SHELLEY SMITH
Current Residence: 2447A N. Bartlett Ave., Milwaukee, WI 53211
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EDUCATION

COLUMBIA UNIVERSITY SCHOOL OF LAW
J.D., 1988
Honors: Harlan Fiske Stone Scholar
Managing Editor of the *Columbia University Journal of Law and Social Problems.*

STATE UNIVERSITY OF NEW YORK AT STONY BROOK
B.A., Humanities, *summa cum laude,* 1984
Honors: Valedictorian; Phi Beta Kappa

PROFESSIONAL EXPERIENCE

MARQUETTE UNIVERSITY LAW SCHOOL 8/09-Present
Milwaukee, WI
Visiting Assistant Professor of Law

I am teaching Contracts, Advanced Topics in Contracts and Alternative Dispute Resolution.

THE FLORIDA STATE UNIVERSITY COLLEGE OF LAW 8/08-5/12/09
Tallahassee, FL
Visiting Assistant Professor

Taught Contracts I, Negotiations, Conflicts of Law and Constitutional Law II.

JENNER & BLOCK, LLC, Chicago, IL
Equity Partner 1996-4/08
Associate 4/91-1995

Gained extensive knowledge of civil and criminal litigation primarily in federal courts in the areas of intellectual property, antitrust, class actions and securities fraud. Recent highlights have included: 1) Defending Alcan in a trial where the jury awarded only $2.5 million of the $40 million its competitor sought in damages based on charges of patent infringement and tortious interference; 2) Obtaining a multi-million dollar settlement in mediation for Pechiney Plastic Packaging, Inc. in a patent infringement case shortly after winning summary judgment on claim construction based on a Markman evidentiary hearing; and 3) Preparing an amicus brief on behalf of the ABA in the enemy combatants case, *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004).

SULLIVAN & CROMWELL, New York, NY
Associate 1988-3/91
Summer Associate 1987

Conducted research, prepared briefs, argued motions and handled depositions in complex litigation. Experience included: 1) Defending S.B Lewis & Co. in a criminal prosecution for stock manipulation; 2) Defending Random House for violating Section 1 of the Sherman Act; 3) Defending the Marquess of Northampton for wrongful possession of a collection of ancient Roman silver, and 4) Submitting a brief to the U.S. Supreme Court concerning the repayment of Eurodollar deposits in *Citibank, N.A. v. Wells Fargo Asia Ltd.*, 495 U.S. 660 (1990).

* f/k/a Sandra Michelle Malinowski

TEACHING INTERESTS

Most Want to Teach: Contracts, Commercial Law, Negotiation/Mediation/ADR

Would also be Interested in Teaching: Conflicts of Law, Securities Regulation, Antitrust, Civil Procedure

Could Also Teach: Evidence, Business Associations, Consumer Law and Constitutional Law.

RESEARCH INTERESTS

- Contracts

Enforcement of a Duty to Negotiate in Good Faith – I am working on a project that expands on the theme of my requirement contracts paper that courts are using the doctrine of good faith to impose mandatory rules that are not based on sound policy and that deprive the contracting parties of their ability to allocate transaction risks ex ante. This paper will reevaluate the rules courts have applied to allocate the risks of pre-contractual investments under the doctrine of good faith. Recent works on the subject from Alan Schwartz, Robert Scott, and Juliet Kostritsky argue that the doctrine is justified by the economic benefits of increasing the sheer volume of trades. My project will examine the support for this thesis. I also plan to apply negotiation theory to consider whether the parties would be able to allocate these risks, despite hold up problems. Work in the area of embedded options may also prove relevant, since in some cases the parties may have a right, not a duty, to take alternative actions as they acquire new information. Finally, the paper will explore methods for honoring the principles of private ordering and individual liberty in the pre-contract negotiation phase with limitations set only at the point where a party has engaged in conduct that violates well-defined norms of justice and fairness.

The Duty of Good Faith – I am planning a series of papers that would provide a more satisfying explanation for courts' applications of other aspects of the doctrine of good faith. Good faith often serves as a "joker's wild" principle, comparable to the unconscionability doctrine in its lack of substantive content and its adaptability to the desired outcome, whatever it may be. One paper would focus on actionable pre-contract non-disclosures, which are defined under Section 161(b) of the Restatement (Second) of Contracts in a rather circular fashion as any non-disclosure that amounts to a failure to act in good faith. Another paper will cover the use of the duty of good faith and fair dealing as an interpretive tool to create new duties when deemed necessary to preserve the "fruits of the contract."

Contract Interpretation and Gap-Filling – This project would focus on the normative principles courts apply to contract interpretation and gap-filling. It would examine when the principle of personal autonomy is displaced with other principles, such as fairness, and why the principle of fairness has been generally accepted while other principles offered by scholars, such as efficiency, have not been. I suspect that one explanation is the integral role fairness plays in the negotiation of contracts, and therefore in the legitimacy of contract itself as private law-making. Experiments involving the "ultimatum game" and the "dictator game" for example, show that negotiators consistently reject profitable offers if they perceive them as being unfair.

