

**Minutes of Meeting of the Bankruptcy/Uniform Commercial Code
Committee of the Business Law Section of the Florida Bar
Wednesday, January 17, 2018; 3:00 p.m.
DoubleTree Hotel, Orlando, Florida**

Carlos E. Sardi, Chair
Stephanie Lieb, Vice-Chair
Hon. Catherine Peek McEwen, Judicial Chair

I. Welcome and Approval of Minutes

The meeting was called to order at 3:00 p.m. by the Chair. Jodi Cook moved to approve the minutes from the June meeting. Leyza Blanco seconded, and the minutes were approved.

II. Introduction of Special Guests and Pro Bono Reminder

Carlos Sardi reminded us of our obligation to take a pro bono case. This can be found on the Florida Bar Foundation website.

III. Business Law Section Update & Welcome

Melanie Damian, Section Chair
Michael Chesal, Section Chair-Elect
Jay Brown, Section Treasurer

IV. Legislative Update

Kacy Donlon, Section Legislative Chair
Aimee Diaz-Lyon, Section Lobbyist

Kacy Donlon reported that Aimee is ill and cannot make it today. Financial literacy has passed out of the senate. Last year this is where it hit the wall, but we are hopeful for momentum. Mortgage foreclosure has gone through committees and Aimee believes it will pass this year. UVTA is on again. The history of how we got to where we are, trying to find solutions with RPPTLS and Tax Sections, was summarized. Lou Conti spearheaded the attempts to come to a solution. It came down to the comments section as to whether the comments are to be considered authoritative in connection with the legislation. In Florida law, the comments are not part of the law, but the other Sections wanted language within the statute which expressly stated the comments are not authority. The controversy came down to one or two words on an impasse. Representative Moraitis has listened. We have no compromise as of today. The other sections intend to oppose the UVTA. We are looking to Arkansas and Indiana regarding how they treat the comments. John Hutton had no further comments. What John foresees happening is that we move through the legislative process with opposition, and that the RPPTLS and Tax sections may seek to interject more provisions in the process, which is something we will have to deal with as they come. Kacy adds that this is an asset protection issue for both the other sections. Rep. Moraitis sees that as perhaps not the best for Florida's citizens.

V. Standing Legislative Subcommittee

Stephanie Lieb

As Kacy reported, this is a busy and tardy legislative session. Our committee has been working diligently reviewing all proposed legislation which could potentially impact our committee. The subcommittee construct is working well.

VI. Reports from Study Groups

- a. *Uniform Commercial Real Estate Receivership Act* (joint with Business Litigation Committee)

Lynn Sherman
Kenny Murena

Kenny Murena reports the meeting is tomorrow at 2:00 p.m. The group has broken into five subcommittees. They have reached agreements on two of five and are now focusing on the remaining three, which have provisions that conflict with Florida law, so they can move forward. Three states have enacted the model law and two have introduced it.

- b. *FBA foreclosure amendment* (proposed amendments to Fla. Stat. § 702.12)

Mindy Mora

- c. *Amendments to Uniform Voidable Transaction Act*

John Hutton- covered in another section

- d. *Digital/Cryptocurrency Regulation*

Stephanie Lieb: This is on hold for now, with a goal to propose a comprehensive statute in the next legislative session.

- e. *Aviation Committee Legislation -Amendments to Aviation Lien Statute (Fla. Stat. §§ 329.41 and .51)*

Lynn Sherman reported that they are trying to decide how to address the case that came out on the issue. We will keep this on the agenda for the next meeting.

- f. *ABI – Consumer Law Bankruptcy Commission*

Dennis Levine reported that the Commission has been holding hearings for the last 10 months and findings will be reported in the DC spring meeting. The purpose is to make the code and process clearer and more seamless. Dennis encouraged everyone to participate via the website.

