

The NEWSLETTER of the AALS Section on Real Estate Transactions

AALS Annual Meeting
New Orleans, Louisiana

January 6-10, 2010

Enlightening & Empowering: Speakers and Topics Finalized for the 2010 AALS Program

Lloyd T. Wilson, Jr., Section Chair, Indiana University School of Law — Indianapolis

Volume 7, Issue 2

November 10, 2009

The Section on Real Estate Transactions has assembled an engaging panel of speakers and topics for our program at the 2010 Annual Meeting of the AALS in New Orleans. Our program will be held on **Thursday, January 7, from 2:00 to 5:00 p.m.** Mark your calendar now!

The speakers and topics described below were selected with two principal criteria in mind; we sought presentations that would be enlightening and empowering. In the official AALS description of our program, we called attention to the fact that members of the legal academy are engaged in wide-ranging and innovative research. Accordingly, we sought speakers who exemplify that diversity of inquiry and creativity and whose presentations will thus be enlightening for us all. Further,

consistent with the theme of the 2010 Annual Meeting — Transformative Scholarship—we sought speakers whose research has the potential to empower others to effect change and promote the commonwealth, and common health, of our society.

For the first panel, the speakers chosen to discharge those goals and the titles of their presentations are:

Robin Paul Malloy, Syracuse University College of Law, *Real Estate Transactions and Entrepreneurship*;

Eduardo M. Peñalver, Cornell University Law School, *The Paradox of Property*; and

Aleatra P. Williams, Charleston School of Law, *Real Estate Market Meltdown, Foreclosure and Tenants' Rights*.

The speakers and presentation titles for the second panel are:

Thomas W. Mitchell, University of Wisconsin Law School, *Economic Justice and the Uniform Model Law Process*;

Rigel C. Oliveri, University of Missouri School of Law, *Discriminatory Housing Advertisements in the Age of the Internet: Lessons from Craigslist*; and

Steven J. Eagle, George Mason University School of Law, *The Really New Property: A Skeptical Appraisal*.

The speakers' presentations are described more specifically in the following paragraphs.

Professor Malloy will examine the process by which transactional law facilitates the
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2010 Section Field Trip: New Orleans River Garden Wilson Freyemuth, Chair-Elect, University of Missouri

In 2010, the AALS returns to New Orleans. As everyone knows, redevelopment in New Orleans has faced tremendous challenge in the post-Katrina period, particularly giving the loss of public and low-income housing stock rendered uninhabitable by the storm. Through the assistance of the firm Sher Garner Cahill Richter Klein & Hilbert, LLC, our 2010 Section field trip will visit the site of the former St. Thomas public housing project, where the River Garden redevelopment project is taking final shape.

River Garden, located in the historic Lower Garden District of New Orleans, is a community created through the HUD HOPE VI Redevelopment of the former St.

Thomas housing project. The developer is Historic Restoration Incorporated (HRI), a New Orleans/St. Louis real estate development company with expertise in the adaptive reuse of historic structures. The River Garden community is located on 60 acres adjacent to the Mississippi Riverfront on the edge of the New Orleans Warehouse District. Embracing "New Urbanism" concepts, River Garden has incorporated mixed use developments (including over 300 apartments, 73 garden homes, a neighborhood park, elderly apartments and a Wal-Mart retail center) in a pedestrian- and historic preservation-friendly atmosphere.

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Enlightening & Empowering: Speakers and Topics Finalized for the 2010 AALS Program

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capture and creation of value from the exchange of assets that property law has commoditized.

Professor Peñalver will consider ways that the values inherent in property as an institution render it simultaneously, and paradoxically, both an object of transformation and an obstacle to it. Professor Williams will evaluate recent initiatives at the federal and state levels to address the impacts of foreclosure on tenants.

Drawing on his experience as a Reporter for the Uniform Partition of Inherited Property Act, Professor Mitchell will propose that the process for developing uniform laws must be reformed if those laws are to have transformative effects for poor and minority property owners. Professor Oliveri will examine the Fair Housing Act's prohibitions against

discriminatory housing advertisements within the context of technological developments and laws governing Internet communications. Professor Eagle's presentation is last because he plans to respond to the other five presentations and to question whether transformative change is achievable within existing frameworks of the law.

Papers based on these presentations will be published in a symposium edition of the *Indiana Law Review*.

I trust you will agree that this line-up invites questions and challenges. Even in an era of tight travel budgets, I hope this program and the perennially popular Section field trip, which Chair-Elect Wilson Freyermuth describes in his column, convinces you to join us in New Orleans. See you there!

