DATE: March 15, 2018

TO: Bankruptcy/UCC Committee of Business Law Section of the Florida Bar
Attn: Carlos Sardi, Esq., *Chair*, and Stephanie Lieb, Esq., *Vice Chair*

FROM: Andrew Layden, Esq.
Christopher Thompson, Esq.
Matthew Hale, Esq.

RE: Revisions to Chapter 607 of the Florida Statutes, known as the Florida Business Corporation Act (the "FBCA"), proposed by the Chapter 607 Drafting Subcommittee of the Corporations, Securities and Financial Services Committee of the Business Law Section of the Florida Bar (the "Drafting Subcommittee")

You asked us to review the Drafting Subcommittee's proposed amendments to the FBCA, and to opine on the proposed changes to the extent that they affect the practice of bankruptcy, creditors' rights, and secured transactions in Florida.

To accomplish this, we reviewed (1) the Drafting Subcommittee's Master Draft dated November 3, 2017 of Articles 1-8 and Article 10 of the FBCA ("Master Draft"), and (2) the Drafting Subcommittee's December 16, 2017 draft of Article 14 of the FBCA, which addresses dissolution of a Florida corporation (the "Article 14 Draft").[1]

We conclude that the proposed changes in the Master Draft are largely irrelevant to the Bankruptcy/UCC Committee's mission. Generally, the proposed changes in the Master Draft are intended to model the FBCA after the Revised Model Business Corporation Act (the "Model Act") promulgated by the Business Law Section of the American Bar Association, and primarily address issues of corporate formation and internal governance. Attached hereto as **Exhibit A** is a chart that identifies the Articles of the FBCA effected by the proposed changes in the Master Draft, and provides examples of the matters effected within each Article.

By contrast, the proposed changes in the Article 14 Draft related to voluntary dissolution of a Florida corporation (§§ 607.1401-1410) are highly relevant to the Bankruptcy/UCC Committee's mission. The Article 14 Draft proposes at least two substantive changes to Florida's current statutory framework for corporate dissolutions, and makes many non-substantive changes to conform the FBCA to the Model Act. Attached as **Exhibit B** is a chart discussing in further detail the proposed revisions to pertinent sections contained in the Article 14 Draft.

The most notable changes are to §§ 607.1406 and 607.1407, which provide the procedures for a dissolving corporation to address known and unknown ("other") claims against the entity. The Drafting Subcommittee's proposed revisions to § 607.1406 would substantially change the current procedure for noticing "known" claimants of a corporation's dissolution. The proposed revisions introduce two key changes. First, when sending the notice of dissolution to "known"

[1] For reference, a copy of the drafts we reviewed are attached to the original version of the memo as **Composite Exhibit C**, and are available upon request to alayden@bakerlaw.com and jdriggers@bakerlaw.com.

creditors, the dissolved corporation would no longer be required to identify an "admitted" claim amount in the notice to the creditor. This would shift more responsibility to creditors to timely assert their claims, since a dissolved corporation would no longer "admit" the existence and validity of any claims. Conversely, this proposal eliminates the burden on dissolved corporations to affirmatively state which claims are deemed admitted. Second, the proposed revisions would relocate or remove many dissolution provisions from current § 607.1406, relocating many provisions to other existing sections or newly created sections. These changes are aimed at tracking the Model Act.

With respect to § 607.1407, the Drafting Subcommittee's proposal would eliminate the option for dissolved corporations to provide notice to "other" or "unknown" claim holders by publication. The only option under the proposed draft would be to file a notice with the Florida Department of State. Generally, this section provides an optional procedure for a dissolved corporation to provide notice to unknown (now "other") claim holders, which if done starts a 4-year statute of limitations from the date of providing such notice within which such claims must be made. The existing statute provides a dissolved corporation the options of (i) filing a notice with the Florida Department of State, which will be made permanently available, or (ii) publishing notice once a week for two consecutive weeks in a newspaper of general circulation in a county in the state in which the corporation has its principal office, or where the corporation owns real or personal property. The Drafting Subcommittee's view is that filing a notice with the Department of State is a more permanent, accessible notice to potential claimants than the publication of a notice in a newspaper of limited circulation. However, the Subcommittee is anticipating the newspaper lobby may push back on this proposal, in which case the publication option may be restored.

