BUSINESS LAW SECTION
OF THE FLORIDA BAR

BUSINESS LAW SECTION EXECUTIVE COUNCIL MEETING AGENDA

Thursday, October 1, 2020 at 4:00 p.m.

VIA ZOOM PLATFORM

https://us02web.zoom.us/j/85221294715?pwd=UjZXRk5mRHJQanA3bDdsQ2h5ZlY4UT09

Meeting ID:	852 2129 4715	Password:	385993

I. Call to Order (Blanco)

II. Minutes of September 4, 2020 Meeting (Stein) – **Exhibit A**

III. Old Business (Blanco)

A. Chapter 607 Subcommittee – Proposed Changes to Florida Business Corporations Act and Florida Not-For-Profit Corporations Act (Schwartz, Teblum, and Schwartz) – **Exhibit B**
   1. Proposed bill text for Sections 607 and 617
   2. Bullet Point Summary of the Changes
   3. White Paper in support
   4. Florida Bar - Legislative or Political Activity Request Form

B. Bankruptcy/UCC Legislative Proposed Changes to Sections 222.105 & 222.111 Requirement for Specific Waivers of Exemption (Morando) – **Exhibit C**
   1. Proposed bill text for Sections 222.105 and 222.111
   2. White Paper in support
   3. Florida Bar - Legislative or Political Activity Request Form

C. § 542.335 Task Force Legislative Proposal to Restrictive Covenant Statute (Barakat) **Exhibit D**
   1. Proposed bill text
   2. White paper in support
   3. Florida Bar - Legislative or Political Activity Request Form

IV. New Business (Blanco)

V. Adjourn (Blanco)

NOTE: For those seeking to place "triple motions" before the Executive Council at this meeting, please email Secretary Mark Stein, in advance of the meeting, the full written text of any motions and please ensure the motion is consistent with Florida Bar Board of Governors Standing Board Policy (2020) 9.50(d) set forth below:

9.50 LEGISLATIVE AND POLITICAL ACTIVITIES OF VOLUNTARY BAR GROUPS
(a) Authority. The board will permit a voluntary bar group to take a position on a legislative or political issue only when the issue:
(1) is within the group's subject matter jurisdiction as described in the group's bylaws;
(2) either is beyond the scope of the bar's permissible legislative or political activity, or is within the bar's permissible scope of legislative or political activity and the proposed position is consistent with an official bar position on that issue; and
(3) does not have the potential for deep philosophical or emotional division among a substantial segment of the bar's membership.

Exhibit

A

BUSINESS LAW SECTION
OF THE FLORIDA BAR

MINUTES OF THE FLORIDA BAR BUSINESS LAW SECTION EXECUTIVE COUNCIL VIRTUAL MEETING

Friday, September 4, 2020 from 9:00 AM to 12:00 PM
Virtual (via Zoom)

I. Call to Order – Ms. Leyza Blanco, Chair of the Section

Leyza Blanco, Chair of The Florida Bar Business Law Section, duly called the September 4, 2020 meeting of the Executive Council to order at approximately 9:10 a.m. Because of the circumstances associated with the COVID-19 pandemic, the meeting convened in a virtual format via Zoom. Attendance at the meeting is reflected in the document attached hereto as Exhibit A.

Because the meeting format was virtual, attendance was taken based upon online registration and recorded in the spreadsheet attached hereto as **Exhibit "I"** to these minutes.

II. Commitment to Pro Bono Service

Chair Blanco began the meeting by reaffirming the Section's commitment to Pro Bono activities on behalf of the Bar and referred to the meeting agenda and the Section's goal to achieve 100% participation in pro bono service by Section members and attorneys in their firms.

Chair Blanco acknowledged the following Executive Council members who have pledged at least $1000 to The Florida Bar Foundation Endowment Trust to become Fellows of The Florida Bar Foundation: Douglas Bates, Leyza Blanco, Giacomo Bossa, Jay Brown, Michael Chesal, Robert Charbonneau, Hon. Caryl Delano, Kacy Donlon, Jodi Dubose, Manuel Farach, Hon. Gill Freeman (Ret.), Irwin Gilbert, Paige Greenlee, Hon. Paul Hyman, Hon. Laurel Isicoff, Stephanie Lieb, Allison Leonard, John Macdonald, Kimra Major-Morris, James Matulis, Kathleen McLeroy, Hon. Catherine McEwen, Hon. Mindy **A.** Mora, Jennifer Morando, Woodrow "Woody" Pollack, Adina Pollan, Carlos Sardi, Philip Schwartz, Detra Shaw-Wilder, Lynn Walter Sherman, Mark Stein, Michelle Suarez, Gary Teblum, Dineen Wasylik and Donald Workman.

III. Recognition of Sponsors

As included in the meeting agenda, Chair Blanco acknowledged and recognized the generous contribution of all the Business Law Section sponsors, including the following Diamond ($10,000), Sapphire ($7,500) and Emerald ($5,000) sponsors.

Diamond Sponsor:

Michael Moecker & Associates

Sapphire Sponsors:	***Emerald Sponsors:***
Berger Singerman	***Akerman***
	CompuMark
Morgan & Morgan	***Eisner Amper***
	Messana, P.A.
Buchanan Ingersoll & Rooney PC	***Sequor Law***
	Shutts & Bowen
	SunTrust

IV. Approval of Minutes of June 18, 2020 Annual Meeting

Secretary Stein presented the meeting minutes from the June 18, 2020 meeting of the Executive Council. Upon motion duly made by Ms. Paige Greenlee, which motion was seconded by Mr. Jay Brown the minutes were approved unanimously as presented.

V. Treasurer's Report

Treasurer Bates presented documentation found as Exhibit B to the meeting agenda and provided brief remarks regarding the documents included in Exhibit B, including comments regarding the Section budget and fund balances and advising that due to Covid related issues, the section does not presently have current and accurate financial information from the Florida Bar, but expects to receive this information soon. Treasurer Bates called for questions regarding the documents presented in Exhibit B. No questions were presented and Treasurer Bates concluded his report.

***Following Treasurer Bates' report, Chair Blanco introduced Mr. Steve Davis as a candidate for President-Elect of The Florida Bar. Following a brief introduction, Mr. Davis provided a brief report on his candidacy. Chair Blanco then introduced Mr. Gary Lesser as a candidate for President-Elect of The Florida Bar. Following a brief introduction, Mr. Lesser provided a brief report on his candidacy.

***Following the presentations, Chair Blanco returned to the meeting agenda.

VI. Recognition of Section Fellows

Ms. Michelle Suarez introduced the Fellows. All of the Section Fellows were asked to introduce themselves. Brief individual introductions followed.

VII. Reports of Substantive Law Committees and Legislation Committee

A. Bankruptcy/UCC

Chair, Jennifer Morando gave the report for the Bankruptcy/UCC Committee. Chair Morando reported that the Committee approved three new legislative positions at its meeting, two for the 2021 legislative session and one for the 2022 legislative session. First, as a point of information, Chair Morando gave a summary of the Committee's proposal to create Section 702.13 which will require a notice to be provided to homeowners in

foreclosure cases involving residential real property. The creation of Section 702.13 is a standing legislative position of the Section that had previously been approved by triple motion. The Committee's white paper and proposed bill text were included with the materials for the EC meeting.

Next, Chair Morando reported on a proposed legislative change advanced by the RPPTL Section in response to a recent decision by the 11th Circuit Court of Appeals which held that a blanket pledge of all personal property resulted in a loss of the exempt status of an IRA which would have otherwise been protected under Section 222.21(2). The RPPTL proposed legislative change would require that a separate document be executed and delivered by a debtor in order for that debtor to pledge collateral that would otherwise be exempt under Chapter 222, and it would require the collateral to be described specifically in that separate document in order for the pledge to be sufficient. The Committee generally supports the proposal, but there are certain modifications that they would like to see the RPPTL Section make in order to improve the statute.

Chair Morando went on to describe the Committee's approval to pursue legislation in the 2022 session to amend the judgment lien statutes. Chair Morando said that the Committee will have a white paper and bill text ready at the midyear meeting and will make a motion to approve at that time; in the meantime, Chair Morando requested that EC members review the written summary that was included in the materials for the EC meeting and direct any comments, questions, or concerns to Professor Jeff Davis. Lastly, Chair Morando described some of the Committee's upcoming CLE webinars and encouraged members to attend.

In addition to her report, Chair Morando made the following motions:

Foreclosure Notice Bill

Chair Morando made a motion to:

> approve the proposed statutory language that was included in the EC meeting materials and, consistent with the standing legislative position of the BLS on this matter previously adopted by the BLS by triple motion, to direct the legislative team to pursue this proposed legislation in the upcoming 2021 legislative session.

After receipt of a second to the motion from Ms. Adina Pollan, Chair Blanco called for a vote and the motion passed unanimously.

Kearney

Chair Morando made a triple motion to:

> (i) take a position to support the RPPTL proposal to create Section 222.105 and (ii) approve the proposed statutory language that was included with the EC materials; and (iii) authorize the Bankruptcy/UCC Committee to engage in discussions with

the RPPTL Section (or its appropriate committee) to negotiate desired modifications.

After receipt of a second to the motion from Ms. Lynn Sherman, there was a discussion regarding the prior discussions between the BLS and the RPPTL sections and the future negotiations between the Legislation Committee and the RPPTL section. Based upon that discussion Chair Morando modified the above triple motion to:

(i) take a position to support the RPPTL proposal to create Section 222.105; and (ii) authorize the Bankruptcy/UCC Committee to engage in discussions with the RPPTL Section (or its appropriate committee) to negotiate desired modifications to the proposed bill.

After receipt of a second to the motion from Ms. Adina Pollan Chair, Blanco called for a vote and the motion passed unanimously.

B. Business Litigation

Vice-Chair Allison Leonard gave the report of the Business Litigation Committee. The committee had a well-attended meeting with a peak of 33 participants. The Committee introduced and explained the use of email blast, list serve, and its legislative sub-committee's list serve. There were reports from each of the following Task Forces: Restrictive Covenants (Section 542.335), UCRERA, Chapter 48 and the Chapter 607 Drafting Subcommittee (regarding the Glitch Bill). The committee also discussed creating a subcommittee on litigation financing, and the legislation subcommittee will look at the changes proposed by the task force on Florida Rules of Civil Procedure. Ms. Dineen Wasylik provided an update on the amicus briefs process and the committee was told about the procedure going forward should it receive additional requests. There were also reports from the Communications, Pro Bono, IMF, and IP Committees and the Covid19 task force. The judiciary presented an update on issues in different circuits regarding jury trials and procedures. Finally, the committee heard a report on CLE and was apprised that a case law update will be starting on Wednesday, October 14, 2020. A visit from BLS Leadership and the Legislative team concluded the meeting.

C. Computer Law & Technology

Chair Peter Maskow provided the report of the Computer Law & Technology Committee. The Computer Law & Technology Committee met on September 2, 2020. The Committee discussed its proposed legislative position on data privacy and cybersecurity of personal information. The proposed position states "Supports legislation relating to data privacy and protection, including cybersecurity, that strikes the appropriate balance between protecting personal information without placing undue restrictions on business development or unnecessarily stifling technological advancement in this State."

Mr. Steven Blickensderfer noted that there had been two prior attempts by others to have the legislature adopt privacy legislation. He noted the proposed position is designed to be a reasonable middle ground between consumer protection interests and interests to prevent overburdening business. Chair Maskow noted that the position was drafted to strike a balance between competing interests and have a position in place to address it with the legislature. Ms. Aimee Diaz Lyon, an attending legislative committee representative, thought the wording was reasonable and strikes a good balance. She anticipates seeing privacy legislation moving forward. She noted that a whitepaper should be drafted if the position is to be taken to the Big Bar Executive Council. Chair Maskow proposed utilizing whitepaper prepared previously by the committee to create the new whitepaper in a short time frame.

Regarding potential CLE ideas for the coming year, Chair Maskow discussed working on a panel, potentially in November, on technology and the unlicensed practice of law. Chair Maskow further encouraged the committee to get involved with the Florida Bar Foundation. Mr. Eli Mattern made an open call for anyone to help with Pro Bono Matters, particularly for help to non-profit technology startups. Mr. Steve Blickensderfer noted the need for pro bono help to businesses to address security incidents. Chair Maskow noted that, as resources are discovered, BLS CTLC can get the word out on the listserve.

Chair Maskow made the following triple motion, which was seconded by Mr. Joshua Marks.

> The BLS should adopt a position that supports legislation relating to data privacy and protection, including cybersecurity, that strikes the appropriate balance between protecting personal information without placing undue restrictions on business development or unnecessarily stifling technological advancement in this State.

Following a discussion regarding the appropriateness of the BLS taking a general position without pending legislation with certain concerns expressed by Mr. John Polenberg, Chair Blanco called for a vote. The motion carried with six members of the EC voting in opposition.

*****Chair Blanco recognized Judge McEwen to wish Judge Isicoff a happy birthday following which, Chair Blanco returned to the meeting.

D. Corporations, Securities & Financial Services

Chair Will Blair gave the report of the Corporations, Securities & Financial Services Committee.

Mr. Blair noted that the Committee had received a report from the Chapter 607 Drafting Subcommittee, with Mr. Philip Schwartz discussing the current status of revisions to Chapter 607. Mr. Blair noted that Mr. Schwartz would be reporting on behalf of that Subcommittee later this morning.

Mr. Blair next reported that the Committee had next received a report by Mr. Danny Aronson with respect to a BLS Survey Ad Hoc Sub Committee, noting that given the recent modernization of the Florida Business Corporation Act, there was interest in forming a sub-committee to look into whether more entities will be incentivized into using Florida corporate statutes instead of Delaware or other states. This sub-committee will look into issues in connection with choice of business and formation of entities. In his report to the Committee, Mr. Aronson indicated that the proponents of the sub-committee are in the early stages of formulating the sub-committee and will report back to the Committee as they progress.