Why Didn't Home Loan Disclosures Prevent Predatory Lending? Lessons From A Cognitive and Social Psychological Explanation

Debra Pogrud Stark, Treasurer, The John Marshall Law School

The federal government's primary method of protecting consumers from "predatory lending" was to enact disclosure laws (RESPA and TILA) that mandated the disclosure of the basic economic terms of the home loan applied for in order to enable consumers to shop around and obtain the lowest cost loan possible. Notwithstanding these disclosure laws, unscrupulous mortgage brokers and lenders were able to convince borrowers to take out higher cost loans than the borrowers qualified for and caused some borrowers to think that they were taking out affordable fixed rate loans when in fact they were entering into an adjustable rate loan that could rise to unaffordable levels. How were mortgage brokers and lenders able to do this?

In a recent article that I co-authored with a cognitive psychologist we identified fourteen cognitive and social psychological phenomena that unscrupulous mortgage brokers and lenders could take advantage of and which we hypothesized caused the mandatory disclosure laws to be ineffective at preventing predatory lending. See, Stark & Choplin, "A Cognitive & Social Psychological Analysis of Disclosures Laws and Call For Mortgage Counseling To Prevent Predatory Lending," *Psychology, Public Policy & Law Journal* (in press) ("A Psychological Analysis of Disclosure Laws") (see also Table 1). Although the recently revised home loan disclosure forms address some of the psychological barriers to rational decision making such as user unfriendly forms, it is still unlikely to effectively prevent predatory lending in the future (once the housing and lending market revives) because of the remaining psychological barriers. For example, we

tested one of these phenomenon, the use of explanation scripts and deception, and found that approximately 80% of the participants proceeded to sign a consent form even after they noticed that it contained a term that was contrary to what had been promised to them when they were told either a plausible or even implausible false explanation for the presence of the inconsistent term. See, Choplin & Stark, "Whispering Sweet Nothings: Seducing Consumers To Sign Contracts Using Explanation Scripts and Deception."

This experiment supported our hypothesis that consumers are vulnerable to deceptive explanations of problematic terms and supports anecdotal evidence that when some mortgage brokers and lenders presented the mandatory disclosure forms to home borrowers they were able to do so in ways that caused the borrowers to fail to realize they were entering into an overpriced and/or unaffordable loan. It also underscores the need to supplement home loan disclosures with a mortgage counseling intervention (both "in-person" and through an interactive computer training program) in order to better overcome the cognitive and social psychological barriers to rational home loan decision-making. The Cognitive and Social Psychological Analysis article provides a detailed description of this proposed counseling and the costs and benefits of its imposition.

Although we are currently in a period of home loan famine (picking up on the biblical analogy from my last newsletter

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Center for Real Estate Law at The John Marshall Law School LLM Program in Real Estate Law

Celeste M. Hammond, Professor & Director of Center for Real Estate Law, John Marshall Law School

For 15 years, the Real Estate Law LLM Program has been the only program of its kind in the Midwest welcoming recent law school graduates, experienced practitioners, and those looking to refocus their careers. Courses in the LLM Program emphasize a transactional approach to legal education where students appreciate the business goals of their clients while learning the substantive law and skills necessary to structure and close deals. A distinguished faculty of Debra Stark, Susan Connor, Michael Seng, Scott Shepard and Celeste Hammond teach courses in conjunction with outstanding practitioners in all aspects of commercial real estate law. The emphasis is on the transaction, rather than dispute resolution.

An Advisory Board of nationally respected attorneys, professors including Dale Whitman and Richard Green, and business leaders assist the director in guiding the Center in preparing students for successful careers.

In today's economy, attorneys wishing to improve skills in a transactional practice, explore a career change or leverage current skills into a business position find themselves well-positioned with an LLM in Real Estate Law. Graduates of the LLM Program take control over their own training and career development in this challenging legal market and distinguish themselves as experts in commercial real estate transactions.

In 2004 an MS in Real Estate Law for non-attorneys was added as a degree program. Students with extensive backgrounds in the real estate industry join the LLM students in classes that allow the archetypal attorney and client to learn from one another. Admission to the MS program is very selective to insure that students will add to the integrated education experience. MS students have included a property manager for the Archdiocese of Chicago, vp of a major national bank, an affordable housing developer, commercial brokers and several architects. Those students choose the John Marshall MS in preference to an MBA because "we already know the business side of real estate; we need to know how to evaluate the legal risk."