Overall, the proposed changes are appropriate because they bring Florida's voluntary dissolution statutes in line with the corollary provisions of the Model Act, which numerous states have already enacted. While the proposed change to § 607.1406 may be viewed as a debtor-friendly change, it is not unreasonable and it eases the burden on a dissolving corporation to provide notice to known claim holders. Claim holders will still be provided adequate notice of the claim filing procedure, much like creditors in bankruptcy. We also support the changes to § 607.1407 because we agree that filing a notice to "other" potential claimants with the Department of State is a more effective way of providing notice of a corporation's dissolution than notice by publication. We should encourage the Drafting Subcommittee to hold their ground against the newspaper lobby on this issue, if possible.

However, we identified two possible drafting inconsistencies (and possibly one substantive change) that we recommend that the Bankruptcy/UCC Committee bring to the attention of the Drafting Subcommittee:

> First, § 607.1405(5) currently provides that "the circuit court may appoint a trustee" to conduct the windup and liquidation of a dissolving corporation when any director or officer is unwilling or unable to carry out the actions required to wind up the dissolving corporation. Under the current proposal, that provision would be changed to state that "the circuit court, ***upon application of a shareholder***, may appoint a trustee, ***custodian or receiver***" to conduct the windup and liquidation. This change appears to limit such relief

only to a shareholder who files an application or motion to request appointment of a trustee, custodian, or receiver, while current law does not appear to place any restrictions on who may apply for such relief, presumably allowing any party in interest to petition the court. We question whether this result was intended by the Drafting Subcommittee because the comment to the proposed changes states that the subsection "expressly allows a court to appoint a trustee, custodian or receiver…*presumably at the behest of creditors or shareholders* who have a stake in the liquidation of the corporation…" (emphasis added). If the Drafting Subcommittee intends to restrict the relief available only to petitioning shareholders, we question why creditors should not also have this relief available to them if the directors and officers of a corporation are unwilling or unable to undertake the actions necessary to wind down the corporation as provided in § 607.1405(1).

Second, the proposed draft § 607.1409 (Court Proceedings) states in subsection (1): "A dissolved corporation that has filed *or published* a notice under s. 607.1407(1)(a) or (1)(b) may file an application with the circuit court…." In light of the Drafting Subcommittee's proposal to remove the publication option from § 607.1407, the reference to "or published" and to "s. 607.1407(1)(a) or (1)(b)" should likely be changed to harmonize these two statutes. If the publication option is removed from § 607.1407, then the opening line of § 607.1409(1) should read: "A dissolved corporation that has filed a notice under s. 607.1407(1) may file an application with the circuit court…."

Please note that we did not perform an in-depth review of the proposed changes to FBCA §§ 607.1420–607.1436, which address, among other things: administrative dissolution, reinstatement, judicial dissolution, appointment of a receiver following actions for judicial dissolution, and other judicial dissolution matters. We view these provisions as outside of the purview of this memorandum because they are focused on corporate ownership disputes and shareholder litigation, and so they do not directly implicate the Bankruptcy/UCC Committee's mission. Further, footnote 8 of the Article 14 Draft states that the Business Litigation Committee of the BLS is still reviewing judicial dissolution provisions, indicating that its review is not final and that our review may be premature at this time. Upon request, however, we are willing to review and report on these sections in further detail.

Please also note we have only reviewed the Master Draft (addressing Articles 1–8 and 10) and the Article 14 Draft, which may not encompass all proposed changes to Chapter 607. If the Bankruptcy/UCC Committee would like us to review any proposed changes to other Articles, please let us know and we will request such drafts from the Drafting Subcommittee as they become available.

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EXHIBIT A

Article	Examples of Affected Matters
1 – General Provisions	Addresses matters such as filing requirements, filing fees, the effective time of documents filed with the Florida Department of State (the "DOS"), correcting documents filed with the DOS, the evidentiary effect of certificates issues by the DOS, corporate status certificates, and definitions to be used in the FBCA.
2 – Incorporation	Addresses matters such as the content of articles of incorporation, liability for pre-incorporation transactions, permissible provisions in bylaws, and forum selection provisions in articles of incorporation or bylaws.
3 – Purposes and Powers	Addresses matters such as corporate purpose, a corporation's general powers, and a corporation's emergency powers.
4- Corporate Names	Addresses matters such as corporate name requirements, reserving corporate names, and registered names.
5 – Office and Agent	Addresses matters such as a corporation's registered office and registered agent, changing a registered office or agent, resignation of a registered agent, service of process, notice or demand on a corporation, and the duties of a registered agent.
6 – Shares and Distributions	Addresses matters such as the amount and nature of authorized shares, issuance of shares, share rights, options, warrants and awards, the form and content of stock certificates, restrictions on transfer of shares and other securities, shareholder preemptive rights, corporation's acquisitions of its own shares, and distributions to shareholders.
7 – Shareholders	Addresses matters such as annual, special and court ordered shareholder meetings, notice of meetings, waiver of notice, record date, remote participation in meetings, shareholders' list for meetings, voting entitlement, proxies, shares held by intermediaries and nominees, quorum and voting requirements, voting for directors, voting procedures, shareholder agreements, derivative proceedings, shareholder action to appoint custodian or receiver, and provisional directors,
8 – Directors and Officers	Addresses matters such as duties of board of directors, qualification of directors, number of directors, election of directors, terms of directors, resignation of directors, removal of directors, board vacancies, board compensation, meetings, actions without a meeting, notice of meetings, quorum and voting, committees, submission of matters for shareholder vote, director standards, director liability, conflicts of interests, required officers, officer standards, indemnification, advances for expenses,
10 – Amendment of Articles of Incorporation and Bylaws	Addresses matters such as amendment by board, amendment by board and shareholders, voting on amendments, effect of amendment, and bylaw provisions relating to the election of directors,