- g. *Northern District Judgeships/Divisions*

Doug Bates
Jodi Cooke

Judge Specie reported that the case filings are down. The numbers are not up to where the new weighed minimum is, she cannot ask for a second judgeship request in the fall. If she does not request this fall it will be 2 years before she can request again.

h. *YLD Bankruptcy Basics CLE*

Doug Bates. Because this is not offered every year, it can be taken off the agenda until we hear back from the YLD with further need from our committee.

i. *Judicial Term Limits / Legislative Oversight of Judicial Decisions*

Doug Bates
Jodi Cooke

Nothing to report. Aimee is looking out for this as something to report.

j. *Florida Constitution Revision Commission*

Carlos Sardi

VII. Continuing Legal Education

a. *ABI/Stetson Seminar*

Hon. Catherine Peek McEwen reported that the seminar begins tomorrow. Judge encourages us the membership to attend.

b. *View from the Bench Seminar/Case Review*

Hon. Michael Williamson
Brad Saxton

November 8th in Tampa, November 9th at Jungle Island. Liz Green will replace Steve Busey.

c. *Bankruptcy Law Education Series (BLES)*

Hon. Michael Williamson

Andrew Roy reported for BLES, and requested programming ideas. He also requests more assistance from volunteers.

d. *UCC Article 9 Program*

Stephanie Lieb

This program will be held on April 20th in Tampa, Florida.

e. *Future CLE Programs*

Brett Lieberman

The topic of Involuntary Cases was proposed. Brett will work to put a program together for June, if possible.

VIII. Liaison Reports from Other BLS Committees

a. *Pro Bono Committee* - John McDonald

John McDonald reported that the meeting will be at 8:30 a.m. tomorrow and invited more participation from this committee. Agenda will include a report from the Florida Bar Foundation and work on the web based platform. Revisions to rule 4-6.6 is an expansion of the short term limited service legal provisions. It is a safe harbor regarding not running afoul of the conflict rules. Rule 12-1 was revised regarding emeritus attorneys to be allowed to provide pro bono service by retired attorneys.

b. *IMF Committee* - Mariane Dorris

Mariane Dorris reported that the meeting is one hour at 11:30 with membership. This committee partners with voluntary bar associations on three annual events geared toward diversity and networking: Central FL, South Florida Kozak Mentoring Picnic, and one with the Hillsborough County Bar Association. This committee needs volunteers and encouraged the membership to volunteer, as well as propose names of fellows.

c. *Membership Committee* - Zach Hyman

Zach reported the committee is hosting a number of events all over the state and encourage participation from our committee. He also reported that the BLS Scholar program going well.

d. *Young Lawyers Division* - Christian George

None.

e. *CLE Committee* - Jennifer Morando

Jennifer reported that the Federal Securities Institute February 1-2 in Miami. Greg Yadley is the program chair, and speakers include a Former SEC Chair, and judge from the Delaware Supreme Court.

Further, the Got Civility program will be held in Tampa in February at Ferguson Law Center.

She reported the need for submissions to the Florida Bar Journal.

She reported her committee is exploring webinar possibilities.

f. *Communications Committee* - Matt Hale

None.

IX. Old Business

a. International Law Section

Carlos E. Sardi

The following laws are being discussed at the ILS:

- Florida International Commercial Conciliation Act
- Amendments to Chapter 684, Fla. Stat. (Florida International Commercial Arbitration Act)

- Judicial Assistance to Foreign & International Arbitral Tribunals

We have no issue with these 3 bills.

- Amendments to Grounds for Non-Recognition of Out-of-Country Foreign
- Money Judgments (Fla. Stat. § 55.605). This is limited in scope.

Carlos reported a planned modification to chapter 48. The Business Litigation Committee will be moving for a task force be created. A discussion was had and a decision that our committee should have representation on the task force. Keith Bell volunteered.

b. Out of State Division Newsletter Submissions

Don Workman

Don reported this group needs articles from this committee. He reminded the committee that publication goes to 14,000 out of state Florida Bar Members.