Fundamental courses in Commercial Real Estate Transactions, Real Estate Finance, Federal Income Tax Aspects of Real Estate, and Bankruptcy and Insolvency Laws Affecting Real Estate anchor the curriculum while seminars in cutting-edge areas of commercial real estate law and practice round-out the curriculum to give students the tools to position themselves for change in an ever-changing real estate market. For example, in summer 2009, the Center offered a seminar entitled "Real Estate Credit Markets in Distress," highlighting the factors that led up to the crash in the financial markets and the proposed

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2010 Section Field Trip: New Orleans River Garden

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Our field trip will be Thursday morning, January 7, 2010. We will depart from the Conference hotels at approximately 8:30, taking New Orleans public transportation to the River Garden project, where we will be met by David Abbenante, the President of the HRI affiliate managing the River Garden site. Mr. Abbenante will provide us with a tour the River Garden. After the tour, we will have the opportunity to meet with Mr. Abbenante and other representatives of HRI for a question/answer period. Following this question/answer period, we will have our traditional "dutch treat" lunch in a restaurant near the River Garden neighborhood (arrangements will be finalized based upon the number of participants on the field trip), and then return by bus to the AALS hotel in time for the Real Estate Transaction Section program that afternoon. The only costs for the field trip will be the cost of your lunch and the minimal cost of public transportation to and from River Garden.

So that we can make appropriate arrangements for lunch, please confirm that you will be going on the field trip by sending me an e-mail message at freymuthr@missouri.edu.

A SPECIAL NOTE: In addition to the River Garden redevelopment, HRI also operates the Hilton Garden Inn near the New Orleans Convention Center, which is just a few blocks from the AALS headquarters hotel. For those on tight travel budgets --- isn't that all of us? --- our contacts at HRI are offering members of the AALS Real Estate Transactions section a single/double occupancy rate of \$109/night (a \$26 per night savings over the rates at the AALS hotels). This rate will be honored beginning on January 6, 2010 through January 10, 2010. You can contact the Hilton Garden Inn directly at 504-525-0044 or the toll-free number 1-800-HILTONS. When making your reservation, be sure to request the AALS

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Center for Real Estate Law at The John Marshall Law School LLM Program in Real Estate Law

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legislation to address the fall-out. An emphasis on transactional skills is reflected in every course. A Workshop in Drafting and Negotiations is a requirement. Additionally, LLM students are able to gain real-world experience through an externship in a law firm, corporate law department, non-profit organization or government agency under the supervision of experienced commercial real estate practitioners in the Real Estate Legal Practicum course.

For the future, the Center plans to offer a specialization in sustainability including green development and energy and natural resources aspects of ownership and development of real estate.

Extra curricular activities are an integral part of the learning experience. Students have the opportunity to discover how Leadership in Energy and Environmental Design (LEED) certification for buildings and accreditation for professionals is affecting the real estate industry through site visits, speaker series, and opportunities to prepare them for the LEED Green Associate exam. Student chapters of Lambda Alpha International a Land Economics Association, Corenet Global, US Green Buildings Council (USGBC) and the Eisenberg Foundation offer students provide interdisciplinary learning opportunities. Students also have the opportunity to gain a broader perspective of the real estate industry through site visits to new developments in Chicago. The fact that the program is in Chicago, one of the most relevant real estate towns, enhances all aspects of the learning.

The Center also hosts academic conferences on emerging topics in real estate law and practice. These produce scholarship in real estate transactions that explore issues and provide alternative approaches. This year's Kratovil Conference on Real Estate Law & Practice is entitled, "Water as a Resource: Impact on Real Estate Ownership, Development, and Land Use Policy." Scholars making presentations and submitting articles to the John Marshall Law Review include Praveen Kumar, (University of Illinois hydrologist), Julian Juergensmeyer (Georgia State), Sara Gosman (University of Michigan) and Lincoln Davies (Utah). A panel of practitioners and industry leaders will add their reflections on how water scarcity will affect the industry, especially beyond the West and Southwest portions of the country.

Inquiries from prospective students can be directed to: Heather F. Harper, Associate Director, Center for Real Estate Law at The John Marshall Law School, 315 S. Plymouth Court, Chicago, IL 60604. Phone: 312.427.2737 ext. 534 or hharper@jmls.edu. For more information on the LLM Program can be found at jmls.edu/realestate.