EXHIBIT B

Statute	Summary of Proposed Change
607.1401 – Dissolution by incorporators or directors	**No substantive changes.** This section provides that a corporation "that has not issued shares or has not commenced business" may be dissolved by incorporators or directors of a corporation, and that will remain unchanged.
607.1402 – Dissolution by board of directors and shareholders; dissolution by written consent of shareholders	**No substantive changes.** This section generally provides that the board may propose to the shareholders that the corporation be dissolved, that the board may set conditions for the approval of the proposal for dissolution, sets forth the manner of required notice if a shareholder meeting will be held to consider a dissolution proposal, and that the shareholders may approval dissolution of the company by written consent without action of the board of directors. *Note*: There are two substantive differences between Florida's current statute and the corollary Model Act provision, and both would continue to exist post amendment. First, Florida law allows shareholders to approve dissolution of the corporation by written consent without action by the board of directors. (*See* § 607.1402(6)). Second, Florida law requires that the shareholders approve a proposed for dissolution by a vote of a majority of the shares entitled to vote on the proposal, which differs from the corollary provision of the Model Act only requiring approval by a majority of the quorum in attendance at a meeting called to consider the proposal (*See* § 607.1402(5)).
607.1403 – Articles of dissolution	**No substantive changes.** This section generally sets forth the requirements for articles of dissolution, governs when those articles become effective, and defines the terms "dissolved corporation" and "successor entity" for purposes of the dissolution sections.
607.1404 – Revocation of dissolution	**No substantive changes.** This section generally sets forth the circumstances under which a dissolved corporation can revoke its election to dissolve.
607.1405 – Effect of dissolution	**Substantive changes.** This section generally provides that a dissolved corporation continues its existence but cannot carry on a business except as appropriate to wind down, and otherwise clarifies the effect of dissolution. Section 607.1405(2)(c) previously provided that dissolution of a corporation does not "subject it directors or officers to standards of conduct different from those prescribed in ss. 607.0801-607.0859 *except as provided in s. 607.1421(4)*. In the Article 14 Draft, the italicized language is deleted

	because that section of the FBCA, which deals with possible personal liability of officers or directors in dissolution, is proposed to be deleted. A new subsection (§ 607.1405(3)) is added, which provides that the board of directors may fix a record date for determining shareholders entitled to a distribution in liquidation, otherwise, the record date is the date the board of directors authorizes the distribution in liquidation. Section 607.1405(4) would be changed to provide that the name of dissolved corporation is not available for use by another entity for *1 year* after the effective date of dissolution absent the dissolved corporation permits immediate use by another business entitled. 607.1405(4) currently provides that a name is unavailable for *120 days* following dissolution. 607.1405(5) would be changed to state that the circuit court, *upon application of a shareholder*, may appoint a trustee, *custodian or receiver* to carry out the winding up process. This change appears to require that a shareholder request appointment of a trustee, custodian, or receiver, while current law is silent, presumably allowing any party in interest to petition the court for such relief. Note: Florida law includes three non-standard subsections (§§ 607.1405(3), (4), and (5)), and those would continue to exist post-amendment as re-numbered subsections (4), (5), and (6). Subsection 4 provides that the a director's personal liability is not changed by dissolution. Subsection 5 provides that a dissolved corporation's name is generally unavailable for 1 year after dissolution. And Subsection 6 provides that the court may appoint a trustee, custodian, or receiver to carry out the windup process.
607.1406 – Known claims against dissolved corporation	**Substantive changes.** This section prescribes the procedure for a dissolving corporation to provide notice to known creditors and provides for the processing and determination of claims. The noticing procedure is substantially altered from the current version of the statute. The current version requires a dissolving corporation to send a notice to holders of known claims that must contain a description of the claim and state whether the claim is admitted (in whole or in part). If the claim is admitted, the notice must state the amount admitted.

