

**Minutes for the Meeting of the Bankruptcy/UCC Committee
of the Business Law Section of the Florida Bar**

Held January 28, 2016, at 9:30 a.m.

At the Hilton Bonnet Creek in Orlando, Florida

Lynn Welter Sherman, Chair
Jodi Daniel Cooke, Vice Chair
Hon. Catherine Peek McEwen, Judicial Chair

I. Welcome and Approval of Minutes.

The meeting was called to order at 9:30 by Leyza F. Blanco, a past chair of the Committee, as representative of the current Chair, Vice Chair, and Judicial Chair. She explained that all three Chairs of the Committee were unable to attend the meeting due to trial commitments and unexpected travel delays, so she would be leading the meeting in their stead.

Ms. Blanco reminded the Committee that proposed minutes from the September 5, 2015, meeting in Naples, Florida, had been circulated via email prior to the meeting. She read a motion by John Hutton to revise the proposed minutes with respect to his report on the UVTA sub-committee as follows:

John Hutton provided an overview of the UVTA. The current UFTA in effect in Florida was promulgated in 1984, and has been enacted by 43 states, DC and the USVI as of 2014. The ULC drafting project started out with a narrow purpose, which was to incorporate a choice of law provision into the UVTA (as neither the UVCA nor the UFTA contained a choice of law rule, which caused courts to fall back on general choice of law rules). The project was expanded, and despite the proposed name change to the act (the “UVTA”), the amendments are characterized by the ULC as “relatively minor.”

As summarized by John, the 2014 amendments are the first made to the act since its original promulgation. The amendments address a small number of narrowly-defined issues, and are not a comprehensive revision. The principal features of the amendments are as follows:

Name Change. The amendments change the title of the act to the “Uniform Voidable Transactions Act.” The name change is not motivated by the substantive revisions made by the amendments, which are relatively minor. Rather, the original title of the act, though sanctioned by historical usage, has always been a misleading description of its provisions in two respects. First, fraud is not, and never has been, a necessary element of a claim under the act. Second, the act has always applied to the incurrence of obligations as well as to transfers of property.

Choice of Law. The amendments add, for the first time, a choice of law rule for claims of the nature governed by the act. New Section 10(b) provides: “A claim for relief in the nature of a claim for relief under this [Act] is governed by the local law of the jurisdiction in which the debtor is located when the transfer is made or the obligation is incurred.”

Evidentiary Matters. New provisions add uniform rules allocating the burden of proof and defining the standard of proof with respect to claims and defenses under the act. The new provisions make clear that the standard of proof for claims and defenses under the UVTA is the typical civil “preponderance of the evidence” standard, not some heightened standard for fraud actions.

Deletion of the Special Definition of “Insolvency” for Partnerships. Under the general definition of “insolvency” in the act, a debtor is insolvent if, at a fair valuation, the sum of the debtor’s debts is greater than the sum of the debtor’s assets. The act as originally written set forth a special definition of “insolvency” applicable to partnerships, which adds to the sum of the partnership’s assets the net worth of each of its general partners. The amendments delete that special definition, with the result that a partnership will be subject to the general definition.

Defenses. The amendments refine in relatively minor respects several provisions relating to defenses available to a transferee or obligee, as follows:

- As originally written, Section 8(a) of the act creates a complete defense to an action under Section 4(a)(1) (which renders voidable a transfer made or obligation incurred with actual intent to hinder, delay, or defraud any creditor of the debtor) if the transferee or obligee takes in good faith and for a reasonably equivalent value. The amendments add to Section 8(a) the further requirement that the reasonably equivalent value must be given the debtor.
- Section 8(b), derived from Bankruptcy Code §§ 550(a), (b) (1984), creates a defense for a subsequent transferee (that is, a transferee other than the first transferee) that takes in good faith and for value, and for any subsequent good-faith transferee from such a person. The amendments clarify the meaning of Section 8(b) by rewording it to follow more closely the wording of Bankruptcy Code §§ 550(a), (b) (which is substantially unchanged as of 2014).
- Section 8(e)(2) as originally written created a defense to an action under Section 4(a)(2) or Section 5 to avoid a transfer if the transfer results from enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code. The amendments exclude from that defense acceptance of collateral in full or partial satisfaction of the obligation it secures (a remedy sometimes referred to as “strict foreclosure”).