Mr. Blair said that the Committee next received a report from Mr. Gregory Yadley who gave a report to the Committee on the work of the Federal Securities Institute Task Force in organizing the annual conference of the Federal Securities Institute. Mr. Blair noted that Mr. Yadley would be delivering his report on behalf of this task force later this morning.

Mr. Blair next reported that Professor Stu Cohn discussed the Florida Benefit Corporation Statute and recent amendments that have been made to the Delaware version of the statute. He stated that Professor Cohn reported that Delaware amended its benefit statute and noted that practitioners have reached out to him and want Florida to move in the same direction as Delaware and make similar amendments, i.e., simple majority instead of supermajority to approve the conversion of a regular corporation to a benefit corporation and the elimination of appraisal rights in connection with a merger. Mr. Blair advised that interest will be solicited from the Committee to determine whether these amendments are something that the Committee is willing to proceed with.

Mr. Blair next reported that Mr. Lou Conti made a presentation with respect to UCC §§ 9-406 and 9-408 and the recent amendments in seven or eight states to Article 9's overrides of anti-assignment provisions to make them inapplicable to LLC and partnership interests and that the Committee discussed supporting the Bankruptcy and UCC Committee which is piloting these proposed changes. He noted that the Committee decided it will distribute relevant materials to the committee members for their review and then, at a future meeting, consider a motion as to whether to support the Bankruptcy and UCC Committee's recommendation as to making this legislative change.

Finally, Mr. Blair reported that the Committee discussed the following future projects: (a) Not for Profit Statute –Chapter 617, (b) Series LLC and (c) Defective Acts – consideration of whether to adopt Subchapter E of the Model Act or the current Delaware provisions (Sections 204 and 205 of the DGCL) that cover the topic of ratification of defective

corporate acts. He advised that the Committee will solicit interests from members to see which projects the Committee will undertake in the immediate future.

E. Intellectual Property Law

Chair Jim Matulis provided the report of the Intellectual Property Law Committee.

Mr. Matulis reported that the meeting of the Intellectual Property Law Committee included a presentation of a CLE on insurance coverage for trade secret claims. He advised that the Committee had not identified any issues for which it anticipates the need for proactive legislation in 2021. He noted that the Committee was happy to hear that Judge Mary Scriven had agreed to serve as the Committee's Judicial Chair for next year, and that Professor Jake Linford had agreed to serve as the Committee's Faculty Chair for another year as well.

Mr. Matulis stated that, during the 2020 session, the Committee had prepared a white paper about four related pieces of legislation involving trade secrets (CS HB 0801 & HB 0799 / SB 1532 & SB 1534) and also proposed edits to each of the bills. He noted that the Committee continues to remain vigilant for any future legislative issues that may involve IP.

Mr. Matulis next advised that the Committee had been able to sunset one of its four legislative positions, and had renewed the following three positions, subject to review and approval by the BLS Legislation Committee and the BLS Executive Council:

A. Opposes changes that weaken contracts governed under current franchise laws and expand claims available under Florida's Unfair and Deceptive Trade Practices Act.

B. Supports legislation that defines blockchain technology in such a manner as to encourage innovation in the blockchain space without tying any statutory definition to a specific implementation of the technology.

C. Supports amending pending legislation relating to trade secret information to require Florida state agencies to inform potential bidders, vendors, service providers, contractors and/or others that may engage in business with state agencies that their submission of information to an agency may waive trade secret protection and to further require informed consent by potential bidders, vendors, service providers, contractors and/or others that may engage in business with the state agencies, in order to prevent inadvertent waiver of said trade secrets and potential litigation.

Mr. Matulis next reported that the 11th Annual IP Symposium (scheduled for April 16-17, 2020) was cancelled due to the pandemic, but that the Bar was able to renegotiate the contract to allow the committee to host the Symposium instead on October 15-16, 2020 at the same location. He noted that the Committee will continue to monitor the situation and adjust as the date approaches.

F. Legislation

Chair Manuel Farach provided the report of the Legislation Committee. As was reported at the Executive Council's June meeting, the BLS was extremely fortunate this past Legislative session to successfully pass two major legislative priorities – SB 838 the Corporations Glitch bill and HB 783 UCRERA. Chair Farach announced that both have now been signed into law by the Governor.

Chair Farach announced that, the Governor vetoed over $1 billion from the state's approximately $92 billion budget and included in those vetoes was the $21 million allocated for the new 2nd DCA courthouse and the $3.4 million in funding for 10 new judgeships. He further announced that the most recent estimates show a shortfall to the state budget of approximately $3.4 billion and that State agencies have been asked to cut 8.5% reductions to both their current general revenue funding, as well as their trust fund revenues, to address expected budget shortfalls.

Chair Farach advised that the 2021 Regular Legislative Session will commence on March 2, 2021, that the 60-day session is scheduled to conclude on April 30, 2021, that the bill filing deadline is officially March 2nd, but that, in reality, the BLS must secure bill sponsors in the next few weeks. Chair Farach asked that the respective substantive committees would be best to bring any proactive legislation for the 2021 legislative session to EC for triple motion today in order to give the legislative team time to line up bill sponsors, work with bill drafting and get the bills in proper posture for this upcoming Session.

Chair Farach noted that neither Senate President-Designate Wilton Simpson nor House Speaker-Designate Chris Sprowls have announced a schedule for the fall interim committee meetings which are typically held from December through February. He indicated his expectation that, shortly after the November election, these presiding officers will officially take over and announce new committee chairs and committee membership and his understanding that there will be a new standing joint committee established to review the state's response to COVID-19 to determine what the state did right and what improvements could be made in the future.

Finally, Chair Farach reported that the BLS Legislation Committee has updated its portion of the BLS website to include a variety of resources for BLS members.

VIII. Reports of Permanent and Other Committees

A. Amicus Brief Guideline Subcommittee

Chair Dineen Wasylik gave the report of the Committee. Chair Wasylik advised that the task force is not yet ready to present official guidelines to the EC and hopes to be in a position to do so at our next meeting. Chair Wasylik advised that the task force has assisted the Chair and the Business Litigation section in vetting a request for amicus participation

and has also provided the Communications Committee with copies of the prior briefs filed, which are now posted on the website.

B. Antitrust and Trade Regulation Subcommittee

The Antitrust and Trade Regulation Subcommittee did not provide a report.

C. Bankruptcy Judicial Liaison

Chair John Hutton gave the report of the committee. He noted that the Districts generally reported that bankruptcy cases have not picked up, that consumer cases are down YOY, and business cases are on par with last year. Chair Hutton reported that there was some discussion by the Judges as to the use of Zoom and video hearings, which present advantages over telephonic hearings, and that some of the Judges are conducting in person trials on a limited basis, in special circumstances, in which the number of parties attending in person is limited, and social distancing and other safe guidelines can be implemented.

Chair Hutton advised that Judge Colton lead a presentation and discussion on Subchapter V at the Committee's meeting and discussed developing forms and practices addressing new "small business" cases. He noted that Ms. Amy Harris, as a Subchapter V Trustee discussed her experience focusing on:

- Election of Subchapter V in a pending case
- Eligibility under 11 U.S.C. sec. 101(51D)(A) (debt limits on "non-contingent" and "liquidated" debt)
- Modification of residences used for business
- Subchapter V Trustee
    - (a) compensation and retention of professionals, and
    - (b) role as facilitator between debtor and creditors
- Plan confirmation issues (fair and equitable; best interest)

Chair Hutton stated that the discussion leaders included Southern District Judges Hyman and Mora, Middle District Judge McEwen and Northern District Chief Judge Specie.

D. Blockchain and Cryptocurrency Task Force

Committee Second Vice-Chair Robert Kain gave the report of the task force. Chair Kain reported that the task force discussed Florida's Financial Technology Sandbox law ("FinTech Sandbox"), Fla.Stat. 559.952 (effective January 1, 2021), which establishes a two year, extendable for an additional year, exemption and waiver of select provisions of Florida's Money Services Business Act ("FMSBA"), Fla. Stat. 560.103, and Florida's Consumer Finance Act ("FCFA"), Fla.Stat. 516.03(1). He noted that he and Mr. Zac Catanzaro briefly discussed the FinTech Sandbox Act and circulated the paper they wrote on the Act for comments by the Taskforce. Chair Kain advised that, after securing any

further comments from absent members of the DC-BC Taskforce, the paper is expected to be posted Sept. 10, 2020. Chair Kain next noted that Mr. Zac Catanzaro had reported at the Committee meeting that Ms. Anessa Santos anessa@intellilaw.io has been appointed by the Florida Bar's Board of Governors (BOG) to gather and post papers relative to digital currency and blockchain developments.

E. Business Courts Task Force

The Business Courts Task Force did not provide a report.

F. Chapter 48 (Service of Process) Task Force

Vice Chair Adina Pollan gave the report of the task force. She advised that the Chapter 48 task force met again for 1 ½ hours, starting a little earlier than its originally scheduled time. Ms. Pollan reported that the meeting was attended by the usual suspects and was very effective and that the group completed the analysis of the flowchart that will be used as a control mechanism for the drafting and as a guide to be provided to practitioners. She explained that there are some intricacies with respect to local service and the Hague Convention that are being scrutinized, but once this has been resolved, the group has a map against which to check the drafts. On behalf of the Task Force, Ms. Pollan advised that the Task Force does not expect to have a bill ready for the 2021 legislative session.

G. Chapter 607 Sub-Committee

Co-Chair Phil Schwartz gave the report of the Chapter 607 Sub-Committee. He reported that the Subcommittee has been meeting since June to finalize a proposed bill to make additional changes to the Florida Business Corporation Act to deal with issues in Article 13 of the FBCA (shareholder appraisal rights) that had arisen during the 2020 legislative session, and on the meeting of the Subcommittee held earlier this week to work on the proposal.

Mr. Schwartz then reported that the proposed bill will deal with three issues:

- Changes to §607.1302(1) modifying in certain respects the types of circumstances under which a shareholder has a right to seek appraisal rights;

- Changes to §607.1302(2) dealing with the "market out" exception to §607.1302(1); and

- Changes to various sections of Article 13 to address perceived abuses by persons seeking to engage in appraisal rights arbitrage, as illustrated by disputes that have recently arisen in appraisal rights litigation in the Florida courts.

Mr. Schwartz also reported that the Subcommittee is currently engaged in a dialogue with members of the Real Property, Probate and Trust Law Section of the Florida Bar (the "RPPTL Section") regarding their desire to make certain changes to Chapter 617 (the "Florida Not-For-Profit Corporation Act") to deal with issues relating to condominiums, cooperatives, homeowners' associations, timeshares, and mobile home owner's association

organized under Chapters 718, 719, 720, 721, and 723 of the Florida Statutes, respectively.

Finally, Mr. Schwartz reported that the Subcommittee will be meeting in mid-September to finalize its proposal so that the proposal can be presented to the EC for approval at an EC meeting to be held at the beginning of October.

H. Continuing Legal Education

Vice-Chair Andrew Layden provided a brief report on behalf of the Continuing Legal Education Committee. He advised that the CLE Committee met via Zoom and discussed the CLEs recently hosted by the BLS, including:

- UCRERA CLE held on July 31, 2020 with approximately 200 attendees
- A four-part collaboration between Tax and Bankruptcy/UCC Sections – held on July 22, August 26, August 31, 2020 and to be held on September 9, 2020. Each of the sessions had or will have at least 100 attendees.

Vice Chair Layden reported on his understanding that the Communications Committee was very pleased with these CLEs and looks forward to hosting additional CLEs using a webinar format, which allows for attendance from multiple locations. He noted that the Continuing Legal education Committee was also supportive of cross-section collaborations on CLE, such as the ongoing Tax and Bankruptcy/UCC collaboration.

Vice Chair Layden was pleased to note that the Communications Committee has requested that each of the substantive committees appoint a liaison to the CLE committee to increase participation and collaboration and had voted unanimously to support the IMF Diversity Policy for presenters at CLEs.

I. Communications

Ms. Adina Pollan provided a brief report on behalf of the Communications Committee.

With respect to the Newsletter, Ms. Pollan reported as follows:

> At the request of Chair Blanco, the committee implemented a new newsletter, which has been sent out on a weekly basis each Thursday for about 6 weeks now. Ms. Tracey Eller has assisted the committee with the content. The committee has based timing and content based on both its own calendar as well as the BLS overall calendar

With respect to the Website, Ms. Pollan reported as follows:

> The committee has started the process on upgrading the website and has 3 RFPs and is waiting for the fourth that is expected to come in next week. The goal is to have the new website up and running by December 31, 2020. The committee has been constantly refreshing content on the existing website – blogs, social media linked posts, videos and photos. For example, it has posted all Amicus Briefs written by the section on the website and promises more surprises over the next few weeks.

With respect to Spotlights and Blogs. Ms. Pollan reported as follows:

> The committee started with two truths and a lie, featuring Chair Blanco, Ms. Marianne Dorris and Judge Isicoff and plans to feature three more members starting next week. In addition, the committee is starting a Fellows spotlight with current and past fellows and also started with Kudos to our Members, and featured Ms. Jodi Dubose's new little baby in one of the Section's August newsletters

With respect to Committee Liaisons, Ms. Pollan reported as follows:

> The Communications Committee is reminding all of the other committees of the importance of having a liaison on the committee to make sure that information about what other BLS committees, task forces and groups are doing gets highlighted in the Section's communications as promptly as reasonably possible.

J. COVID Task Force

Co- Chair Bart Valdes gave the report of the task force. He noted that the Task Force recently conducted a survey the results of which indicated many practitioners expect an uptick in bankruptcy, foreclosure and eviction cases as the country emerges from the pandemic. Co-Chair Valdes reported that the Task Force is working on a CLE to cover practice and procedure issues in foreclosure and eviction cases and is compiling "how-to" materials for the website. He also reported that the Task Force is compiling Administrative Orders from around the state in regard to the reopening of the courts in an effort to help lawyers more easily find the most up-to-date information.

