

Business Transactions: Connecting the Threads III
Sept. 27, 2019

Event Speakers

Colleen M. Baker is an assistant professor of legal studies at the University of Oklahoma's Price College of Business, and an Affiliate Faculty, College of Law. She is an expert in banking and financial institutions law and regulation with extensive knowledge of the regulation of over-the-counter derivatives, clearing, the Dodd-Frank Act, bankruptcy, and dispute resolution (including being a mediator).

Benjamin Edwards has been a professor at the UNLV William S. Boyd School of Law since 2017. He researches and writes about business and securities law, corporate governance, arbitration, and consumer protection.

Dean Joshua P. Fershée is dean and professor of law at Creighton University School of Law. A graduate of Tulane Law School, his areas of expertise include business law and energy law.

Professor Joan MacLeod Heminway is the Rick Rose Distinguished Professor of Law at the University of Tennessee College of Law. Professor Heminway's research agenda currently focuses on crowdfunding, U.S. securities fraud doctrine (including insider trading regulation), other areas of securities disclosure law and policy, and governance and contract issues in business associations law.

Professor Don Leatherman is the W. Allen Separk Distinguished Professor of Law at the University of Tennessee College of Law teaching primarily courses in the federal income tax. He writes and speaks frequently on issues related to federal income tax, particularly those involving corporations and consolidated groups.

Professor Douglas K. Moll is the Beirne, Maynard & Parsons, L.L.P. Professor of Law at University of Houston Law Center. Professor Moll teaches in the areas of business organizations, business torts, and commercial law.

Professor J. Haskell Murray is an associate professor at the Jack C. Massey College of Business at Belmont University in Nashville, Tennessee where he teaches business law, business ethics, and ADR courses. Professor Murray's research focuses on corporate governance, mergers & acquisitions, sports law, and social enterprise law issues.

Professor Stefan Padfield is a professor of law at the University of Akron School of Law. He teaches business associations, securities regulation, and mergers and acquisitions.

Professor Thomas Plank is the Joel A. Katz Distinguished Professor of Law at The University of Tennessee (UT) College of Law. His scholarly interests include the nature of property, the

relationship between bankruptcy and non-bankruptcy law, and the historical development and comparison of commercial law and property law systems.

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Panel Topics and Content

Professor Baker will be presenting on “Banking on the Cloud.” The use of cloud computing is becoming ubiquitous in today’s economy for both businesses and individuals. As a highly regulated industry, the banking industry has perhaps taken a more cautious approach than other less-regulated industries to the use of this new technology. However, this is changing. Banks are increasingly relying upon cloud computing to expand their services to customers and to decrease capital investment. Nevertheless, concerns about regulatory and security issues have not disappeared. In fact, recent news reports detail the theft of significant amounts of bank data from a well-known cloud computing provider and increasing scrutiny by federal banking regulators of these platforms.

This presentation is designed to provide: an overview of cloud computing; costs and benefits for banking institutions in the use of these platforms; risk tradeoffs involved in such outsourcing; accompanying legal and regulatory considerations; and, some generalized reflections on legal aspects involved with the use of cloud computing by businesses.

Professor Edwards will present on “Fiduciary Fracas: State Power to Regulate Investment Advice.” In June 2019, the Securities & Exchange Commission made significant changes to the regulation of investment advice, issuing regulations and new interpretations of the Investment Advisers Act of 1940. Industry advocates have argued that states lack power to enact their own regulations on the theory that various federal statutes and regulations combine to preempt and sharply limit state authority. This article examines the current state of reforms around the country and the policy and legal arguments for and against limiting state efforts to raise the standards for investment advice.

Dean Fershée’s topic is “This, I Believe: A New Look at Corporate Purpose, Director Primacy and the Business Judgment Rule.” Contrary to widespread belief, corporate directors generally are not under a legal obligation to maximize profits for their shareholders. This is reflected in the acceptance in nearly all jurisdictions of some version of the business judgment rule, under which disinterested and informed directors have the discretion to act in what they believe to be in the best long term interests of the company as a separate entity, even if this does not entail seeking to maximize short-term shareholder value. Where directors pursue the latter goal, it is usually a product not of legal obligation, but of the pressures imposed on them by financial markets, activist shareholders, the threat of a hostile takeover and/or stock-based compensation schemes. This article will amend, update, and expand upon my 2015 model to provide a new framework for considering director decision making and how we view corporations and other business entities. In doing so, this article will consider recent high-profile business, and controversial decisions that have led to questions about proper director and officer decision making processes, such as Dick’s Sporting Goods decision to restrict certain

gun sales, Nike's Colin Kaepernick ads, and CVS/Caremark's decision to stop selling tobacco products.