- Contracts/Negotiation

Drafting To Negotiate the Unforeseen – This paper will discuss a new method of contract drafting. In many cases, the parties attempt to anticipate every possible eventuality that may arise, negotiate a solution, and draft appropriate language. In other transactions, including deals involving substantial dollar amounts, the parties rely on one-page documents. Both approaches have their advantages and disadvantages. An alternative would be to negotiate and draft two sets of terms. One would cover the situations most likely to occur and the other would provide procedures for negotiating issues not covered by the contract and consequences if the parties fail to reach agreement.

- **WORKING PAPER**

Reforming the Law of Adhesion Contracts: A Judicial Response to the Subprime Mortgage Crisis. This Article argues that standardized contracts of adhesion, in the form of mortgages and other contracts creating obligations the borrowers cannot repay, were instrumental in causing the subprime mortgage crisis and the Great Depression. (Contracts of adhesion are presented to the recipients as a "take it or leave it" proposition with the knowledge that they will not be understood or even read before they are signed.) Evidence from the Great Depression, the Savings and Loan Crisis of the 1980s, and the subprime mortgage crisis demonstrates the futility of relying on regulation alone to prevent these crises from recurring, and suggests that a judicial response to the role of adhesion contracts should be considered. Traditionally, courts have enforced adhesion contracts, allowing exceptions only in rare cases, usually based on the defense of unconscionability. Scholars have generally supported this presumption of enforceability as essential to our system of mass distribution. Yet the impact on the economy that results from giving businesses the unilateral power to draft the terms of these contracts in language incomprehensible to the average lay person has never been examined. The recipients of adhesion contracts may not always decide wisely, but depriving them of the opportunity to make informed decisions violates a fundamental principle that legitimizes the private law-making of contract, and deprives society of the input of an entire constituency of contracting parties. This article proposes a new method for salvaging assent in adhesion contracts, which constitute the vast majority of all contracts, while remaining true to the doctrine that assent is based on an objective manifestation of assent through conduct rather than on subjective intent.

PUBLICATIONS

A New Approach to the Identification and Enforcement of Open Quantity Contracts: Reforming the Law of Exclusivity and Good Faith, 43 Valparaiso University Law Review 871 (Spring 2009). This article identifies three areas for reform. First, there is a conflict among the courts over whether the exclusivity rule, variations on the exclusivity rule, or the duty of good faith are required to satisfy the mutuality and definiteness doctrines for enforcing open quantity term contracts. I propose a new validation rule to resolve this conflict. Second, courts are utilizing flawed interpretive methods when applying validation rules to identify enforceable open quantity contracts to conclude that that business documents such as master purchase agreements, volume discount offers, blanket purchase orders and buyer's options are binding requirements contracts. Buyers are also taking advantage of the enhanced litigation risk inherent in the courts' uneven treatment of open quantity contracts by using ambiguous open quantity term contracts to create strategic opportunities when the market changes. The article offers a principled basis for identifying valid open quantity contracts that will lead to consistent results without strait-jacketing the parties' ability to tailor the contract to their business needs. Finally, the cases do not articulate any uniform standards for breach of the implied duty of good faith on the quantity-determining party to purchase in quantities that are not unreasonably disproportionate to estimates or normal quantities. I suggest an amendment to UCC 2-306(1) to supply a uniform standard. Since my underlying thesis is that requirements contracts should be interpreted as obligations on the buyer to purchase its requirements, *if any*, from the seller, rather than from any of the seller's competitors, without any implied duty of good faith, I address Judge Posner's concern, raised in *Empire Gas Corp. v. American Bakeries Co.*, 840 F.2d 1333, 1335-36 (7th Cir. 1988), that this position, while reasonable, would render requirements contracts indistinguishable from buyer's options.

Removing Pre-CAFA Cases under the Act, For the Defense (July 2006). This article examines the circuit splits and inconsistent decisions on whether amendments made to complaints that were filed before the enactment of the Class Action Fairness Act, 28 U.S.C.A. § 1332(d), on February 18, 2005, are sufficient to re-"commence" the cases after the statute's enactment, thereby allowing for their removal from state to federal court. Courts are criticized for failing to incorporate the Rule 15(c) relation back doctrine in its entirety as a workable standard, and for denying removal even when the amendment would qualify using Rule 15(c) by, for example, converting an individual action into a class action; dramatically increasing the size of the class from a single state to a nationwide class, or from a single products to a group of product, in a way that significantly increases the defendant's exposure; or by adding new defendants to the case.