K. eDiscovery Committee

Committee Chair, Zachary Catanzaro provided a brief report on behalf of the eDiscovery Committee. He noted that, during the Committee's meeting, the Committee discussed the efforts of the Proposed Amendments to the Fla. R. Civ. P. Task Force and related matters and considered input from Judges Matthewman and Smith. In addition, he reported that the Committee intends to propose such draft changes to the BLS substantive committees and also to the Trial Lawyers section of the bar. Chair Catanzaro stated that the Committee also discussed the possibility of hosting a CLE focused on the differences between the Federal Rules of Civil Procedure and the Florida Rules and that there had also been a discussion of CLEs on production and e-Discovery and on evidentiary objections. Finally, he advised that there were discussions on harmonizing state rules with FRE 902(13)-(14) and regarding deep fakes.

L. Financial Literacy Task Force

Task Force Chair Amanda Finley gave the report of the task force. She reported on behalf of the Committee that the Department of Education has adopted a new teaching standard that incorporates teaching financial literacy as a part of the required math curriculum. Chair Finley noted that the Task Force will be analyzing the depth in which the new teaching standard will cover financial literacy topics and will then determine next steps for the Task Force. She explained that the Task Force's long-term goal is to support having financial literacy as a standalone mandatory requirement for all Florida high school students.

M. Health & Wellness Task Force

Task Force Chair Wasylik provided a brief report on behalf of the Task Force and reported that COVID-19 has had an enormous effect on mental and physical wellness of attorneys throughout the state. She noted that there has been some renewed interest in membership on the Task Force, and that the Task Force has worked to share the excellent state-level materials put forth by the Florida Bar. Chair Wasylik advised that, if a lawyer is struggling in any way as a result of COVID-19 effects, that such lawyer should check out the Florida Bar's new hotline. Finally, she advised that the Task Force is working on adding some additional virtual wellness events in the near future

N. Inclusion/Mentoring/Fellowships

Committee Chair, Michelle Suarez delivered the report for the Inclusion, Mentoring and Fellowships ("IMF") Committee. She advised that the IMF committee had voted and recommended, for presentation to and approval by the Executive Council, the following 2 major items:

(1) The BLS CLE Diversity Policy, which requires that an average of 20% of each CLE panel meet certain criteria for "diversity" as defined in the policy, and that each CLE panel be submitted to the IMF committee for approval with compliance with the CLE Diversity policy, unless certain exceptions are met (due diligence must be shown and emergent circumstances must exist), no less than 7 days before the CLE is to take place. This policy is designed to help ensure that the BLS is effectively taking steps to help make sure that diversity is implemented from the ground up by supporting, promoting, and providing programs that are dedicated to diversity.

(2) The BLS Fellowship Program would require that all incoming Fellows sign and commit to a Pledge requiring each Fellow to attend at least 2 out of the 3 annual BLS meetings, participate in at least one substantive and one non-substantive committee meeting at each of the BLS meetings they attend, and that each of them report back to the IMF committee as to which substantive project they are participating in and contributing to (as they are already required to participate in substantive projects). A Fellow's failure to do so would result in the Fellow being notified that such Felow has been dis-enrolled from the Fellowship program for the second year, and an alternate Fellow would be selected to receive the $2,500 award, replacing the dis-enrolled Fellow, in order to give other Fellow candidates, who were not selected, a chance to benefit from the Program and in order to raise the standards of the Fellowship Program by holding Fellows to a higher standard so that they can get the most out of the Program.

Chair Suarez noted that the IMF committee has also relaunched the Mentor/Mentee Program and created Pledges for all Mentors and Mentees to sign, which outlines the expectations of the Mentors/Mentees and also provides guidelines to the Mentors/Mentees as to how often the parties should be meeting (4x a year; 2x by video conference or in person and 2x by phone at minimum). She stated that the Pledge Agreements have been provided to EC Members, and will soon be made available on the BLS website. She requested that all inquires regarding the program be sent to MSuarez@FloridaEntrepreneurLaw.com.

Finally, Chair Suarez reported that the IMF committee has several fun networking events coming up, including a pumpkin carving contest (there will be an award for the best carving) running now through October 28, 2020. She indicated that all pictures of pumpkins to be considered in the contest should be sent to MSuarez@FloridaEntrepreneurLaw.com on or by 10/28/20 and that the winner will be

announced in the BLS Newsletter and also at the IMF Halloween Party, which will be held online on 10/29/20 at 6pm. Details to follow.

Following the report, Chair Suarez moved for the BLS to adopt the following diversity CLE policy:

> CLE Diversity Policy. This policy applies to CLE programs with three or more panel participants, including the moderator. Effective **January 1, 2021**, the following guidelines will apply: (a) individual programs with faculty of three or four panel participants, including the moderator, will require at least 1 diverse member; (b) individual programs with faculty of five to eight panel participants, including the moderator, will require at least 2 diverse members; and (c) individual programs with faculty of nine or more panel participants, including the moderator, will require at least 3 diverse members. The BLS will not sponsor, co-sponsor, or seek CLE accreditation for any program failing to comply with this policy unless an exception or appeal is granted.

The motion was seconded by Ms. Jennifer Morando. A lengthy discussion followed regarding how to address the View from the Bench because the possible panelists are only bankruptcy judges, so the universe of potential members is limited. Ms. Stephanie Lieb pointed out that each previous View from the Bench during the last ten (10) years complied with the above policy. Following the discussion, Chair Blanco called for a vote and the motion carried with a small number of members voting no.

O. IOTA Task Force

Committee Chair John McDonald, the Chair of the Pro Bono Task Force delivered the report. He advised that the task force decided to monitor The Florida Supreme Court Task Force on the Distribution of IOTA Funds ("FSC Task Force") which met by Zoom at 2:00 p.m. on September 2, 2020. Chair Macdonald reported on the recent activity and projected future events for advancement of the FSC Task Force's proposed revised Rule 5-1.1(g), which controls the distribution of IOTA funds to fund the provision of civil legal services to Florida's poor.

He explained that the FSC Task Force's initial proposal called for the removal of the Florida Bar Foundation as the sole administrator of IOTA funds, to be replaced by one or more alternative administrators (potentially including the Foundation), and capped administrative overhead expenses at 5% of the funds administered, the balance of which was required to be distributed downstream to Grantees within six months. He continued, noting that, in early summer 2020, the Foundation and the Florida Civil Legal Aid Association (FCLAA) jointly submitted an alternative version of the Rule revision which they would support, which revision restored the Foundation to be the sole IOTA funds administrator and offered alternative provisions for the monitoring of expenses and regular

review. Chair Macdonald said that the hope had been that, following the proposal of that alternative version, there would be dialogue among the FSC Task Force, the Foundation, and the grantees towards a consensus version. He advised, however, that the Task Force did not adopt most of the joint proposal's alternative provisions, and no substantial, productive dialogue ensued and that a final meeting of the FSC Task Force was scheduled for August 14, at which it was anticipated the FSC Task Force would vote on the final Rule to be submitted to the Supreme Court.

Chair Macdonald continued, reporting that, at the August 14 meeting, Judge Edwin Scales announced that he was working on a "hybrid" version of the revised Rule which would meld concepts from the Foundation/FCLAA joint proposal with the FSC Task Force's current version. Chair Macdonald advised that the FSC Task Force determined to delay a final vote until it could review a refined version of Judge Scales' "hybrid" revision, that the refined "hybrid" version was subsequently published as an August 15 revision, that the "hybrid" version restored the Foundation as the sole funds administrator but brought forward most of the FSC Task Force's limitations on administrative and overhead expenses, and that the "hybrid" version proposed to cap direct expense for administration and overhead, including the maintenance of reserves, at 15% at the Foundation level and 10% at the grantee level.

Chair Macdonald next advised that, at a meeting held August 28, the Foundation Board voted 13-7 to not oppose further the FSC Task Force's proposal, that the Foundation Board would acquiesce in the submission and that, by letter of August 25, the FCLAA provided a critique of the "hybrid" version, focusing mainly on (a) the lack of provision for reserves at any level, (b) the arbitrary caps on administrative and overhead expenses at both the Foundation and Grantee level, and (c) the perceived disproportionate impact the revised Rule would have on smaller grantees. Chair Macdonald continued, noting that the FSC Task Force next convened another meeting on August 31 and that, although the public did not have Zoom access to the full meeting, the FSC Task Force apparently determined at that meeting that it would continue to refine the "hybrid" version but that it would vote, presumably by e-mail or the like, to approve a final version of the "hybrid" rule prior to the deadline for submission to the Supreme Court of September 15. He reported that no further public meetings were scheduled.

Chair Macdonald observed that, at this point no one knows what the process will be at the Supreme Court level for consideration of the FSC Task Force's proposed Rule revision, noting that the alternatives range from a normal publication of the proposed Rule revision with a period for public comment, or a blessing and approval of the Rule revision without further discussion. He advised that the BLS Task Force will continue to monitor the progress of the Task Force's submission and will report to BLS leadership if there is an opportunity for comment at the Supreme Court level.

P. Marketing, Promotions and Sponsorship

The Marketing, Promotions and Sponsorship Committee did not provide a report.

Q. Membership

Ms. Dyanne Feinberg, Chair of the Membership Committee, presented a brief report on behalf of the Committee. Chair Feinberg reported that the Committee is not having a "formal" Scholars Program for the 2020-2021 year due to the current events. She advised that the Membership Committee reached out to the BLS Faculty Liaison at each school to invite the business law students to attend the virtual meetings/events at the Retreat this year and forwarded them the Zoom links. She also noted that the Membership Committee has reached out to each BLS Faculty Liaison to hold a Zoom event in the Fall or before the end of the year at each of the Florida law schools, that the Committee intends to prepare a PowerPoint or video presentation that promotes the BLS, to be presented at these law school events, that the Committee also intends to hold joint networking events (likely also by Zoom) with local bar associations and other Florida Bar Sections to obtain new members and, finally, that the Committee plans to update the Membership Committee portion of the BLS website, as it is out of date.

R. Opinion Standards

Mr. Gary Teblum, Co-Chair of the Opinion Standards Committee, provided a brief report on behalf of the Committee. He noted that the meeting was very well attended, maybe even the largest attendance in recent memory. Co-Chair Teblum reported that the members discussed the status and timetable for preparing and submitting an updated First Supplement to the Third Party Legal Opinions Report, noting that, although an earlier version was previously approved by the Executive Council, while the BLS was waiting to approval from the RPPTL Section, the extensive revisions to Chapter 607 went into effect. Co-Chair Teblum advised that the Committee is in the process of trying to incorporate those Chapter 607 into the First Supplement and, once completed, the further updated Supplement draft will be represented to the Executive Council for review and approval, hopefully at the January mid-year meeting. Co-Chair Teblum reported that the Committee received updates on what the Working Group on Legal Opinions and the Tri Bar Opinions were doing in the opinions arena and, finally, had a good discussion of certain hot topics associated with rendering third party legal opinions.

S. Pro Bono

Carlos Sardi, Chair of the Pro Bono Committee provided a report on behalf of the Committee, which started with the reading of the BLS Mission Statement and the recognition of the following Section members as the 2019 BLS Pro Bono Heroes for reporting the fulfillment of their 2019 Pro Bono Pledge of at least 20 hours of pro bono work during the year:

Brian Barakat

Giacomo Bossa
Jay Brown
Irwin Gilbert
Robert Kain
Shobah Lizaso
John B. MacDonald
James B. Murphy
Adina Pollan
Terry Sanks
Carlos E. Sardi
Grey Squires-Binford

Chair Sardi reported that at the meeting of the Committee, reports were given about Ongoing Work and Initiatives, including The Florida Bar Foundation Matching Program, the New & Improved Pro Bono, Best Practices Guide (posted in Committee's Website since July 2020), BLS IOTA Task Force on The Florida Bar's Task Force on Distribution of IOTA Funds, and Pro Bono Pledge Campaign.

Chair Sardi noted that the Committee also reviewed BLS Pro Bono Statistics, with year-over-year numbers showing that 47% of the BLS membership reported pro bono hours with a total number of hours reported of 81,818 – a slight decrease from the prior year, but a lot higher than in 2017-2018.

Chair Sardi stated that, during the past three years, approximately 450 BLS members have consistently reported over 50 hours of pro bono hours. He advised that the Committee will be recognizing these individuals for going above and beyond the call of duty, noting that these members will also be recognized as BLS Pro Bono Heroes, and a subset will be bestowed with the BLS PRO BONO SUPERHERO award during National Pro Bono Week (10/25/20 to 10/31/20).

Next, Chair Sardi reported that the Committee had discussed the "One Promise" Campaign, which is the 2.0 version of the "One Campaign" of *One Client. One Attorney. One Promise* back in 2009/2010. He explained that the revised version consists of a new video designed as a marketing tool for attorneys committed to doing pro bono work, that the project is currently being managed and developed by the Pro Bono Legal Services Committee of The Florida Bar chaired by the Honorable Catherine McEwen, that the project is estimated to cost a total of $30,000 and that the Florida Bar Foundation has committed to be the receptor of funds.

Chair Sardi made a motion to the EC to approve a one-time gift to The Florida Bar Foundation earmarked for this endeavor in the sum of $2,500. The motion was seconded by Mr. John McDonald. Chair Blanco then called for a vote and the motion passed without discussion.

T. Proposed Amendments to the Fla. R. Civ. P. Task Force

Task Force Chair Bart Valdes provided a brief report on behalf of the Task Force noting the Task Force has approved a package of proposed Rule changes that are incorporated into a white paper detailing the changes and the reasons for the suggested amendments. He explained that the Task Force had rolled out these proposed amendments to all of the substantive committees during the Retreat and has asked that everyone review the proposed amendments and provide comments before the next meeting regularly scheduled meeting of the Executive Council.

U. Scholar and Fellows Retention Task Force

The Scholar and Fellows Retention Task Force did not provide a report.