Hon. Catherine Peek McEwen

c. C.A.R.E. / Money\$mart\$ Programs / Elder Care

Hon. Laurel Isicoff

Judge Isicoff reported that this section has been supportive of these efforts. You can go online and use the materials. You are asked to join and donate, but donation not a requirement.

X. New Business

a. Bankruptcy Venue Reform Act of 2017

Carlos Sardi
Ivan Reich

The following email substance and requests were discussed at the meeting:

Bankruptcy Venue Reform Act of 2017 closes a long-exploited loophole (nearly 30 years) that allows companies to flee their home states and file bankruptcy in far away districts. This loophole allows companies to manipulate the system and deprive employees, retirees, small trade creditors and others from meaningful participation in bankruptcy cases. It also substantially increases the costs of any such participation by forcing travel across country to just be heard.

Please reach out to your United States Senators to express your support for bipartisan bankruptcy venue reform legislation that is being co-sponsored by Senators John Cornyn (R. Tx. and No. 2 in the Republican leadership), and Elizabeth Warren (D. Ma., a former bankruptcy professor and practitioner, and one of the most prominent Democrats), a copy of which I have attached for your review and for you to forward on to your Senator's office and staff. I am also asking each of you to get staff and other attorneys in your firms, clients, chambers of commerce, hospitality industry, and your family and friends to also reach out and contact your Senators.

This link https://www.senate.gov/general/contact_information/senators_cfm.cfm gets you to a list of the office numbers and emails for all 50 senators in case you do not have a staffer's contact information. Senator Marco Rubio's General Counsel is Samantha Roberts and her email is Samantha_roberts@rubio.senate.gov. Senator Bill Nelson's General Counsel is Kirstin Dunham and her email is kirstin_dunham@billnelson.senate.gov.

It should be obvious to each of us as local bankruptcy practitioners the importance to our practices to get this bill passed, but Congress generally doesn't care about lawyers or a fight between lawyers from different states. Hence, it is important to make arguments that go beyond that point, and to elicit support from other constituencies and interests. If you go to the CLLA Bankruptcy Venue Reform Workroom at http://clla.org/?page=resources_venue_rfm, you will find numerous resources on the issue that you can forward to your Senators and their staff, some of which I have provided in this email.

I ask if each of you could try to think of and provide me with clients of yours that may have been harmed in some way by having to litigate their bankruptcy issues in a jurisdiction far from home or where the debtor's principal assets or business are located. Also, if you know of a large case that was filed by you or in your jurisdiction that is reflective of showing that our local bankruptcy judges are more than capable of and have procedures in place for the handling of large Chapter 11 cases, please send those to me as well. One of the arguments our opponents keep falling back on is that the bankruptcy judges in Delaware and the Southern District of New York are more used to and far more competent to handle these types of cases than the local bankruptcy judges, which is an assertion that we all know not to be true. Nonetheless, we need to demonstrate otherwise.

I ask that you call and email your senators and ask them to not only support the bill, but to also contact Jessica Carter at Senator Cornyn's office (for your Republican Senators), or Stephanie Akpa at Senator Warren's office (for your Democratic Senators), and get them to offer to co-sponsor the bill.

Also, there is an opportunity to have this bipartisan bill heard shortly after the new year if the Senate Judiciary Committee foregoes regular order. The goal is to attach it to the soon-to-be rolled over spending and/or deficit raising bill that will be heard right after Congress comes back in session after the

holidays. As such, I ask each of you to please have your senator also contact senators on the Judiciary Committee and ask them to support this bill, forego formal hearings so that it can be passed promptly, and bring fairness and access to justice back to the bankruptcy system. If you know lawyer and non-lawyer constituents from these states that have a senator on the Judiciary Committee, please have them call and email their senators to request them to waive regular order and forego formal hearings on the bill (which should have the support of almost all of the Judiciary Committee members) so that it can be considered for a vote right after the new year.