Professors Heminway, Leatherman, and Plank will present on "What is a Merger Anyway?" Specifically: Business lawyers who work on structuring mergers and other business combinations come from different disciplines. This session captures a conversation about mergers among three experienced professor-practitioners from three different substantive law traditions: business associations, property, and taxation. After laying a foundation by describing various different forms of business combination, the panelists will engage in a discussion that addresses a series of questions, including those set forth below.

- How do each of these lawyers conceptualize mergers and other business combinations?
- What issues do their individual conceptions raise in the structuring and documentation of a business combination?
- How do those issues get resolved?
- What rules of professional responsibility are or may be implicated, and how is compliance with those rules best assured?
- Are broader notions of ethics involved in merger decision-making and implementation?
- If so, what are they, how do they arise, and how are they resolved?

Through the resulting conversation, the panel seeks to illustrate that diverse policies underly the interpretation and application of transactional business law, even in a single business combination transaction. At the same time, the panelists reflect on the lawyering process and the role of lawyers in mergers and acquisitions practice.

Professor Moll will present on "Minority Owner Oppression in the Closely Held Corporation and the LLC." The problems of minority shareholder oppression have long been a part of the closely held corporation setting. Largely due to the principle of majority rule and the lack of a market exit, minority shareholders in closely held corporations are particularly vulnerable to abuse. Perhaps not surprisingly, therefore, judicial precedents and statutory provisions in many jurisdictions afford some protection to a minority investor in a closely held corporation from the improper exercise of majority control.

Many closely held businesses today, however, are structured not as closely held corporations, but as limited liability companies ("LLCs"). As a consequence, it is important to ask whether the LLC form of business organization poses the same risks of oppression to minority owners, and, if so, whether judicial and legislative assistance is needed. The presentation will explore these questions and conclude that the problems of minority oppression are likely to arise in the LLC setting as well. Because the "seeds" of oppression are also present in the LLC, in other words, the presentation will argue that LLC minority owners will need a protective oppression doctrine just like their closely held corporation brethren. The presentation will also explore the types of oppression disputes that have arisen in the LLC setting over the past two decades.

Professor Murray will present on “Impact Investing and Measuring Social Returns.” Specifically: “Impact investments” —“investments made with the intention to generate positive, measurable social and environmental impact alongside a financial return”—have grown rapidly in recent years. According to the 2018 Global Impact Investing Network (“GIIN”) annual survey, 229 responding organizations manage over \$228 billion in “impact investments.” Over the past five years, GIIN calculates a 13% per annum increase in “impact investments” by constant respondents. During this growth, various “third-party standards,” including B Impact Assessment, Ceres Roadmap to Sustainability, Global Reporting Initiative, and ISO2600, have been developed to aid in quantifying social impact. Most state benefit corporation laws require both “a material positive impact on society and the environment” and use of a “third-party standard” to measure the impact, yet precisely how this social impact is measured, and the details of the third-party standard providers, has not been the focus of a detailed legal academic article to date. This article examines each of the major third-party standards and provides suggestions for both the legally-required and voluntary measurement of social impact.

Professor Padfield’s topic is “Reflections on the 34th Economics Institute for Law Professors.” Specifically, Professor Padfield will discuss: The Law Economics Center (LEC) at the Antonin Scalia Law School at George Mason University is “dedicated to introducing sound economic analysis into the public policy debates and legal discussions encountered by public servants, professors, and legal professionals alike.” It operates “under the belief that if policymakers understand economics, they will be more likely to make decisions that support the rule of law and the free enterprise system, thus advancing innovation, job creation, and economic growth.”

The LEC’s Economics Institute for Law Professors (the Institute) “covers basic price theory, with emphasis on the allocative effects of alternative property rights regimes, transaction cost economics, and the application of basic economic theory to a variety of legal issues.” The goal of the Institute “is to help participants enhance their understanding of economics and broaden their analytical tools in order to introduce greater economic sophistication and policy relevance to their professional work. More than 830 law professors worldwide have attended the LEC’s Economics Institutes.”

This paper contains reflections on the 34th Economics Institute for Law Professors, which the author attended June 16-28, 2019. The reflections focus on portions of the Institute of particular relevance to those interested in corporate governance and are intended to provide practical arguments and perspectives for use in a wide variety of practice settings, including litigation, transaction planning, and policy making.