V. Uniform Commercial Real Estate Receivership Act (UCRERA) Task Force

Kenneth Murena, Chair of the Uniform Commercial Real Estate Receivership Act Task Force gave the report. He reported that the UCRERA Task Force had been asked by the Florida Bar Civ. Pro. Legislative Review Subcommittee to determine whether any revisions to Rule 1.620 (and any other Fla. R. Civ. P.) are necessary in light of the enactment of UCRERA. Chair Murena noted that the Task Force has held two Zoom meetings to address this, including yesterday's Zoom meeting during which it decided that althoughthe reporting (filing inventory) requirements in Rule 1.620 and UCRERA (and the LLC act) are not the same, the Task Force believes that courts should have the discretion to decide by when the initial inventory must be filed, and that thus the Task Force recommends that "unless the Court otherwise orders" (language from the second sentence of subsection (b) of Rule 1.620) be added to the first sentence of subsection (b) so that the requirements of filing the initial inventory and the subsequent interim inventories are both subject to the Court's discretion. Chair Murena advised that the Task Force has provided this report to the CivPro Legislative Review Subcommittee.

Chair Murena noted that at the next Zoom meeting/call, scheduled for Wed., September 23rd at 3:00 pm, the Task Force will focus on whether any other Rules need to be revised or added in light of UCRERA.

W. Uniform Voidable Transfers Act (UVTA) Task Force

The Uniform Voidable Transfers Act Task Force did not provide a report.

X. 542.335 Task Force

Task Force Chair Brian Barakat gave the report of the 542.335 Task Force. Chair Barakat reported that the Task Force had finished a draft rewrite of 542.335 prior to the Retreat. He noted, however, that the Task Force received a last-minute change which it thought was advisable and that thus the Task Force was in the process of incorporating this change into the draft revised statute. Chair Barakat reported that the Task Force expects to have

finalized this change in the next two weeks and will be prepared to submit the draft revised statute along with a white paper to the EC for a triple motion at that time.

IX. Reports of Section Liaisons

A. The Florida Bar Board of Governors

Board of Governors member Paige Greenlee gave the report. Board of Governor's member Greg Weiss sent his apologies he was unable to attend the EC meeting. Governor Greenlee recognized other Governors in attendance on the EC, specifically Governors Steve Davis, Gary Lesser, Lorna Brown-Burton and Scott Westheimer. She advised that President Foster Morales has been conducting virtual Town Halls throughout all of the Circuits and she encouraged everyone to attend and provide feedback regarding what the Bar can be doing to help its membership during these difficult times. Governor Greenlee reported that the Florida Bar Mental Hotline is a free, anonymous resource available to all bar members and encouraged members to call and talk to one of the counselors if they happen to be struggling with mental health issues and requested members of the EC to spread the word to colleagues who might find this service useful. She further reported that President Elect Mike Tanner is chairing the Bar's COVID Task Force and that there is a banner at the top of the website for The Florida Bar with links to various resources. Governor Greenlee also asked anyone that has any issues or suggestions on what the Bar should be doing to assist membership with COVID issues, to please contact President Elect Tanner. She also reported that the Florida Bar Young Lawyers Division has a section on its website to allow attorneys to register as supervising attorneys under The Florida Supreme Court's AO allowing for a Temporary Supervised Practice Program. She asked all EC members to please consider registering to serve in this capacity to help one of the approximately 3,000 bar applicants who are waiting to take the Bar Exam on October 13, many of whom are struggling financially.

B. The Florida Bar Continuing Legal Education

This report was the same as the CLE Committee Report above.

C. The Florida Bar Council of Sections

The Florida Bar Council of Sections did not provide a report.

D. The Florida Bar Diversity & Inclusion Committee – Marianne Dorris

Liaison Marianne Doris advised that she would be providing the BLS CLE Diversity Policy to the Florida Bar, noting that the BLS is the first section to adopt such a policy.

E. The Florida Bar Real Property, Probate & Trust Law (RPPTL) Section – James Marx

The Florida Bar Real Property, Probate & Trust Law (RPPTL) Section did not provide a report.

F. The Florida Bar Young Lawyers (YLD) Division

Liaison Cherine Valbrun provided a brief report congratulating the BLS on its Fellowship and Mentorship Programs. She also requested BLS members to consider becoming a supervising attorney for one or more law school graduates waiting to take the Bar on October 13.

G. The Florida Institute of CPAs (FICPA)

Liaison Donald Workman reported that the FICPA/bar committee has been meeting and has added new members. The group will be meeting later this month virtually.

H. The Out-of-State Division of The Florida Bar

Liaison Larry Kunin reported that the out-of-state division will be meeting during the week of October 12 and is also planning a CLE on practicing during Covid. Mr. Kunin reminded everyone of the out of state lawyer newsletter.

I. The Working Group on Legal Opinions (WGLO)

Chair, Phil Schwarz reported that the WGLO will be putting on an upcoming seminar.

X. Other Reports

A. Chair's Report

Chair Blanco showed the EC an inspiring video celebrating the fifty (50) year history of the Business Law Section through former Chairs talking about their Executive Council Retreat trips. Chair Blanco also discussed a possible Executive Council Retreat from April 7-11, 2021 to Sedona, Arizona with a side trip to the Grand Canyon or to Savannah, Georgia or to the Florida Keys. The EC voted favorably for each trip.

B. Chair-Elect's Report

Chair-Elect Donlon provided a brief report. She advised that many in the Florida Bar view the BLS as a great Section role model for innovative and successful programs, particularly the Fellows program. She also advised that planning for the 2021 Labor Day Retreat has begun and invited other EC members to assist her and Amanda Fernandez, the 2021 Labor Day Retreat Chair.

XII. New Business

There was no new business.

XIII. Good and Welfare

There was no good and welfare.

XIII. Adjournment

There being no further business to come before the Executive Council, the meeting was adjourned by Chair Blanco at approximately 11:52 a.m.

Exhibit I

First Name	Last Name	Email	Registration Time	Approval S
Alexander	Bowen	Abowen@wrgn-law.com	8/31/2020 21:24	approved
Michele	Moss	mgmoss@johnsonmosslaw.com	9/3/2020 14:38	approved
Victoria N.	Clark	vclark@bhpalaw.com	8/11/2020 10:02	approved
Paul	Hyman	paul_hyman@flsb.uscourts.gov	9/1/2020 15:21	approved
Phil	von Kahle	philv@moecker.com	8/28/2020 9:20	approved
James	Marx	James@MarxRosenthal.com	9/4/2020 10:51	approved
Keith	Bell	kbell@clarkpartington.com	9/4/2020 8:05	approved
Glaucia	Jones	glaujones@gmail.com	9/4/2020 8:21	approved
Zachary	Hyman	Zach@millenniallaw.com	9/4/2020 8:38	approved
Lorna	Brown-Burton	lornab@lebburtonlaw.com	8/5/2020 15:04	approved
Carlos	Sardi	carlos@sardilaw.com	8/5/2020 14:13	approved
Andrew	Layden	alayden@bakerlaw.com	9/1/2020 20:16	approved
Alan	Howard	ahoward@milamhoward.com	8/5/2020 16:54	approved
Lynn	Sherman	lsherman@trenam.com	9/1/2020 16:03	approved
Russell	Blain	rblain@srbp.com	8/28/2020 14:56	approved
Kelly	Roberts	Kelly@kellyrobertslaw.com	8/5/2020 14:37	approved
Thomas	Smith	thomas_smith@flmd.uscourts.gov	9/1/2020 9:43	approved
Edward	LaRose	larosee@flcourts.org	8/20/2020 14:01	approved
Jim	Matulis	Feb2011baracct@gmail.com	8/28/2020 22:22	approved
Gary	Teblum	gteblum@trenam.com	8/5/2020 14:07	approved
Giacomo	Bossa	gbossa@anmpa.com	8/30/2020 3:05	approved
Allison	Leonard	aleonard@dvllp.com	9/4/2020 7:56	approved
Gary	Teblum	gteblum@tampabay.rr.com	8/11/2020 14:04	approved
Toni	Tsvetanova	toni.tsvetanova@akerman.com	9/1/2020 10:43	approved
Lori	Vaughan	lori_vaughan@flmb.uscourts.gov	9/1/2020 8:59	approved
John	Hutton	huttonj@gtlaw.com	8/28/2020 22:29	approved
rbarron	barron	rbarron@bergersingerman.com	9/3/2020 9:05	approved
Karen J	Orlin	kjorlin@yahoo.com	9/3/2020 15:36	approved
Catherine	McEwen	cmcewen@flmb.uscourts.gov	8/6/2020 11:57	approved
Merrick L. "Rick"	Gross	mgross@carltonfields.com	8/12/2020 9:30	approved
Louis	Conti	louis.conti@hklaw.com	9/4/2020 7:45	approved
Kenneth	Murena	kmurena@dvllp.com	9/4/2020 8:02	approved
peter	valori	pvalori@dvllp.com	9/3/2020 9:10	approved
Adina	Pollan	apollan@pollanlegal.com	8/27/2020 13:57	approved
Valeria	Angelucci	vangelucci@anmpa.com	8/27/2020 19:39	approved
Robert	Kain	rkain@conceptlaw.com	8/31/2020 7:06	approved
PAUL	SINGERMAN	singerman@bergersingerman.com	8/27/2020 17:15	approved
Mark	Wolfson	mwolfson@foley.com	9/3/2020 9:55	approved
Jon	Polenberg	jpolenberg@beckerlawyers.com	8/31/2020 15:42	approved
Jeffrey	Davis	davis@law.ufl.edu	8/29/2020 10:21	approved
Steven	Davis	sdavis@bsfllp.com	8/31/2020 17:01	approved
Will Blair		wblair@shumaker.com	8/31/2020 13:09	approved
Gregory	Yadley	gyadley@shumaker.com	8/27/2020 17:01	approved
Stuart	Cohn	cohn@law.ufl.edu	8/28/2020 14:26	approved
Stephanie	Lieb	slieb@trenam.com	9/4/2020 8:04	approved
Jay	Brown	jacob.brown@akerman.com	8/25/2020 6:45	approved

April	Stone	ahs@agentislaw.com	9/1/2020 8:42	approved
Christopher	DeCort	cdecort@jclaw.com	8/27/2020 16:07	approved
Cherine	Valbrun	cvalbrun@kvllaw.com	9/3/2020 9:44	approved
Zachary	Catanzaro	zachary@zlclaw.com	8/25/2020 10:00	approved
Garrett	LaBorde	Garrett@LabordeLegal.com	9/1/2020 11:55	approved
Nicole	McLemore	nicole_mclemore@flsb.uscourts.gov	8/27/2020 13:48	approved
Michelle	Suarez	MSuarez@FloridaEntrepreneurLaw.com	8/28/2020 16:07	approved
stefan	rubin	srubin@shutts.com	8/5/2020 15:15	approved
Jodi	Dubose	Jdubose@srbp.com	9/1/2020 10:10	approved
BLS	Leadership	pperdomo@nova.edu	9/4/2020 8:03	approved
Jennifer	Morando	jennifer@morandolegal.com	8/27/2020 11:03	approved
Caryl	Delano	cdelano@flmb.uscourts.gov	8/6/2020 8:36	approved
Dyanne	Feinberg	def@kttlaw.com	9/1/2020 12:59	approved
Brian	Barakat	clara@triallawmiami.com	9/1/2020 10:30	approved
Roberta	Colton	Roberta_Colton@flmb.uscourts.gov	8/31/2020 13:37	approved
April	Martindale	april@martindalelaw.org	9/4/2020 9:02	approved
Gill	Freeman	gfreeman@jamsadr.com	9/2/2020 9:05	approved
Reginald	Sainvil	sainvilr@gtlaw.com	9/4/2020 8:18	approved
Matthew	Hale	mhale@srbp.com	9/1/2020 6:36	approved
Jerry	Markowitz	jmarkowitz@mrthlaw.com	8/27/2020 14:31	approved
Karen J Orlin		kjorlin@bellsouth.net	9/4/2020 8:05	approved
philip schwartz		philip.schwartz@akerman.com	8/30/2020 16:15	approved
Amanda	Finley	afinley@sequorlaw.com	9/2/2020 12:26	approved
Michael	Williamson	mwilliamson@flmb.uscourts.gov	8/31/2020 11:30	approved
Tracey	Eller	tceller@bellsouth.net	9/4/2020 7:16	approved
Russell	Landy	rlandy@dvllp.com	8/6/2020 11:19	approved
Maxine	Long	maxinelong43@gmail.com	8/5/2020 15:37	approved
Aimee	Diaz Lyon	adl@mhdfirm.com	8/19/2020 10:13	approved
Doug	Bell	Doug.bell@mhdfirm.com	8/19/2020 10:19	approved
Rob	Brighton	rbrighton@beckerlawyers.com	8/5/2020 14:49	approved
Amir	Isaiah	Isaiah@forthepeople.com	9/4/2020 7:55	approved
Joseph	Van de Bogart	joseph@vandebogartlaw.com	9/2/2020 12:31	approved
Dineen	Wasylik	dineen@ip-appeals.com	9/4/2020 8:07	approved
Joshua	Marks	joshua.houss.marks@gmail.com	9/2/2020 14:48	approved
Peter	Maskow	pmaskow@mcglinchey.com	9/2/2020 10:02	approved
Felipe	Plechac-Diaz	fplechacdiaz@gmail.com	9/3/2020 18:02	approved
Terry	Sanks	tsanks@firstiniplaw.com	9/1/2020 3:41	approved
F Scott	Westheimer	swestheimer@smrl.com	8/28/2020 10:29	approved
Woodrow	Pollack	wpollack@shutts.com	9/2/2020 8:23	approved
Juan	Mendoza	jmendoza@sequorlaw.com	8/31/2020 22:07	approved
melanie	damian	mdamian@dvllp.com	8/31/2020 16:01	approved
Gary	Lesser	GLesser@lesserlawfirm.com	9/3/2020 12:40	approved
Paige	Greenlee	paige@greenleelawtampa.com	8/6/2020 8:56	approved
Mariane	Dorris	mdorris@shukerdorris.com	8/12/2020 12:21	approved
Larry	Kunin	lhk@mmmlaw.com	9/4/2020 9:41	approved
Sara	Paris	sara.paris@thomsonreuters.com	8/19/2020 19:11	approved
John	Macdonald	john.macdonald@akerman.com	9/1/2020 11:35	approved

Jude	Cooper	JCooper@beckerlawyers.com	9/4/2020 7:58	approved
Laurel	Isicoff	lmisicoff@flsb.uscourts.gov	8/17/2020 10:10	approved
Amanda	Fernandez	afernandez@dvllp.com	9/3/2020 8:16	approved
Karen	Specie	karen_specie@flnb.uscourts.gov	8/31/2020 10:15	approved
Andrew	Schwartz	andrew.schwartz@akerman.com	9/2/2020 8:48	approved
James	Murphy	jbmurphyjr@gmail.com	8/27/2020 17:51	approved
mindy	mora	mamora@flsb.uscourts.gov	9/1/2020 14:36	approved
Donald	Workman	dworkman@bakerlaw.com	8/31/2020 14:47	approved
Bart	Valdes	bvaldes@dsklawgroup.com	8/25/2020 19:09	approved
Angelique	Gulla	agulla@anmpa.com	9/4/2020 7:59	approved

Exhibit B

EXHIBIT B-1

DRAFT DATED SEPTEMBER 29, 2020

PROPOSED MODIFICATIONS TO CHAPTER 607

607.1301 Appraisal rights; definitions.—The following definitions apply to ss. 607.1301-607.1340:

(1) "Accrued interest" means interest ~~from the date the corporate action becomes effective until the date of payment,~~ (i) at the rate of interest agreed to by the corporation and the shareholder asserting appraisal right, or (ii) at the rate of interest that is determined by the court to be equitable, but in no event at a rate greater than the rate of interest determined for judgments pursuant to s. 55.03, ~~the determined as of the effective date of the corporate action~~; however, if the court finds that the shareholder asserting appraisal rights acted arbitrarily or otherwise not in good faith, no interest shall be allowed by the court.