Series Organizations. The amendments add a new section which provides that each “protected series” of a “series organization” is to be treated as a person for purposes of the act, even if it is not treated as a person for other purposes. This change responds to the emergence of the “series organization” as a significant form of business organization. Florida, however, has not authorized or recognized series organizations, which creates an issue, noted below.

Medium Neutrality. In order to accommodate modern technology, the amendments replace references in the act to a “writing” with “record,” and make related changes.

Comments. In addition to changes to the text, the ULC made numerous changes/additions to the “Official Comments,” including extensive changes to the Official Comments to Section 4, which has virtually no changes to the text.

John pointed out that the RPPTL study group on the UVTA has raised significant concerns regarding Section 10 (the choice of law provision), and the Section 4 Official comments. As to Section 10, the RPPTL study group has raised concerns that the choice of law rule will somehow impair Florida’s constitutional homestead protection. The BLS study group does not believe this is the case, and will try to persuade the RPPTL group on this point. As to the extensive new Section 4 Official Comments, the RPPTL study group has raised concerns that the new comments are not consistent with Florida law. Our study group is going to work to try to address their concerns in this regard, especially since Florida does not adopt the Official Comments, and there is virtually no substantive change to Section 4 of the UFTA, other than language clarifying the burden of proof.

The proposed minutes, as revised, were unanimously approved upon motion by Daniel Stermer, seconded by Don Workman.

II. Update and Welcome from Section Leadership. Section Chair Alan Howard welcomed everyone to the mid-year Meetings and reminded members of the Executive Council that restated Section Bylaws had been proposed by Phil Schwartz’s committee, were circulated via email, and would be discussed during the Executive Council meeting. Mr. Howard also explained that he is asking every Committee to prepare policies and procedures to memorialize the way the Section does its business and create institutional memory. Finally, Mr. Howard thanked the Committee’s legislative sub-committee for the initiative and impact they are offering towards the Section’s legislative efforts this year.

III. Legislative Committee Update. Section Legislation Chair Michael Chesal and Section Lobbyist Aimee Diaz-Lyon gave an update on the legislative initiatives affecting the Committee this year, including UCC-4A (moving quickly) and Proceedings Supplementary (high on the Bankers’ priority list), and reminded everyone to let them know as soon as possible about any expected legislative initiatives for the 2017 legislative session.

IV. Reports from Study Groups.

A. Proceedings Supplementary Task Force – Barbara Reisberg, Chair; Donald Kirk & Michael Weisz, Vice Chairs (joint Task Force with Business Litigation Committee)

No report.

B. HB 713/SB 562 – Mindy Mora, Chair

This study group was formed to respond to proposed amendments to § 559.72, Fla. Stat. (aka, the Wildcard Exemption) and is chaired by Mindy Mora. Other Study Group members include Committee Chair Lynn Sherman, Committee Vice Chair Jodi Cooke, Judge Laurel Isicoff, Eric Rosen, Tim Kingcaid, Zach Shelomith, and Joel Aresti.

The amendments propose that filing a notice of intention to surrender and getting a discharge order would cause a debtor to be deemed to have relinquished his or her rights to defend a foreclosure case thereafter. They are based on a perceived abuse of the process by debtors. The Study Group has expressed to the bill proponents (Bankers' group) several concerns about the proposed amendment.

There was discussion by the Committee about those concerns, including impact on "failure to reaffirm"/constructive surrender and other judicial concerns. Ms. Mora invited any Committee members who are interested to join the study group.

C. *FBA proposed amendments to Fla. Stat. § 559.72* – Jodi Cooke, Chair

No report.

D. *Amendments to Uniform Voidable Transaction Act* – John Hutton, Chair

John Hutton reported that the RPPTL Section has an issue with the proposed legislation in 2 sections/official comments. The first is § 10 (Choice of Law provision) and the other is § 4 (burden of proof clarification in the official comments). Mr. Hutton is going to try to approach the RPPTL chair about writing a white paper, as friction is developing over these issues.