New Orleans River Garden

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rate. This rate will be available only until December 25, 2009. [More information about the hotel is available on its website, www.neworleansconventioncenter.gardeninn.com.] Special thanks to HRI and its President, Eddie Boettner, for facilitating this cost-saving alternative for Section members.

I look forward to seeing everyone in New Orleans!

For further information and background on the River Garden development, see:

<http://www.rivergardenneworleans.com/>

[The River Garden website]

<http://www.npr.org/templates/story/story.php?storyId=5571289> [NPR story about controversy associated with River Garden and development plans for other former housing projects]

http://findarticles.com/p/articles/mi_qn4200/is_20070226/ai_n18636378/?tag=rel.res1 [bNet story about beginning of final stages of River Garden redevelopment]

Acknowledgement of Support

The hard copy version of this edition of the Newsletter of the AALS Section on Real Estate Transactions was made possible by the generous financial support of the **Indiana University School of Law—Indianapolis** and the **University of North Carolina School of Law**.

Why Didn't Home Loan Disclosures Prevent Predatory Lending?

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article), it is hoped that this proposal becomes a new federal law before the period of home loan plenty arises with its concomitant incentives to arranging and making overpriced loans.

TABLE 1

1. *Inability to process user-unfriendly features of disclosure forms.*

Disclosure forms need to be user friendly to be effective.

2. *Lack of contractual schemas or knowledge structures.*

Consumers often lack knowledge necessary to comprehend disclosures.

3. *Inaccurate default assumptions of how contractual provisions are likely to be structured and if the contract is negotiable.*

Consumers often assume that they know how the transaction will be structured or assume that provisions cannot be negotiated.

4. *Availability heuristics.*

Consumers assess risks by the ease with which they can imagine consequences.

5. *Reason-based decision making.*

Consumers look for a justification or reason to choose one option over another, rather than weighing all of the pros and cons.

6. *Biases in attribute estimation and evaluation.*

Consumers rely upon heuristics to estimate unknown attribute values and evaluate known attribute values.

7. *Positive confirmation biases.*

Consumers look for information that confirms, rather than disconfirms, their prior beliefs. Disconfirmatory evidence is often ignored.

8. *Consumers will often accept senseless explanations.*

Suspensions can often be allayed by an explanation. The explanation need not be true or even sensible.

9. *Argument immunization.*

Exposure to a weak argument in favor of a point of view that is then defeated by a stronger counter-argument will immunize consumers from even stronger arguments in favor of that point of view.

10. *Sunk costs effects.*

Once consumers have invested time and effort getting a loan, they will often underestimate the likelihood of negative consequences.

11. *Endowment effects.*

Once consumers feel as if a house belongs to them, then it will feel as if they have lost their house if the deal falls through. People are willing to take on additional risk to avoid losses.

12. *Temporal and uncertainty discounting.*

Consumers evaluate delayed fees and costs as smaller than they actually are and fail to appreciate the likelihood of uncertain, but probable, fees and costs.

13. *Strong motivation to trust and misplaced trust in mortgage brokers.*

Consumers often put misplaced trust in mortgage brokers or lenders or—perhaps justifiably—are afraid to display distrust.

14. *Social norms and signals.*

There are often social signals that consumers are expected to simply sign disclosures and go on.

Call for Papers Winners Recognized

The officers and executive board members of the AALS Section on Real Estate Transactions congratulate **Rigel C. Oliveri**, Associate Professor of Law and Associate Dean for Research and Faculty Development at the University of Missouri School of Law, and **Aleatra P. Williams**, Assistant Professor of Law at the Charleston School of Law. Professors Oliveri and Williams authored the papers chosen from a call for papers jointly issued by our section and the Section on Property Law. By virtue of their selection, Professors Oliveri and Williams will present their research at the Section's Program at the AALS Annual Meeting and will have their papers published in a symposium issue of the *Indiana Law Review*.

There was significant response to the call for papers, and many abstracts were worthy of selection. We appreciate the hard work of our colleagues in the academy and recognize the scholarly value of the papers that were not selected. We look forward to reading those papers when they are published in journals and reviews at law schools around the country.

A Note from the Secretary

Carol Nicole Brown, Secretary

The University of North Carolina School of Law

It has been a pleasure serving as the Secretary of the Real Estate Transactions Section this year. I have thoroughly enjoyed working directly with our Chair and applaud him for his tireless efforts on behalf of the Section. Please enjoy the Newsletter let the Section's officers and executive committee members know if there are articles or topics you would like to see covered in future editions.

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NEWSLETTER—AALS SECTION ON REAL ESTATE TRANSACTIONS

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