607.1302 Right of shareholders to appraisal.

(1) A shareholder of a domestic corporation is entitled to appraisal rights, and to obtain payment of the fair value of that shareholder's shares, in the event of any of the following corporate actions:

(a) Consummation of a domestication or a conversion of such corporation pursuant to s. 607.11921 or s. 607.11932, as applicable, if shareholder approval is required for the domestication or the conversion;

(b) Consummation of a merger to which such corporation is a party:

1. If shareholder approval is required for the merger under s. 607.1103 or would be required, but for s. 607.11035, except that appraisal rights shall not be available to any shareholder of the corporation with respect to shares of any class or series that remain~~s~~ outstanding after consummation of the merger where the terms of such class or series have not been materially altered; or

2. If such corporation is a subsidiary and the merger is governed by s. 607.1104;

(c) Consummation of a share exchange to which the corporation is a party as the corporation whose shares will be acquired, except that appraisal rights shall not be ~~are not~~ available to any shareholder of the corporation with respect to any class or series of shares of the corporation that is not acquired in the share exchange;

(d) Consummation of a disposition of assets pursuant to s. 607.1202 if the shareholder is entitled to vote on the disposition~~, including a sale in dissolution,~~ except that appraisal rights shall not be available to any shareholder of the corporation with respect to shares of any class or series if:

1. Under the terms of the corporate action approved by the shareholders there is to be distributed to shareholders in cash the corporation's net assets, in excess of a reasonable amount reserved to meet claims of the type described in ss. 607.1406 and 607.1407, within 1 year after the shareholders' approval of the action and in accordance with their respective interests determined at the time of distribution; and

2. The disposition of assets is not an interested transaction;

(e) An amendment of the articles of incorporation with respect to a class or series of shares which reduces the number of shares of a class or series owned by the

shareholder to a fraction of a share if the corporation has the obligation or the right to repurchase the fractional share so created;

(f) Any other merger, share exchange, disposition of assets, or amendment to the articles of incorporation, in each case to the extent provided as of the record date by the articles of incorporation~~,~~ bylaws, or a resolution of the board of directors providing for appraisal rights, except that no bylaw or board resolution providing for appraisal rights may be amended or otherwise altered except by shareholder approval;

~~(g) An amendment to the articles of incorporation or bylaws of the corporation, the effect of which is to alter or abolish voting or other rights with respect to such interest in a manner that is adverse to the interest of such shareholder, except as the right may be affected by the voting or other rights of new shares then being authorized of a new class or series of shares;~~

(g~~h~~) An amendment to the articles of incorporation or bylaws of a corporation the effect of which is to adversely affect the interest of the shareholder by altering or abolishing appraisal rights under this section;

(h~~i~~) With regard to a class of shares prescribed in the articles of incorporation ~~prior to October 1, 2003, including any shares within that class subsequently authorized by amendment~~, in any corporation as to which a particular class of shares was in existence prior to October 1, 2003 and, for classes of shares authorized on or after October 1, 2003, in any corporation with 100 or fewer shareholders, any amendment of the articles of incorporation if the shareholder is entitled to vote on the amendment and if such amendment would adversely affect such shareholder by:

1. Altering or abolishing any preemptive rights attached to any of his, her, or its shares;

2. Altering or abolishing the voting rights pertaining to any of his, her, or its shares, except as such rights may be affected by the voting rights of new shares then being authorized of any existing or new class or series of shares;

3. Effecting an exchange, cancellation, or reclassification of any of his, her, or its shares, when such exchange, cancellation, or reclassification would alter or abolish the shareholder's voting rights or alter his, her, or its percentage of equity in the corporation, or effecting a reduction or cancellation of accrued dividends or other arrearages in respect to such shares;

4. Reducing the stated redemption price of any of the shareholder's redeemable shares, altering or abolishing any provision relating to any sinking fund

for the redemption or purchase of any of his, her, or its shares, or making any of his, her, or its shares subject to redemption when they are not otherwise redeemable;

5. Making noncumulative, in whole or in part, dividends of any of the shareholder's preferred shares which had theretofore been cumulative;

6. Reducing the stated dividend preference of any of the shareholder's preferred shares; or

7. Reducing any stated preferential amount payable on any of the shareholder's preferred shares upon voluntary or involuntary liquidation;

(ij) An amendment of the articles of incorporation of a social purpose corporation to which s. 607.504 or s. 607.505 applies;

(jk) An amendment of the articles of incorporation of a benefit corporation to which s. 607.604 or s. 607.605 applies;

(kl) A merger, domestication, conversion, or share exchange of a social purpose corporation to which s. 607.504 applies; or

(lm) A merger, domestication, conversion, or share exchange of a benefit corporation to which s. 607.604 applies.

(2) Notwithstanding subsection (1), the availability of appraisal rights under paragraphs (1)(a), (b), (c), (d), and (e), (f) and (h) shall be limited in accordance with the following provisions:

(a) Appraisal rights shall not be available for the holders of shares of any class or series of shares which is:

1. A covered security under s. 18(b)(1)(A) or (B) of the Securities Act of 1933;

2. Not a covered security, but traded in an organized market (or subject to a comparable trading process) and has at least 2,000 shareholders and the outstanding shares of such class or series have a market value of at least $20 million, exclusive of the value of outstanding shares held by the corporation's subsidiaries, by the corporation's senior executives, by the corporation's directors, and by the corporation's beneficial shareholders and voting trust beneficial owners owning more than 10 percent of the outstanding shares; or

3. Issued by an open end management investment company registered with the Securities and Exchange Commission under the Investment Company Act of 1940 and which may be redeemed at the option of the holder at net asset value.

(b) The applicability of paragraph (a) shall be determined as of:

1. The record date fixed to determine the shareholders entitled to receive notice of the meeting of shareholders to act upon the corporate action requiring appraisal rights, the record date fixed to determine the shareholders entitled to sign a written consent approving the corporate action requiring appraisal rights, or, in the case of an offer made pursuant to s. 607.11035, the date of such offer; or

2. If there will be no meeting of shareholders, no written consent approving the corporate action, and no offer ~~is~~ made pursuant to s. 607.11035, the close of business on the day before the consummation of the corporate action or the effective date of the amendment of the articles, as applicable.

(c) Paragraph (a) is not applicable and appraisal rights shall be available pursuant to subsection (1) for the holders of any class or series of shares where the corporate action is an interested transaction.

(d) For purposes of paragraph (2)(a)2., a "comparable trading process" shall exist if:

1. The market price of the corporation's shares is determined at least quarterly based on an independent valuation and by following a formalized process that is designed to determine a value for the corporation's shares that is comparable to the value of comparable publicly traded companies; and

2. The corporation repurchases the shares at pricing set by its board of directors based on the independent valuation and subject to certain terms and conditions established by the corporation and provides the corporation's stockholders with a trading market comparable to what would typically be available if the corporation's shares were traded in an organized market.

(3) Notwithstanding any other provision of this section, the articles of incorporation as originally filed or any amendment to the articles of incorporation may limit or eliminate appraisal rights for any class or series of preferred shares, except that:

(a) No such limitation or elimination shall be effective if the class or series does not have the right to vote separately as a voting group, alone or as part of a group, on the action or if the action is a domestication under s. 607.11920 or a conversion under s. 607.

11930, or a merger having a similar effect as a domestication or conversion in which the domesticated eligible entity or the converted eligible entity, as applicable, is an eligible entity, and

(b) Any such limitation or elimination contained in an amendment to the articles of incorporation that limits or eliminates appraisal rights for any of such shares that are outstanding immediately before the effective date of such amendment or that the corporation is or may be required to issue or sell thereafter pursuant to any conversion, exchange, or other right existing immediately before the effective date of such amendment shall not apply to any corporate action that becomes effective within 1 year after the effective date of such amendment if such action would otherwise afford appraisal rights.

607.1303 Assertion of rights by nominees and beneficial owners.

(1) A record shareholder may assert appraisal rights as to fewer than all the shares registered in the record shareholder's name but owned by a beneficial shareholder or a voting trust beneficial owner only if (i) the record shareholder objects with respect to all shares of the class or series owned by the beneficial shareholder or a voting trust beneficial owner, (ii) the particular beneficial shareholder or voting trust beneficial owner acquired all such shares before the record date established under s. 607.1321 in connection with the applicable corporate action, and (iii) the record shareholder notifies the corporation in writing of its ~~the~~ name and address (if the record shareholder beneficially owns the shares as to which appraisal rights are being asserted) or notifies the corporation in writing of the name and address of ~~each~~ the particular beneficial shareholder or voting trust beneficial owner on whose behalf appraisal rights are being asserted. The rights of a record shareholder who asserts appraisal rights for only part of the shares held of record in the record shareholder's name under this subsection shall be determined as if the shares as to which the record shareholder objects and the record shareholder's other shares were registered in the names of different record shareholders.

(2) A beneficial shareholder and a voting trust beneficial owner may assert appraisal rights as to shares of any class or series held on behalf of the shareholder only if such shareholder:

(a) Submits to the corporation the record shareholder's written consent to the assertion of such rights no later than the date referred to in s. 607.1322(2)(b)2.

(b) Does so with respect to all shares of the class or series that are beneficially owned by the beneficial shareholder or the voting trust beneficial owner.

(c) Acquired all shares of the class or series before the record date established under s. 607.1321 in connection with the applicable corporate action.

607.1321 Notice of intent to demand payment.

(1) If a proposed corporate action requiring appraisal rights under s. 607.1302 is submitted to a vote at a shareholders' meeting, a shareholder who wishes to assert appraisal rights with respect to any class or series of shares:

(a) Must have beneficially owned the shares of such class or series as of the record date for the shareholders' meeting at which the proposed corporate action is to be submitted to a vote;

(b) Must deliver to the corporation before the vote is taken written notice of the shareholder's intent to demand payment if the proposed corporate action is effectuated, for all shares of such class or series beneficially owned by the shareholder as of the record date for the shareholders' meeting at which the proposed corporate action is to be submitted to a vote; and

(c~~b~~) Must not vote, or cause or permit to be voted, any shares of such class or series in favor of the proposed corporate action.

(2) If a proposed corporate action requiring appraisal rights under s. 607.1302 is to be approved by written consent, a shareholder who wishes to assert appraisal rights with respect to any class or series of shares ~~must not sign a consent in favor of the proposed corporate action with respect to that class or series of shares.~~:

(a) Must have beneficially owned the shares of such class or series as of the record date established for determining who is entitled to sign a written consent;

(b) Must assert such appraisal rights for all shares of such class or series beneficially owned by the shareholder as of the record date for determining who is entitled to sign the written consent; and

(c~~b~~) Must not sign a consent in favor of the proposed corporate action with respect to that class or series of shares.

(3) If a proposed corporate action specified in s. 607.1302(1) does not require shareholder approval pursuant to s. 607.11035, a shareholder who wishes to assert appraisal rights with respect to any class or series of shares:

(a) Must have beneficially owned the shares of such class or series as of the date the offer to purchase is made pursuant to s. 607.11035;

(b) Must deliver to the corporation before the shares are purchased pursuant to the offer a written notice of the shareholder's intent to demand payment if the proposed

corporate action is effected for all shares of such class or series beneficially owned by the shareholder as of the date the offer to purchase is made pursuant to s. 607.11035; and

(b) Must not tender, or cause or permit to be tendered, any shares of such class or series in response to such offer.

(4) A shareholder who may otherwise be entitled to appraisal rights but does not satisfy the requirements of subsection (1), subsection (2), or subsection (3) is not entitled to payment under this chapter.

607.1322 Appraisal notice and form.

(1) If a proposed corporate action requiring appraisal rights under s. 607.1302(1) becomes effective, the corporation must deliver a written appraisal notice and form required by paragraph (2)(a) to all shareholders who satisfied the requirements of s. 607.1321(1), (2), or (3). In the case of a merger under s. 607.1104, the parent must deliver a written appraisal notice and form to all record shareholders who may be entitled to assert appraisal rights.