I further attach for your review, and for you to forward to your senator's office, the CLLA's White Paper supporting Bankruptcy Venue Reform, as well as an article I wrote in the Florida Bar Journal several years ago in support of the Chapter 11 Bankruptcy Reform Act of 2011, then HR 2533, that details the effects bankruptcy venue manipulation has had on Florida. Both papers provide detailed arguments in favor of bankruptcy venue reform.

You should know that under the then leadership of Mindy Mora and Brian Gart, the Florida Bar's Business Law Section previously supported HR 2533, which is similar to the legislation about to be introduced. Also, you can tell your senators that the National Association of Credit Managers ("NACM") is firmly in support of this legislation as well.

The rest of this email comes from my email to the General Counsels for each of Florida's senators. Please feel free to use liberally from this email to cut and paste to your emails, and to create a script when talking to your senator's office. I attach a database our group has put together that shows the economic impacts on each of your states from Delaware and SDNY filings. Also there is a great video put together by one of my colleagues in Iowa (and BTW the Chair of the Senate Judiciary is Grassley from Iowa) that really demonstrates the harm caused to local communities by venue shopping.

"The abuse of the current venue statute creates the perception that companies and Wall Street banks can choose their jurisdiction and judge without considering the interests of the home state and its citizens. This directly threatens the integrity of the bankruptcy system by eroding public confidence and calling into question the fairness of a bankruptcy process that can so easily be manipulated.

While not specific to Florida, but nonetheless just as equally applicable, please find a video attached to this link, <https://www.youtube.com/watch?v=7GdifLvuRdw&t=5s>, about the Vera Sun case, that demonstrates the negative effect that the rampant abuse of forum shopping of bankruptcy cases has had on local communities.

As you can see from the attached excel spreadsheets, from 2004-2016, nationally 735 Chapter 11 cases were filed in Delaware alone that should have been filed where the companies' principal assets or place of business was located. Those cases comprised total assets of \$619,120,897,170, total liabilities of \$1,507,667,884,263, and affected 4,508,564 creditors and 1,001,686 employees, the most of whom would most likely be from their home state. Similarly, in cases lost to the Southern District of New York (the other jurisdiction to which most of these cases are forum shopped), over that same time period, there were 125 cases filed, comprising total assets of \$373,621,633,080, total liabilities of \$493,775,672,959, and affected 1,834,660 creditors and 1,129,856 employees. In just those two

jurisdictions alone we had over this 12-year period 860 of these type cases filed, comprising total assets of \$992,742,530,250, total liabilities of \$2,001,443,557,222, and affected 6,343,224 creditors and 2,131,542 employees.

Of those Delaware cases, 36 were cases whose companies, principal assets or places of business were in Florida comprising total assets of \$6,927,820,461, total liabilities of \$9,776,900,747, and which affected 229,877 creditors and 35,380 employees. Eight cases over that time period that should have been filed in Florida were also filed in the Southern District of New York comprising total assets of \$4,045,019,787, total liabilities of \$4,171,490,871, and which affected 115,666 creditors and 91,160 employees. Between those two jurisdictions alone, Florida lost 44 Chapter 11 cases comprising total assets of \$10,972,840,248, total liabilities of \$13,948,391,618, and which affected 345,543 creditors and 126,540 employees, the majority of whom were Florida businesses and individuals.

Twenty-two (22) of those companies should have filed in the Southern District of Florida, and were based in Miami (5), Fort Lauderdale (2), Palm Beach (2), Boca Raton (5), Port St. Lucie (2), Pompano Beach (2), Sunrise, West Palm Beach and Plantation. Twenty-one (21) of those companies should have filed in the Middle District of Florida, and were based in Orlando (3), Jacksonville (2), Bonita Springs (3), Tampa (4), Largo, Oviedo, Kissimmee, Winter Park, Seffner, Clearwater, Naples, Fort Myers and Sarasota. One company based in Fort Walton Beach should have filed in the Northern District of Florida.