E. *Collaborative Law* – Patricia Redmond, Chair

No report.

V. *Pro Bono Reminder.* Judge Laurel Isicoff reminded everyone to take pro bono cases in Judge McEwen's stead, and pointed out that many volunteer opportunities don't require a court appearance. She also encouraged everyone to consult the "Best Practices for Law Firms" on the BLS website, and notified the Committee that Judge McEwen is not present at the meeting because she is accepting a pro bono award. The Committee is very proud of Judge McEwen and is excited that she is being honored for her tireless efforts concerning pro bono.

VI. *Bankruptcy Judicial Liaison Committee Report.* Committee Chair Judge Paul Hyman reported that the Committee would meet that afternoon, and would be discussing the status of Florida's Northern, Middle, and Southern Bankruptcy Districts; and whether the Section should be comp'ing the attendance of law students at their dinner events.

VII. *Continuing Legal Education Reports.*

A. *View From The Bench* – Judge Michael Williamson

Judge Williamson reported that this year's VFTB will be November 3-4 in Tampa & Miami, respectively. Russ Blain will moderate, and Brad Saxton will once again compile the materials. Brad Saxton announced that he needs assistance compiling the materials every year and if anyone is interested in helping, please let him know.

B. *Bankruptcy Law Education Series (BLES)* – Andrew Roy, Executive Director of BLES

Andrew Roy reported that BLES has \$70,000 in the bank to fund Middle District-wide pro bono clinics. They are planning to hire a fulltime fellow to assist, and are also considering the availability of video consultations between volunteers and clients.

C. *ABI/Stetson Paskay Seminar*

The 2016 Seminar will be held March 31-April 2 at the Sheraton Sand Key. Judge Delano is the judicial chair. Speakers include the ABI President and Judge Bob Gerber (GM case), and there will be 12 hours of CLE.

VIII. New Business.

A. *NCBJ 2015* – Paul Singerman

Sponsorship efforts from this group were excellent and much appreciated.

B. *Elder\$mart\$*– Judge Laurel Isicoff

There are opportunities to volunteer for this program. Contact Judge Isicoff.

April is financial literacy month. There will be a push for this program during that time.

IX. Liaison Reports.

A. *Pro Bono Committee* – John MacDonald, Liaison & Committee Chair

No report.

B. *Inclusion, Mentoring & Fellowship Committee* – Carlos Sardi, Liaison & Committee Chair

No report.

C. *Membership Committee* – Zach Hyman, Liaison & Committee Chair

No report.

D. *Communications Committee* – Christopher Broussard, Liaison

There is a BLS blog. If you are willing to contribute, contact Chris.

X. Old Business.

A. 11th Judicial Circuit Receivership Application – Cori Lopez-Castro

Leyza Blanco and Cori Lopez-Castro attended a meeting with the state court judges of the 11th Judicial Circuit. The application has been approved and they are almost ready to put it on the website. They are trying to get the message out so eligible individuals will fill out the application. The judges are very grateful for the Section's help.

B. CARE Program/financial literacy – Judge Laurel Isicoff

April is financial literacy month. There will be a push for this program during that time.

XI. Future Meeting Dates. Ms. Blanco reminded the Committee that our next meeting date is during the Section's annual meeting, June 15-18, 2016, at the Hilton Bonnet Creek in Orlando.

XII. CLE: Federal & State Receiverships – What's Happening Now

Tom Messana mediated an esteemed panel of receivers, including Melanie Damian, Mark Healy, Gianluca Morello, and Daniel Stermer, who discussed various trending topics in federal and state court receiverships. Topics included an 11th Circuit review of a receiver's authority to pursue fraudulent conveyances, a NAFER update, receivership model laws, the commencement and conclusion of receiverships, federal v. state receiverships, the autonomy of a receiver, and other emerging topics in receivership law.

XIII. Adjournment. Jay Brown moved to adjourn the meeting and the meeting was concluded.