(2) The appraisal notice must be delivered no earlier than the date the corporate action became effective, and no later than 10 days after such date, and must:

(a) Supply a form that specifies the date that the corporate action became effective and that provides for the shareholder to state:

1. The shareholder's name and address.

2. The number, classes, and series of shares as to which the shareholder asserts appraisal rights.

3. That the shareholder did not vote for or consent to the transaction.

4. Whether the shareholder accepts the corporation's offer as stated in subparagraph (b)4.

5. If the offer is not accepted, the shareholder's estimated fair value of the shares and a demand for payment of the shareholder's estimated value plus accrued interest, if and to the extent applicable.

(b) State:

1. Where the form must be sent and where certificates for certificated shares must be deposited and the date by which those certificates must be deposited, which date may not be earlier than the date by which the corporation must receive the required form under subparagraph 2.

2. A date by which the corporation must receive the form, which date may not be fewer than 40 nor more than 60 days after the date the subsection (1) appraisal notice and form are sent, and state that the shareholder shall have waived the right to demand appraisal with respect to the shares unless the form is received by the corporation by such specified date.

3. The corporation's estimate of the fair value of the shares.

4. An offer to each shareholder who is entitled to appraisal rights to pay the corporation's estimate of fair value set forth in subparagraph 3.

5. That, if requested in writing, the corporation will provide to the shareholder so requesting, within 10 days after the date specified in subparagraph 2., the number of shareholders who return the forms by the specified date and the total number of shares owned by them.

6. The date by which the notice to withdraw under s. 607.1323 must be received, which date must be within 20 days after the date specified in subparagraph 2.

(c) If not previously provided, be accompanied by a copy of ss. 607.1301-607.1340.

607.1326 Procedure if shareholder is dissatisfied with offer.

(1) A shareholder who is dissatisfied with the corporation's offer as set forth pursuant to s. 607.1322(2)(b)4. must notify the corporation on the form provided pursuant to s. 607.1322(1) of that shareholder's estimate of the fair value of the shares and demand payment of that estimate plus accrued interest, if and to the extent applicable.

(2) A shareholder who fails to notify the corporation in writing of that shareholder's demand to be paid the shareholder's stated estimate of the fair value plus accrued interest, if and to the extent applicable under subsection (1) within the timeframe set forth in s. 607.1322(2)(b)2. waives the right to demand payment under this section and shall be entitled only to the payment offered by the corporation pursuant to s. 607.1322(2)(b)4.

(3) With respect to a shareholder who properly makes demand for payment under s. 607.1326(1), at any time after the shareholder so makes demand for payment under s. 607.1326(1), including during a court proceeding pursuant to s. 607.1330, the corporation shall have the right to prepay to the shareholder (and the shareholder shall be obligated to accept such prepayment) all or any portion of the amount that the corporation has determined to be due under s. 607.1322(2)(b)3.

(a) If such prepayment is made within 90 days after the earlier of the date on which the appraisal notice is provided by the corporation under s. 607.1322(1) or the deadline date by which the appraisal notice is required to be provided by the corporation under s. 607.1322(2), accrued interest will only be payable, if at all, computed from the date that the corporate action became effective, to the shareholder entitled to appraisal rights on amounts determined to be due to the shareholder above the amount so prepaid, and no accrued interest will be payable to the shareholder entitled to appraisal rights on the prepaid amount.

(b) If such prepayment is made more than 90 days after the earlier of the date on which the appraisal notice is provided by the corporation under s. 607.1322(1) or the deadline date by which the appraisal notice is required to be provided by the corporation under s. 607.1322(2), the prepayment must include accrued interest on the amount of the prepayment, computed from the date that the corporate action became effective through the date of the prepayment and, for these purposes, at the rate of interest determined for judgments pursuant to s. 55.03. In addition, on such amounts, if any, determined to be due to the shareholder above the amount so prepaid, accrued interest will be payable, if at all, to the shareholder entitled to appraisal rights, computed from the date that the corporate action became effective.

607.1330 Court action.

(1) If a shareholder makes demand for payment under s. 607.1326 which remains unsettled, the corporation shall commence a proceeding within 60 days after receiving the payment demand and petition the court to determine the fair value of the shares and accrued interest, if and to the extent applicable, computed from the date the corporate action became effective, taking into account for these purposes the amount of any prepayment that has been made to the shareholder by the corporation under s. 607.1326(3) ~~from the date of the corporate action~~,. If the corporation does not commence the proceeding within the 60-day period, any shareholder who has made a demand pursuant to s. 607.1326 may commence the proceeding in the name of the corporation.

* * * *

(5) Each shareholder entitled to appraisal rights who is made a party to the proceeding is entitled to judgment for the amount of the fair value of such shareholder's shares as found by the court, plus accrued interest, if and to the extent applicable, as found by the court, taking into account for these purposes the amount of any prepayment that has been made to the shareholder by the corporation under s. 607.1326(3).

617.0825 Board committees and advisory committees.

(9) This section does not apply to a committee established under chapter 718, chapter 719, or chapter 720 to perform the functions set forth in s. 718.303(3), s. 719.303(3), s. 720.305(2) ~~720.303(2)~~, ~~or~~ s. 720.3035(1), or 720.405, respectively.

Potential change to s. 617.1703 currently being discussed with members of the RPPTL Section.

617.1703 Application of chapter.

The provisions of this chapter shall be applicable to a corporation that is an association as defined in and regulated by any of chapter 718 regarding condominiums, chapter 719 regarding cooperatives, chapter 720 regarding homeowners associations, chapter 721 regarding timeshares, and chapter 723 regarding mobile homeowners' associations except to the extent:

1. Of ~~In the event of~~ any conflict between the provisions of this chapter and the respective chapter 718 ~~regarding condominiums~~, chapter 719 ~~regarding cooperatives~~, chapter 720 ~~regarding homeowners' associations~~, chapter 721 ~~regarding timeshares~~, or chapter 723 ~~regarding mobile home owners' associations~~, or

2. Otherwise provided for in any of chapter 718, chapter 719, chapter 720, chapter 721, or chapter 723;

in which case the applicable provision~~s~~ of such other respective chapter~~s~~ shall apply. The provisions of ss. 617.0605-617.0608 do not apply to corporations regulated by any of the foregoing chapters or to any other corporation where membership in the corporation is required pursuant to a document recorded in the county property records.

_____

Section __. This act shall take effect upon becoming a law.

EXHIBIT B-2

Bullet Point Summary of Changes in the Proposed Chapter 607/Chapter 617 Glitch Bill
Proposed 2021 Legislation

Chapter 607

Tightening up of and fixing glitches in the appraisal rights provisions in Chapter 607 (the Florida Business Corporation Act), including, among other items:

(i) removing the broad and ambiguous trigger associated with amendments to a Florida corporation's Articles or Bylaws;
(ii) reinstating narrower triggers associated with certain more limited amendments to a Florida corporation's Articles;
(iii) expanding the list of trigger events that get the benefit of exclusion under the "market out" exception for Florida corporations;
(iv) allowing Florida corporations that meet the concept of having a "comparable trading process" to be considered as "traded in an organized market;"
(v) changing the definition of "accrued interest" such that, if the parties can't agree on a rate of interest, the rate of interest will be as determined by the court, but in no event greater than the statutory rate provided for in Section 55.03, with no interest allowed (similar to that provided in the Section 607.1436 buy out right in a dissolution proceeding) if the court finds that the shareholder asserting appraisal rights acted arbitrarily or otherwise not in good faith; and
(vi) conditioning the ability to exercise appraisal rights on having beneficial ownership of the shares on the record date for the applicable corporate action, as a further effort to eliminate perceived abuses engaged in by "appraisal rights arbitrageurs."

Chapter 617

Correcting a statutory cross reference typo in Section 617.0825 relating to not for profit corporation committee provisions that are considered superseded by provisions in Chapters 718, 719 and 720 and adding 720.405 as a further statutory cross reference override in Section 617.0825.

Expanding Section 617.1703 relating to not for profit corporations to further clarify and confirm that matters that are addressed by provisions in Chapter 617, but are addressed and otherwise provided for by provisions in Chapter 718, Chapter 719 or Chapter 720, as applicable, the respective provisions in Chapter 718, Chapter 719 or Chapter 720, as applicable, will apply instead.

EXHIBIT B-3

[DRAFT 9-29-2020]

WHITE PAPER FOR S.B. ____ & H.B. ___

"AN ACT RELATING TO CORPORATIONS AND OTHER ENTITIES"

Prepared by

The Florida Bar Business Law Section

Chapter 607 Drafting Subcommittee

Co-Chairs, Philip B. Schwartz and Gary I. Teblum

October 1, 2020

INTRODUCTION & BACKGROUND

This bill proposes changes to Article 13 (the appraisal rights sections) of the Florida Business Corporation Act ("FBCA").

This bill is the next step in a series of legislative proposals developed by the Business Law Section of The Florida Bar ("Section") to update and modernize Florida's business corporation act (Chapter 607). In 2015, a drafting subcommittee (the "Drafting Subcommittee") was organized under the auspices of the Corporations, Securities and Financial Services Committee of the Section. The Drafting Subcommittee worked for almost five years to develop a comprehensive proposal to update and modernize Florida's corporate statute based in large part on the 2016 version of the Model Business Corporation Act (the "Model Act") and to harmonize certain provisions of Chapter 607 with the provisions of other Florida entity statutes.

The Drafting Subcommittee's original proposal was presented to the Florida legislature for consideration during the 2019 legislative session. The final bill as adopted (CS/CS/HB 1009), which largely followed the proposal developed by the Drafting Subcommittee, unanimously passed the Florida House of Representatives on April 25, 2019 and unanimously passed the Florida Senate on April 30, 2019. The bill was signed into law by Governor DeSantis on June 7, 2019 and became effective on January 1, 2020. The bill as adopted was designated as Laws of Florida, Chapter 2019-90 (the "revised act").

Like all comprehensive updates of Florida's entity statutes, after passage of the revised act, a number of issues were raised about the new act. The revised act was a large piece of legislation (the bill that passed the legislature in 2019 was more than 500 pages). In the course of the Drafting Subcommittee's final review of the legislation as adopted and in the months that followed its enactment, a number of glitches were identified in the revised act, including typos, errors in cross references, and inconsistencies in the structure and/or terminology used in various sections. In order to address these various glitches that were identified, the Drafting Subcommittee developed a glitch bill addressing these issues. That glitch bill, which was presented to the Florida legislature during the 2020 Florida legislative session (the "2020 glitch bill"), unanimously passed the Florida Senate on February 26, 2020, and unanimously passed the Florida House of Representatives on March 13, 2020 (CS/SB 838). Because of the COVID-19 pandemic, the 2020 glitch bill was not presented to Governor DeSantis for his signature until June 3, 2020. Once presented, on June 18, 2020, the 2020 glitch bill was signed into law by Governor DeSantis, and became effective immediately upon becoming law. The 2020 glitch bill as adopted was designated as Laws of Florida, Chapter 2020-32.

In the fall of 2019, before the revised act became effective, the Section presented a series of programs to publicize the revised act, and several articles about the revised act were published in legal publications. Although the revised act widely circulated during the period in which the proposal was developed by the Drafting Committee, as is typical of comprehensive entity statute updates, there were issues raised by members of the legal community as the revised act was about to become law. A number of these issues were presented to the Drafting Subcommittee in early 2020 after the proposal that became the 2020 glitch bill was already being considered by the Florida legislature. The issues raised were largely concerns expressed by several large publicly traded corporations organized in Florida who were concerned about the implications of

changes made in the revised act to the provisions relating to shareholders' appraisal rights (Article 13 of the FBCA).

While the Drafting Subcommittee agreed that the issues being raised were worthy of consideration, the Drafting Subcommittee also believed that, because of the timing, these issues should be carefully considered during 2020 and that if changes were determined to be required to be made to the FBCA regarding those issues, that it would make the most sense for these changes to be presented to the legislature in a new bill to be considered during the 2021 legislation session.

Notwithstanding, in January 2020, the Drafting Subcommittee began consideration of one of the issues raised, and between January 2020 and late February 2020 the Drafting Subcommittee developed a temporary legislative fix seeking to resolve that issue (and that proposal was added to the version of the 2020 glitch bill adopted by the Florida House of Representatives. Although this temporary legislative fix would have worked, the Co-Chairs of the Drafting Subcommittee did not believe it to be the best solution to resolve the issue that had been raised. Further, because this temporary legislative fix was finalized after the Florida Senate had adopted the 2020 glitch bill, the Florida Senate was unwilling to consider this change on the Senate floor. Following dialogue between the Florida House and the Florida Senate, the House agreed to remove this change from the 2020 glitch bill so that the 2020 glitch bill, which included important clean up changes to the revised act, could become law.

At the same time, the Co-Chairs of the Drafting Committee committed to the member of the House who had sponsored the 2020 glitch bill that the issues that had been raised would be considered by the Drafting Subcommittee in 2020, and that a proposal dealing with the concerns raised would be developed for consideration by the Florida legislature during the 2021 legislative session.

The bill discussed in this White Paper (designated as H.B. ____ and S.B. _____) was developed by the Drafting Subcommittee at a series of "zoom" meetings held in the spring and summer of 2020. The bill as presented includes proposed changes to Article 13 of the FBCA, as follows:

- Changes to §607.1302(1) modifying in certain respects the types of circumstances under which a shareholder has a right to seek appraisal rights;

- Changes to §607.1302(2) dealing with the "market out" exception to §607.1302(1); and

- Changes to various sections of Article 13 to address perceived abuses by persons seeking to engage in appraisal rights arbitrage, as illustrated by disputes that have recently arisen in appraisal rights litigation in the Florida courts.

Additionally, the Drafting Subcommittee has engaged in a dialogue with members of the Real Property, Probate and Trust Law Section of the Florida Bar (the "RPPTL Section") regarding their desire to make certain changes to Chapter 617 (the "Florida Not-For-Profit Corporation Act") to deal with issues relating to condominiums, cooperatives, homeowners'

associations, timeshares, and mobile home owner's association organized under Chapters 718, 719, 720, 721, and 723 of the Florida Statutes, respectively.