Practice Commentaries -- FRCP: with CFC, MDL, and Admiralty Rules, Commentaries for Rules 61, 62 and 63 of the Federal Rules of Civil Procedure, *The Practice Commentaries Series*, National Institute for Trial Advocacy (2002/2003 Ed.). The commentary to Rule 61 (Harmless Error), discusses, *inter alia*, the cumulative-error doctrine, the standards for obtaining a new trial based on the admission or exclusion of prejudicial evidence and for the use of improper jury instructions, and how these standards differ depending on whether the case was tried to a judge or a jury. For Rule 62 (Stay of Proceedings to Enforce a Judgment), the commentary provides advice on obtaining a stay of an injunction under Rule 62(c) and Rule 62(g), including the fallback remedy of seeking an expedited appeal. The commentary on Rule 63 (Inability of a

Judge to Proceed), focuses on the proper grounds for objecting to a successor judge, the initial status conference with the successor judge, procedures for recalling witnesses in a bench trial, and the successor judge's ability to reconsider prior decisions or rule on post-trial motions.

An Update on U.S. Laws Affecting Japanese Companies and Their Subsidiaries, International Legal Strategy (June, 1994) (published in Japanese), (Antitrust laws and their jurisdictional scope).

Antitrust Decision Was Based on Misunderstandings, 94 Best's Review (October, 1993). This commentary contends that the antitrust claims for an illegal boycott of policy forms prepared by an industry trade association that were upheld in *Hartfort Fire Ins. Co. v. California*,509 U.S. 764 (1993), were based on fundamental errors in the characterization of the market for pollution liability coverage.

Runaway Shelters: Rights of Confidentiality and Self-Determination, 21 Colum. J.L. & Soc. Probs. 235 (1988). This article argues that laws protecting runaways' identity and confidential communications, and their ability to participate in placement decisions, should be strengthened, expanded and harmonized with state statues requiring reporting, arrest and detention of runaways to avoid the risk that runaways who are fleeing abusive home environments will be afraid to check in to runaway shelters and instead will attempt to survive on the streets by engaging in prostitution, child pornography and drug-dealing.

PRESENTATIONS

- "A New Approach to the Identification and Enforcement of Open Quantity Contracts: Reforming the Law of Exclusivity and Good Faith," Florida State University College of Law, Summer Workshop Program, May 12, 2009.

- "Indefinite Detention of Enemy Combatants, Habeas Corpus and the 5th Amendment: *Hamdi v. Rumsfeld*," Constitutional Rights Foundation of Chicago, 2004 Summer Supreme Court Institute, Chicago, Illinois, August 10, 2004.

  "Remedies for Breach under Article Two of the UCC," Purchasing Law in Illinois, Lorman Educational Services, Chicago, Illinois, December 6, 2002.

- "Women in the Law," University of Chicago Law School, Women's Bar Association of Illinois, Chicago, Illinois, February, 2001.

- "Scientific Evidence on Trial," Wright State University, Department of Biological Sciences, the College of Science and Mathematics and the Wright State Alumni Foundation, Dayton, Ohio, January 26, 1995.

REFERENCES

- Donald J. Weidner, Dean, Florida State University School of Law, 425 West Jefferson Street, Tallahassee, Florida 32306, (850) 644-3071, dweidner@law.fsu.edu.

- David L. Markell, Professor, Florida State University School of Law, 425 West Jefferson Street, Tallahassee, Florida 32306, (850) 644-7692, dmarkell@law.fsu.edu.

- Nat S. Stern, Professor, Florida State University School of Law, 425 West Jefferson Street, Tallahassee, Florida 32306, (850) 644-1801, nstern@law.fsu.edu.

- Tahirih V. Lee, Associate Professor, Florida State University School of Law, 425 West Jefferson Street, Tallahassee, Florida 32306, (850) 644-3833, tlee@law.fsu.edu.

AWARDS

- Illinois Super Lawyer
  Antitrust Litigation – 2006

- AV Peer Review Rating – Martindale-Hubbell's Highest Rating

- Business & Professional Women - USA
  Young Careerist for Illinois – 1996

COMMUNITY SERVICE

- Center for Conflict Resolution
  Member, Board of Directors, 2001- 2005

- Young Women's Leadership Charter School
- Student Mentor, 2000-2004

SERVICE TO THE BAR

American Bar Association
Member, Committee on Commercial & Business Litigation Section of Litigation, 2004-2008
Member, Class Actions & Derivative Suits, Section of Litigation, 2003-Present
Member, Intellectual Property Litigation Committee, Section of Litigation, 2001-2008
Chicago-Lincoln Inn of Court
Member, 2001-2008

- Women's Bar Association of Illinois
  Director, 1999-2001

BAR ADMISSIONS

- New York, 1989
- Illinois, 1991

COURT ADMISSIONS

- U.S. Court of Appeals, Seventh Circuit, 1991
- U.S. District Court, Northern District of Illinois (Trial Bar), 1991
- U.S. District Court, Southern District of New York, 1989
- U.S. District Court, Eastern District of New York, 1989
- U.S. District Court, Western District of New York, 1991
- U.S. District Court, Eastern District of Wisconsin, 1997
- U.S. District Court, Eastern District of Michigan, 2001