	The proposed revisions would remove these requirements, instead providing for a generic notice of dissolution sent to each holder of a known claim that would notify holders of the opportunity to file a claim. In effect, the revised statute shifts burden to creditors of a dissolving corporation to timely assert claims, rather than requiring the dissolving corporation to notify creditors what its books and records reflect is owed, and to affirmatively state which claims are deemed admitted by the dissolving corporation. The proposed revisions also remove treatment of most contingent claims, which are now treated as "other" claims under § 607.1407. The only contingent claims dealt with under the new § 607.1406 are those where the only contingency relates solely to the passage of time (e.g., a promissory note which matures on a date certain). Because of the removal of contingent claims, the proposed revisions also remove certain provisions for providing security to holders of contingent claims. These security provisions are now dealt with in proposed § 607.1409. In general, the changes to this section appear to simplify the noticing and claims procedure for dissolving corporations. The substantive issues addressed in many subsections of the current § 607.1406 have been moved to new statute sections as discussed below.
607.1407 – Other claims against dissolved corporations	**Substantive changes.** Generally, this section provides an optional procedure for a dissolved corporation to provide notice to unknown claim holders, which if done starts a 4-year statute of limitations from the date of providing such notice within which such claims must be made. The proposal eliminates the publication option for notice of claims against a dissolved corporation other than known claims (f/k/a "unknown claims"). The Drafting Subcommittee's view is that filing a notice with the Department of State is a more permanent, accessible notice to potential claimants than the publication of a notice in a newspaper of limited circulation. However, the Subcommittee is anticipating the newspaper lobby may push back on this proposal, in which case the publication option may be added back in. The proposal also adds some specificity to the optional notice filing with the Department of State. Under the proposal, a

	notice filing must: (a) state the name of the corporation subject to dissolution; (b) state the corporation is the subject of a dissolution and the effective date of the dissolution; (c) specify the information that must be included in a claim; (d) state that a claim must be in writing and provide a mailing address where a claim may be sent; (e) state that a claim against a corporation under this subjection will be barred unless a proceeding to enforce the claim is commenced within 4 years after the filing of the notice.
607.1408 – Enforcement of claims against dissolved corporations	**New section.** This is an entirely new section, but substantially similar provisions currently exist as §§ 607.1406(12), (13) and (14), and § 607.1407(4), which detail shareholder liability in connection with dissolution. The new section contains the same limitations on shareholder liability. Notably, however, the new provision does not carry over current § 607.1406(13), which provides that any suit against a shareholder for liability following dissolution must be commenced within 3 years following the effective date of the dissolution.
607.1409 – Court proceedings	**New section.** This is a new section, but a substantially similar provision currently exists as §§ 607.1406(6) and (7). Current §§ 607.1406(6) and (7) provide a mechanism for the dissolving corporation to petition the circuit court: (6) "to determine the amount and form of security that will be sufficient to provide compensation to any claim" holding a contingent, conditional, or unmaterured claim that has rejected the dissolving company's offer of security, and (7) to determine the amount and form of security "which will be sufficient to provide compensation to claimants whose claims are known to the corporation…but whose identities are unknown." This section is a Model Act provision, and provides a similar claims resolution process for unknown and contingent claims. **Note**: There is a possible inconsistency with the proposed draft of § 607.1407 insofar as the draft of 607.1409 refers to "A dissolved corporation that has filed or published a notice under s. 607.1407(1)(a) or (1)(b)…" and the current draft of § 607.1407 eliminates the publication option and current subsection (1)(b).
607.1410 – Director duties	**New section.** This section is a Model Act provision, which clarifies directors' obligations in dissolution and comports with the structural changes in new § 607.1406 and

	§ 607.1407. Directors are insulated from liability of claimants of the dissolving corporation so long as the dissolved corporation followed §§ 607.1406, 607.1407, and § 607.1409 in disposing of claims. Note that current § 607.1406(11) (which currently governs relieving directors of liability in dissolution), allowed for insulation from liability in circumstances where the dissolving corporation did not follow the noticing and claims procedure so long as certain provisions for payment of claims were followed (see current § 607.1406(10)).