These substantive revisions, and the effect thereof, are described more specifically below.

Grounds for appraisal rights and the "market-out" exception (§607.1302 of the FBCA)

Section 607.1302 lists the corporate events that trigger shareholder appraisal rights. Appraisal rights are available to shareholders for certain enumerated fundamental events, and allow a minority shareholder to seek to receive the "fair value" for his, her or its shares if he, she or it believe that the corporate event is not providing "fair value" or is otherwise not supportive of the particular proposed fundamental corporate event. The FBCA has included the right of shareholders to seek appraisal rights for many years, and many of the corporate events that trigger shareholder appraisal rights (such as in the event of a merger, conversion, or share exchange) are in the corporate statutes of most U.S. states. Similarly, Chapter 605 of the Florida Statutes (the "Florida Revised Limited Liability Company Act, or FRLLCA), adopted in 2013, provides for member appraisal rights in a similar manner to what is included in the FBCA.

In this section of the revised act adopted in 2019 and effective on January 1, 2020, the grounds for a shareholder to seek appraisal rights were expanded, largely to harmonize these triggering events with the corollary provisions contained in FRLLCA. Changes were also made to the language in this provision of the FBCA to update the language based on changes made in the 2016 version of the Model Act. These corollary changes were also made in the corollary section of the FBCA (§605.1006 of FRLLCA) so that the provisions were substantively the same following adoption of the revised act.

In early 2020, a number of lawyers (primarily lawyers representing publicly traded companies organized in Florida) raised concerns about which of these new grounds for appraisal rights should be covered by the "market out" exception in §607.1302(2). Those same lawyers also raised concerns about whether one of more of the triggering events giving rise to appraisal rights that been added to the FBCA in the revised act to harmonize this provision with the corollary provision in FRLLCA went too far. While there was not consensus of the Drafting Subcommittee on how to proceed when this issue was first raised in early January 2020, this issue led the Co-Chairs of the Drafting Subcommittee to conclude that both of these issues should be further considered.

During the Drafting Subcommittee's consideration of this bill, the following issues were addressed:

1. Grounds for appraisal rights – changes to §607.1302(1).

One of the triggering events that was added to §607.1302(1) in the revised act was new subsection (g), which reads as follows:

> *(g) An amendment to the articles of incorporation or bylaws of the corporation, the effect of which is to alter or abolish voting or other rights with respect to such interest in a manner that is adverse to the interest of such shareholder, except as the*

right may be affected by the voting or other rights of new shares then being authorized of a new class or series of shares;

In theory, a fundamental change in a corporation's articles of incorporation or bylaws that abolishes fundamental rights of a shareholder ought to be the type of event that allows a minority shareholder to assert appraisal rights. At the same time, this provision is extremely broad and may bring proposed charter amendments that are not relating to fundamental rights within the ambit of this provision.

In an earlier version of this provision of the FBCA, following an earlier version of the Model Act, there had been a statutory provision in the FBCA that allowed shareholders to assert appraisal rights for certain more-narrowly enumerated changes to articles of incorporation (and that provision remains in the corporate statutes in 16 states). This provision was eliminated in Florida in 2003 for classes of shares created on or after October 1, 2003.

After discussion, the Drafting Subcommittee concluded that while some types of changes to articles of incorporation should give rise to appraisal rights, subparagraph (1)(g) was considered too broad and would likely bring proposed charter amendments that are not related to fundamental corporate changes in rights within the ambit of this provision. The Drafting Subcommittee also concluded that the provision eliminated in 2003 (which is contained in subparagraph (h) of §607.1302(1) in the bill) provides appraisal rights for the specific types of changes to articles of incorporation that can more reasonably be considered fundamental changes.

At the same time, there was a consensus among members of the Drafting Subcommittee that these provisions were primarily intended to provide protections for shareholders in closely held corporations, and as a result, the decision was made by the Drafting Subcommittee to only have these particular grounds for appraisal rights apply to Florida corporations with 100 or fewer shareholders.

Finally, a decision was made by the Drafting Subcommittee to leave consideration of whether to harmonize (and the extent of any such harmonization) the corollary provisions in FRLLCA to a future legislative effort focused on LLCs which explores the differences in form between corporations and LLCs and, in particular, which explores the effect of the corollary provision of subparagraph (g) on the rights of minority holders of LLCs. Thus, the corollary equivalent of subparagraph (g) above remains in Florida's LLC statute.

2. Events giving rise to the "market out" exception

Chapter 13 provides an exception to appraisal rights for certain situations in which shareholders may either accept the appraisal-triggering corporate action or sell their shares in an organized market described in §607.1302(2)(a). This is often referred to as the "market out" exception. The theory behind the "market out" exception is that the shareholder, if dissatisfied with the proposed corporate action, can choose to sell his, her, or its shares into an organized market that is liquid and where the value of the shares is reasonably calculated to arrive at a price reflective of an arm's length transaction.

After consideration, the Drafting Subcommittee considered each of the grounds that trigger appraisal rights and concluded that the grounds under §607.1302(1)(f) and (h) should be added to the triggering events that should be excluded by the "market out" provision in subparagraph (2)(a). Thus, the lead in sentence of subsection (2) has been amended to read as follows:

> *Notwithstanding subsection (1), the availability of appraisal rights under paragraphs (1)(a), (b), (c), (d), ~~and~~ (e), (f) and (h) shall be limited in accordance with the following provisions:*

3. Modifications to subsection (2)(a) of §607.1302(2)

In the revised act, changes were made to add the words "traded in an organized market" to §607.1302(2)(a)2. The purpose of this change, which was based on the change to this provision in the corollary section of the 2016 version of the Model Act, was intended to make sure, in the context of publicly traded companies that are not traded on an exchange, that the market for such securities is liquid and is reasonably calculated to arrive at a price reflective of an arm's length transaction. The Drafting Subcommittee continues to believe that this wording should continue to be included in this statutory provision.

However, following adoption of the revised act, the Drafting Subcommittee became aware of the unique circumstance of a large Florida private company which files reports under the Securities Exchange Act of 1934 and has hundreds of thousands of shareholders (largely employees) and billions of dollars in revenues that has developed a robust platform that allows its shareholders to buy and sell the company's stock at a price determined based on periodically obtained independent third party valuations. Because of the addition of the "traded in an organized market" language to the "market out" exception in this section of the FBCA, this company (and any other companies that might have a truly parallel set of circumstances), might very well be hard-pressed to qualify for the market out exception, or at least the added language created some ambiguity in this regard. The Drafting Subcommittee was strongly of the view that this company (and any other companies that might have a truly parallel set of circumstances), with this robust trading and valuation platform, should fall within the "market out" exception, because the robust process created by this company appears to meet (and any companies that might have a truly parallel set of circumstances would likely meet) the intent of both criteria established for an organized market.

In an effort to resolve this issue, the Drafting Subcommittee (i) added language to revised subparagraph section (2)(a)2. to provide that a corporation subject to "a comparable trading process" would be considered as being "traded in an organized market", and (ii) defined what the words "comparable trading process" are intended to mean for this purpose. The new definition, which is included in §607.1302(2)(d), provides that a "comparable trading process" shall be deemed to exist if:

> 1. The market price of the corporation’s shares is determined at least quarterly based on an independent valuation and by following a formalized process that is designed to determine a value for the corporation’s shares that is comparable to the value of comparable publicly traded companies; and

2. The corporation repurchases the shares at pricing set by its board of directors based on the independent valuation and subject to certain terms and conditions established by the corporation and provides the corporation's stockholders with a trading market comparable to what would typically be available if the corporation's shares were traded in an organized market.

Through this fix, the Drafting Subcommittee believes that it has dealt with the unique circumstances of this particular large Florida corporation (and any companies that might have a truly parallel set of circumstances) without changing the basic requirements that in order for the "market out" exception to apply, a corporation must have the hallmarks of liquidity and a methodology to set a fair valuation of the shares that is typically found in an organized trading market. The Drafting Subcommittee also reviewed this provision with the identified Florida corporation impacted by the change in the revised act, and that corporation is believed to be supportive of the change recommended by the Drafting Subcommittee in this bill.

4. Other changes to §607.1302

Two additional non-substantive clean up changes were made to §607.1302, as follows:

A. Subsection (1)(d) was modified to remove the words "including a sale in dissolution" from that section. This change was made in the 2016 version of the Model Act and was inadvertently left out of the changes to this section made in the revised act. Sales in dissolution are now covered by the provisions of Article 14 of the FBCA and these words no longer need to be in this section.

B. Subsection (2)(b) dealing with evaluating the applicability of the "market out" exception is modified to clarify when the exception will be evaluated where the shareholders are signing a written consent approving the corporate action requiring appraisal rights.

Proposed changes to the FBCA to counter perceived appraisal rights arbitrage abuses that have recently arisen in Florida

Throughout the country, there has been a perceived abuse of the appraisal rights provisions by certain hedge funds and other persons similarly acting who acquire shares of stock that are entitled to appraisal rights subsequent to the announcement of the pendency of a proposed appraisal rights transaction, then exercise those appraisal rights, then proceed as parties to an appraisal rights proceeding and, in that process, then seek (i) to realize on an asserted spread between their position as to what is the fair value of the shares and the company's position as to what is the fair value of the shares and (ii) whether or not it turns out that there was such an actual spread, to collect interest on the fair value at the statutory judgment interest rate provided for in §55.03, Florida Statutes (which is often a rate of return substantially in excess of what the appraisal rights that these hedge funds could get by investing the same dollars in fairly conservative investments).

Although these hedge funds (and other persons similarly acting) who are appraisal rights arbitrageurs had initially focused on transactions involving Delaware corporations where Delaware appraisal rights were triggered, the ability to realize significant returns on those transactions has been dramatically cut back by virtue of certain changes in the Delaware General Corporation Law targeted against this abuse. As a result, appraisal rights arbitrageurs have now branched out in an effort to secure this arbitrage play in other states, including Florida. Indeed, several cases have already been filed in Florida, with one recent decision rendered (but under the FBCA as in effect before the changes that took effect on January 1, 2020).

The Drafting Subcommittee after studying this issue concluded that curbing this perceived abuse by appraisal rights arbitrageurs while still preserving meaningful appraisal rights for shareholders of Florida corporations who became shareholders prior to the record date for consideration of the corporate action triggering appraisal rights should be added to the FBCA. In an effort to curb the abuse, the proposed appraisal rights legislation makes three primary changes, summarized as follows:

- Modifying the definition of "accrued interest" to allow the courts to determine the appropriate amount of "accrued interest" with certain parameters;

- Giving the corporation the right to prepay to the shareholder asserting appraisal rights all or any portion of its determined amount of fair value in order to cut off further accrual of interest on such prepaid amount; and

- Requiring a shareholder to have acquired beneficial ownership of shares prior to the record date established under §607.1321, in connection with the applicable corporate action in order for that shareholder to exercise appraisal rights.

Changes to §§ 607.1301, 607.1322, 607.1626 and 607.1330 – Interest

Accrued Interest Definition

Rather than continuing to set an accrued interest rate tied to the statutory judgment interest rate, the proposed new definition of accrued interest in §607.1301 borrows a concept from §607.1436 (election to purchase instead of dissolution), directing the court to set the rate of interest (if the parties can't otherwise agree), but with a cap on the rate the court can set equal to the statutory judgment rate provided for by §55.03, Florida Statutes (consistent with the existing statute). The change goes further, again following the approach taken in §607.1436, by directing the court not to allow any interest in circumstances where the court finds that the shareholder asserting appraisal rights acted arbitrarily or not in good faith.

References to "accrued interest" in several other of the appraisal rights provisions are also revised to recognize that there is no set interest rate and that there may be cases where no accrued interest would be allowed. Those revised references generally appear as ". . . accrued interest, if and to the extent applicable. . ."

Right to Prepay

For those corporations that would like to manage their interest rate risk in the context of appraisal rights proceedings, the proposed appraisal rights legislation, in §607.1326, gives the corporation the option, at any time after the shareholder exercising appraisal rights makes demand for payment, to prepay to that shareholder all or any portion of the corporation's estimate of the fair value of the shares, and thus to cut off any further accrual of interest on the amount so prepaid, as follows:

- Partial Free Ride Period. If the prepayment is made within 90 days after the earlier of the date on which the corporation delivers to the shareholder the appraisal notice under §607.1322(1) or the latest date by which the corporation is required to deliver that appraisal notice, there would be no required accrued interest on such prepaid amount (essentially, a "partial free ride period"), with any applicable accrued interest running only on the excess of determined or agreed upon fair value over the amount prepaid.

- Prepayment After 90 Days. Recognizing that a prepayment could be made at any time, including after such 90 day period, the proposed appraisal rights legislation provides that, if the prepayment is made after the applicable 90 day period expires, (i) the prepayment must include accrued interest on the amount of the prepayment at the statutory judgment rate provided in §55.03, Florida Statutes, and (ii) interest may also be due on any amount determined to be owing to the shareholder above the amount so prepaid, computed from the date that the corporate action became effective.

Changes to §§ 607.1303 and 607.1321- Ownership of shares required on the record date

Because most appraisal right arbitrageurs are not historical shareholders of the corporation, but rather purchase their shares after the announcement date of, or record date for, the meeting at which the corporate action is to be voted upon or the effective date of the written consent approving such corporate action, as the case may be, the proposed appraisal rights legislation, in §607.1303 and §607.1321 and in a further effort to curb the perceived abuses associated with appraisal rights arbitrage, requires a shareholder (i) to have beneficial ownership of the shares as of the record date established under §607.1321 in connection with the applicable corporate action in order for that shareholder to be able to exercise appraisal rights with respect to such shares and (ii) must exercise appraisal rights with respect to all shares beneficially owned (an "all or none requirement").

Moreover, in order to cover the field, if a proposed corporate action with respect to which appraisal rights are triggered does not require shareholder approval pursuant to §607.11035, Florida Statutes, (i.e., a transaction involving a tender offer followed by a "mop-up merger"), a shareholder who wishes to assert appraisal rights with respect to any class or series of shares of that corporation must have beneficially owned the shares of such class or series as of the date the offer to purchase is made pursuant to §607.11035.