Amongst the diverse industries covered by these lost Florida filings were services, manufacturing, home builder, retail clothing, retail restaurants, business communication, media, digital entertainment, magazines, advertising, telecommunications, communications, internet management and data migration software, a provider of security products to business and government organizations, production of polypropylene based cedar and masonry replica siding, healthcare, medical devices, automotive, retail automotive, aerospace, healthcare staffing business, technology, textiles, fibers, luxury destination club/resort, detective, guard, and armored car services, electronic fax services, aviation, oil and gas, digital production, patio furniture retailer, medical supplies retailer, manufacturer of pipe fittings, plastic shipping pallet rental service, plastic shipping pallet rental service, internet provider advice, retirement community, golf retailers, manufacturer of front end retail checkout displays, education, hospice care provider, food retailer, real estate investment, business process outsourcing industry, television broadcasting, service equipment rental, retail furniture, property management and a steel company.

By allowing companies to file elsewhere, this loophole also has cost home states, like Florida, billions of dollars in lost revenues from food, lodging, etc. According to a study in the attached Bloomberg Business Week article of February 10, 2012, each chapter 11 case that files in another jurisdiction costs Florida more than \$4.5 million in lost revenue. Hence, this forum shopping to Delaware alone has cost Florida at least \$198,000,000 in lost revenue.

The continuation of the status quo will continue to deprive Florida's citizens of due process and negatively impact our local economies. It is now time to close that loophole and fix this wrong for

Florida's citizens and businesses. The amendment introduced by Senators Cornyn and Warren will bring this injustice to an end and require companies to solve their problems in their home states.

What this bill will also do is allow the Courts to operate more efficiently and cost effectively in that these cases can be heard locally by our highly knowledgeable and capable bankruptcy judges and well-skilled Florida bankruptcy lawyers, rather than have bankruptcy judges in faraway jurisdictions disproportionately be allocated more resources than our own courts. Traditionally, the allocation of judicial budgets is based upon the population within those districts and states. However, because of the rampant forum shopping that is going on, more and more bankruptcy judicial resources are being asked for and reallocated away from the bankruptcy courts in our states to judicial districts disproportionate to their population and size. Quite frankly, this abuse has led to the underutilization of our highly talented pool of bankruptcy jurists here in Florida. Enough is enough!"

b. *In re Northington*, 2017 WL 6276001 (11th Cir. Dec. 21, 2017)

Potential Amicus Brief

Scott Underwood

After further review of this case, it is to be removed.

HB 239 Consumer Finance and SB 386 Consumer Finance

Douglas Bates reported as follows:

These companion bills are identical and are geared toward changing certain features of consumer finance loans made pursuant to ch. 516, F.S. The proposed legislation allows consumer finance loans made under the applicable chapter of F.S. to be repaid in installments due every 2 weeks, semimonthly, or monthly. Currently, consumer finance loans may only be repaid in monthly installment payments. Additionally, the bill permits a borrower's final payment to be less than his or her prior installments, and sets a maximum delinquency charge, depending on the number of scheduled payments in a month. For context, a consumer finance loan, as compared to a traditional loan, is any loan valued at \$25,000 or less, with an interest rate greater than 18 percent per annum. As of November 2017, 174 consumer finance loan companies were licensed in 361 locations in Florida. The Florida Consumer Finance Act (ch. 516 F.S.) does not apply to banks, trust companies, building and loan associations, credit unions, or industrial loan and investment companies. Also, the Act does not apply to pawn or title loans. Generally speaking, while this legislation might very well provide some relief to certain category of consumer borrowers, I do not think that the Bankruptcy/UCC Committee needs to take a position on these proposed bills. Those practicing in consumer bankruptcy arena may wish to review the proposed legislation to the extent that it might affect some components of how automobile finance companies are treated prior to and/or during some bankruptcy cases.

Dennis LeVine will review this as well.

The trend is to have more attention at the state level on consumer issues.

