THE IMPORTANCE OF CONTINUING EDUCATION FOR DIRECTORS AND SENIOR EXECUTIVES

UNIVERSITY OF MARYLAND
ROBERT H. SMITH SCHOOL OF BUSINESS

It's true that directors and senior executives who routinely attend director development programs stay up-to-date with changes in corporate governance trends and boardroom behavior. But it's the choice of the program that really makes a difference in just how relevant that development is.

The Directors' Institute at the University of Maryland's Robert H. Smith School of Business is the only university-sponsored director development program in the heart of downtown Washington, D.C. Participants who attend the Directors' Institute receive world-class instruction from an array of thought leaders who have successfully researched and navigated the pressing issues facing corporate boards across the nation.

The Directors' Institute offers its participants opportunities to:

- Learn to create long-term value for shareholders by understanding and developing best practices for succession planning, corporate strategy and risk management, executive compensation, and corporate ethics;
- Explore the most relevant issues and hot topics facing corporate boards across the nation and what companies are doing to mitigate impact;
- Engage leading industry executives, government policy-makers legal and financial services experts to develop frameworks for sound business and legal strategies to better solve problems in today's volatile business environment.

Keynote speakers include:

- William E. Mayer, Director, BlackRock Kelso
- Robert S. Miller, Chairman of the Board, AIG
- Harvey L. Pitt, Kaloroma Partners, Inc.
- The Hon. Leo E. Strine, Jr., Court of Chancery

Speaking opportunities and sponsorships are still available for the 2011 Directors' Institute. Questions about program content may be referred to Stephen Wallenstein, Director, at 301.405.3472 or *dirinst@rhsmith.umd.edu*. Visit the Directors' Institute website at *www.rhsmith.umd.edu/directorsinstitute* to register for the 2011 program.

WALL STREET IS MOVING TO K STREET. WE'RE ALREADY THERE.

The Business Law Program
University of Maryland School of Law
500 West Baltimore Street
Baltimore, MD 21201

WANT TO GET INVOLVED?

Host a "brown bag" on a topic of Business Law that interests you. Mentor a Business Law Society student. Sponsor a Business Law symposium. We're always looking for ideas and suggestions to enrich our experiences at UMDLaw. Contact Program Managing Director Hilary Hansen at 410-706-3146 or *hhansen@law.umaryland.edu.*

The Business Law Program 2010-2011 Faculty and Staff

Co-Directors
Michelle Harner, JD
Robert Rhee, JD, MBA

Managing Director
Hilary Hansen, MA, ACT

Brenda Bratton Blom, JD, PhD
Irving Breitowitz, JD
Maxwell Chibundu, JD, MA
Martha Ertman, JD
Daniel Goldberg, JD
Michael Greenberger, JD

Peter Holland, JD, MA
Robert Keller, LLB
Shruti Rana, JD, MSc
William Reynolds, JD
Robert Suggs, JD
Michael Van Alstine, JD, MJurComp, DrJur

Comments about this newsletter should be directed to:

Hillary Hansen, MA, ACT
University of Maryland School of Law
500 West Baltimore Street * Baltimore, MD 21201
hhansen@law.umaryland.edu