→SB 640 Consumer Finance Loans and HB 747 Consumer Finance Pilot Program

Adina Pollan reported as follows:

This would implement a new loan program for consumer finance loans in the range of \$300 to \$10,000, with repayment terms of at least 120 days and no more than 60 months, with a tiered interest rate of a maximum of 36% for amounts up to \$3,000, 30% from \$3,000 to \$4,000, and 24% from \$4,000 to \$10,000. There would be strict admission into the program for lenders, requiring a \$1,000 application fee, plus \$1,000 annual renewal fees. Referral partners are permitted under strict circumstances. This would increase the statutory maximum rate from 30% to 36%. If borrowers successfully complete payments under specific terms, lenders are required to reduce subsequent loans by at least 1/12 of 1%. Reporting requirements will be required, with information on types of loans and delinquency rates, inter alia, being reported. This is based on a pilot program in California, and is intended to increase access to smaller unsecured loans to consumers. Recommendation: For the business side this will help generate new loans in a market that is currently underrepresented. The increase in statutory rate is good for lenders. For the consumer side this will help consumers access loans outside of the "payday" or tax refund loans, and may help build credit and free up cash for struggling consumers. The increase in interest rate may be problematic as consumers may be paying more in the long run. Unclear if BLS should take a position, but I see no reason to oppose the program.

→ SB 920 Deferred Presentment Transactions

Douglas Bates reported as follows:

A deferred presentment transaction means providing currency or payment instrument in exchange for a drawer's check and agreeing to hold the check for a number of days until depositing, presenting, or redeeming the payment instrument. Generally speaking, these type of transactions are referred to as "payday loans." SB 920 authorizes deferred presentment installment transactions under Florida law, and clarifies that payments on such debt can be made in installments. Under the bill, the maximum face amount of a check taken for a deferred presentment installment transaction may not exceed \$1,000, exclusive of fees. The term of a deferred presentment installment transaction may not be less than 60 days or more than 90 days. SB 920 retains current law found in s. 560.404(19) F.S., that a provider may not enter into a deferred presentment transaction with any person who has an outstanding deferred presentment transaction or whose previous transaction has been terminated for less than 24 hours. The bill provides for additional consumer protections that appear to be aimed at amplifying protections contained within current Florida law, the overall goal being to prevent consumers from getting caught in a "debt trap" wherein the consumer elects to continuously enter into lending transactions to pay off principal and fees from previous transactions. Overall, this bill does not appear to be within the historical purview of the Bankruptcy/UCC Committee; however, much the same as various other consumer protection legislation being proposed this session, those attorneys practicing in the area of consumer bankruptcy law may wish to review this proposed legislation.

JNC: Douglas Bates recommended each member of our committee review this.

See HB 753. SB 1030. This House bill has been much discussed already. The bill is largely consistent with SB 1030 with the overarching theme being displacement of The Florida Bar Board of Governors of the Governor of the State of Florida with respect to the selection of lawyers to serve on Judicial Nominating Commissions. Although there are some details of the bills that differ, the generalized theme

is one in which many members of the Bar have taken issue. As a Committee of the Business Law Section, we all understand that these bills do not interfere with the substance of our Committee's work. As such, I do not think that the Bankruptcy/UCC Committee needs to take a position or formal vote on these bills, and can safely expect that Legislative Committee and E.C. will cover that which needs to be addressed.

Judge McEwen posed the question re: attendance at the dinner.

CFBLA Annual seminar May 17 in Orlando. Judge Williamson will be the keynote speaker re: state of the district. Visit cfbla.org.

XI. Future Meeting Dates

- a. BLS Annual Meeting – June 13-16, 2018 (Hilton Orlando Bonnet Creek, Orlando, FL)

XII. Adjourn

The Bankruptcy Judicial Liaison meeting began immediately following.

There being no further business, Jodi Cook and Leyza Blanco moved and seconded to adjourn.