Changes to the Florida Not-For-Profit Corporation Act (Chapter 617)

As noted above, the Drafting Subcommittee has engaged in a dialogue with members of the RPPTL Section regarding the desire by the members of the RPPTL Section to make certain changes to Chapter 617 (the "Florida Not-For-Profit Corporation Act") to deal with issues relating to condominiums, cooperatives, homeowners' associations, timeshares, and mobile home owner's association organized under Chapters 718, 719, 720, 721, and 723 of the Florida Statutes, respectively.

This bill includes two changes based on these discussions:

- Changes to §617.0825(9). The 2020 glitch bill included one substantive change dealing with a substantive update and modernization of §617.0825 (dealing with non-profit corporation committees). In the 2020 glitch bill, certain carve outs from §617.0825 were added in paragraph (9) at the request of the RPPTL Section. Those changes are further modified in this bill to correct two scrivener's errors in the list of exceptions.

- Changes to §617.1703. In its discussions with members of the RPPTL Section, the RPPTL Section sought a further exception to carve out from the provisions of s. 617.0725 corporation's organized under Chapters 718, 719, 720, 721, and 723 of the Florida Statutes. The Drafting Subcommittee pointed out that rather than continue to create exceptions in Chapter 617 for these types of entities, the parties should instead focus on the language of §617.1703, which currently opts out corporations organized under Chapter 617 to the extent that a particular provision in Chapters 718, 719, 720, 721, and 723 of the Florida Statutes covers that issue.

  After discussion, agreement was reached that rather than continue to add exceptions to Chapter 617, it made more sense to clarify the scope of the exception language in §607.1703 so that it is broad enough to cover all exceptions that might occur between the provisions of Chapter 617 and the provisions dealing with not-for-profit corporations organized under Chapters 718, 719, 720, 721, and 723 of the Florida Statutes.

  Based on that agreement, clarifying changes to §607.1703 are proposed in this bill.

Effective Date

The bill provides that the changes in the bill shall become effective upon becoming law. These are clarifying changes and the Drafting Subcommittee does not believe that a delayed effective date is necessary for these changes under the circumstances.

Further information.

This White Paper was prepared by the Drafting Committee. The co-chairs of the Drafting Committee, Philip B. Schwartz and Gary I. Teblum, are available to answer any questions regarding this bill. The contact information for Messrs. Schwartz and Teblum is as follows:

Philip B. Schwartz
Akerman LLP
(954) 468-2455
philip.schwartz@akerman.com

Gary I. Teblum
Trenam Law
(813) 227-7457
GTeblum@trenam.com

EXHIBIT B-4

The Florida Bar

651 East Jefferson Street
Tallahassee, FL 32399-2300

Joshua E. Doyle
Executive Director

(850) 561-5600
www.FLORIDABAR.org

SECTION LEGISLATIVE OR POLITICAL ACTIVITY REQUEST FORM

- This form is for committees, divisions and sections to seek approval for section legislative or political activities.
- Requests for legislative and political activity must be made on this form.
- Political activity is defined in SBP 9.11(c) as "activity by The Florida Bar or a bar group including, but not limited to, filing a comment in a federal administrative law case, taking a position on an action by an elected or appointed governmental official, appearing before a government entity, submitting comments to a regulatory entity on a regulatory matter, or any type of public commentary on an issue of significant public interest or debate."
- Voluntary bar groups must advise TFB of proposed legislative or political activity and must identify all groups the proposal has been submitted to; if comments have been received, they should be attached. SBP 9.50(d).
    - The Legislation Committee and Board will review the proposal unless an expedited decision is required.
    - If expedited review is requested, the Executive Committee may review the proposal.
    - The Bar President, President-Elect, and chair of the Legislation Committee may review the proposal if the legislature is in session or the Executive Committee cannot act because of an emergency.

General Information

Submitted by: *(list name of section, division, committee, TFB group, or individual name)*
The Business Law Section of The Florida Bar

Address: *(address and phone #)* 651 E. Jefferson Street, Tallahassee, FL 32399
(850) 561.5630

Position Level: *(TFB section / division / committee)* TFB Section

Proposed Advocacy

Complete Section 1 below if the issue is legislative, 2 if the issue is political. Section 3 must be completed.

1. Proposed Wording of Legislative Position for Official Publication

Supports proposed legislation updating and modernizing the Florida Business Corporation Act and other for profit and not for profit business entities.

2. Political Proposal

3. Reasons For Proposed Advocacy

a. Is the proposal consistent with *Keller v. State Bar of California*, 496 US 1 (1990), and *The Florida Bar v. Schwarz*, 552 So. 2d 1094 (Fla. 1989)? Yes

b. Which goal or objective of the Bar's strategic plan is advanced by the proposal?
Enhance and improve the vaule of Florida Bar Membership and the Bar's relationship with its members.

c. Does the proposal relate to: *(check all that apply)*

- ____ Regulation and discipline of attorneys
- ✓ Improvement of the functioning of the courts, judicial efficacy, and efficiency
- ____ Increasing the availability of legal services to the public
- ✓ Regulation of lawyer client trust accounts
- ____ Education, ethics, competency, integrity and regulation of the legal profession

d. Additional Information: See attached white paper.

Referrals to Other Committees, Divisions & Sections

The section must provide copies of its proposed legislative or political action to all bar divisions, sections, and committees that may be interested in the issue. SBP 9.50(d). List all divisions, sections, and committees to which the proposal has been provided pursuant to this requirement. Please include with your submission any comments received. **The section may submit its proposal before receiving comments but only after the proposal has been provided to the bar divisions, sections, or committees**. Please feel free to use this form for circulation among the other sections, divisions and committees.

Trial Laywers Section of The Florida Bar

Real Property Probate & Trust Law Section (RPPTL) of The Florida Bar

Tax Section of The Florida Bar

Contacts

Board & Legislation Committee Appearance *(list name, address and phone #)*

Gary Teblum, 101 East Kennedy Blvd, Suite 2700, Tampa, FL 33602 - (813) 227-7457

Philip Schwartz, 350 East Las Olas Blvd, Suite 1600, Fort Lauderdale, FL 33301 - (954) 463-2700

Aimee Diaz Lyon, 119 S. Monroe St, Suite 200, Tallahassee, FL 32301 - (850) 205-9000

Doug Bell, 119 S. Monroe St, Suite 200, Tallahassee, FL 32301 - (850) 205-9000

Appearances before Legislators *(list name and phone # of those having direct contact before House/Senate committees)*

Gary Teblum, 101 East Kennedy Blvd, Suite 2700, Tampa, FL 33602 - (813) 227-7457

Philip Schwartz, 350 East Las Olas Blvd, Suite 1600, Fort Lauderdale, FL 33301 - (954) 463-2700

Aimee Diaz Lyon, 119 S. Monroe St, Suite 200, Tallahassee, FL 32301 - (850) 205-9000

Doug Bell, 119 S. Monroe St, Suite 200, Tallahassee, FL 32301 - (850) 205-9000

Meetings with Legislators/staff *(list name and phone # of those having direct contact with legislators)*

Gary Teblum, 101 East Kennedy Blvd, Suite 2700, Tampa, FL 33602 - (813) 227-7457

Philip Schwartz, 350 East Las Olas Blvd, Suite 1600, Fort Lauderdale, FL 33301 - (954) 463-2700

Aimee Diaz Lyon, 119 S. Monroe St, Suite 200, Tallahassee, FL 32301 - (850) 205-9000

Doug Bell, 119 S. Monroe St, Suite 200, Tallahassee, FL 32301 - (850) 205-9000

Submit this form and attachments to the OGC, jhooks@floridabar.org, (850) 561-5662.

Exhibit C

EXHIBIT C-1

To: Executive Council

From: Jennifer Morando, Chair, Bankruptcy/UCC Committee

Re: Request to Approve Proposed Bill Language for Sections 222.105 & 222.11 (Kearney fix)

Attached please find the following in connection with the above-referenced request:

1) Proposed bill text for Section 222.105 (CLEAN)
2) Proposed bill text for Section 222.105 (redline comparing revisions since Labor Day Retreat meeting)
3) Proposed bill text for Section 222.11 (no revisions since Labor Day Retreat meeting)
4) RPPTL Section White Paper

A bill to be entitled

An act relating to protection of Florida residents from unintentionally assigning, pledging, or waiving rights to assets that are otherwise exempt from legal process; creating s. 222.105, Florida Statutes to provide requirement for specific waivers of exemptions; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 222.105, Florida Statutes, is created to read:

222.105 – Requirement for specific waivers of exemptions.

(1) The exemptions set forth in Florida Statutes Chapter 222 cannot be waived unless the person who is entitled to such exemption has specifically agreed otherwise in a writing described in this section or, with respect to exemption of earnings, in Section 222.11. References in a writing purporting to pledge or encumber all of a person's "assets and rights, wherever located, whether now owned or after acquired, and all proceeds thereof", or words of similar import, are insufficient to pledge or encumber assets which are exempt under Chapter 222 or to waive the protections afforded to such person by Chapter 222.

(2) Any agreement to pledge assets which are exempt under Chapter 222 or to waive protections provided by Chapter 222 must:

(a) Be written in the same language as the contract or agreement to which the waiver relates;

(b) Be a separate document from the contract or agreement to which the waiver relates;

(c) In the case of an account described in Sections 222.21 or 222.22, refer to the name of the custodian of the account and the last four digits of the account number;

(d) In the case of an annuity contract or life insurance policy described in Section 222.14, or the proceeds of life insurance described in Section 222.13, or benefits under disability insurance described in Section 222.18, refer to the name of the issuer or insurer and the last four digits of the annuity or policy number;

(e) In the case of other property described in Section 222.25, refer specifically to the property; and

(f) Contain the following language in at least 14-point type in capital letters stating:

WARNING – BY SIGNING THIS DOCUMENT YOU ARE PLEDGING YOUR EXEMPT ASSETS OR WAIVING YOUR RIGHT TO PROTECT YOUR EXEMPT ASSETS FROM ATTACHMENT, GARNISHMENT OR OTHER LEGAL PROCESS IN FAVOR OF YOUR CREDITOR. THIS WILL CAUSE YOU TO FORFEIT YOUR STATUTORY RIGHTS AND MAY CAUSE ADVERSE INCOME TAX CONSEQUENCES – PLEASE CONSULT YOUR ATTORNEY OR TAX ADVISOR BEFORE SIGNING THIS FORM.

FLORIDA LAW PROVIDES THAT YOUR RETIREMENT AND OTHER ACCOUNTS DESCRIBED IN FLORIDA STATUTES SECTIONS 222.21 AND 222.22, ANNUITY CONTRACTS AND THE CASH SURRENDER VALUE OF LIFE INSURANCE POLICIES DESCRIBED IN FLORIDA STATUTES SECTION 222.14, THE PROCEEDS OF LIFE INSURANCE DESCRIBED IN SECTION 222.13, THE BENEFITS UNDER DISABILITY INSURANCE DESCRIBED IN SECTION 222.18, AND CERTAIN PERSONAL PROPERTY DESCRIBED IN FLORIDA STATUTES SECTION 222.25 ARE EXEMPT FROM ATTACHMENT, GARNISHMENT OR OTHER LEGAL PROCESS IN FAVOR OF YOUR CREDITORS. Initial _____

ADDITIONALLY, THE PLEDGE OF YOUR RETIREMENT AND OTHER ACCOUNTS DESCRIBED IN FLORIDA STATUTES SECTIONS 222.21 AND 222.22, ANNUITY CONTRACTS AND THE CASH SURRENDER VALUE OF LIFE INSURANCE POLICIES DESCRIBED IN FLORIDA STATUTES SECTION 222.14 MAY CAUSE IMMEDIATE FEDERAL (AND STATE, IF APPLICABLE) INCOME TAX CONSEQUENCES AND PENALTIES IN ADDITION TO SURRENDER CHARGES UNDER CERTAIN LIFE INSURANCE POLICIES AND ANNUITY CONTRACTS. **YOU ARE ADVISED TO SEEK THE ADVICE OF YOUR ATTORNEY OR TAX ADVISOR PRIOR TO SIGNING BELOW.** Initial _____

YOU CAN WAIVE THIS PROTECTION ONLY BY SIGNING THIS DOCUMENT. DO NOT SIGN A BLANK DOCUMENT. BY IDENTIFYING AN EXEMPT ASSET AND SIGNING BELOW, YOU AGREE TO WAIVE THE

PROTECTION AS TO THAT EXEMPT ASSET (CIRCLE ALL APPLICABLE AND COMPLETE ALL REQUIRED INFORMATION, OR WRITE "NOT APPLICABLE"):

RETIREMENT AND OTHER ACCOUNTS DESCRIBED IN SECTION 222.21 OR SECTION 222.22

NAME OF CUSTODIAN:_____

LAST FOUR DIGITS OF ACCOUNT NUMBER(S):_____

OBLIGOR'S SIGNATURE:_____ DATE:_____

ANNUITY CONTRACT DESCRIBED IN SECTION 222.14

NAME OF ISSUER OF ANNUITY CONTRACT:_____

LAST FOUR DIGITS OF CONTRACT NUMBER(S):_____

OBLIGOR'S SIGNATURE:_____ DATE:_____

LIFE INSURANCE POLICY DESCRIBED IN SECTION 222.14 (OR PROCEEDS DESCRIBED IN SECTION 222.13)

NAME OF LIFE INSURANCE COMPANY: _____

LAST FOUR DIGITS OF POLICY NUMBER(S): _____

OBLIGOR'S SIGNATURE:_____ DATE:_____

DISABILITY INSURANCE BENEFITS DESCRIBED IN SECTION 222.18

NAME OF INSURANCE COMPANY: _____

LAST FOUR DIGITS OF POLICY NUMBER(S): _____

OBLIGOR'S SIGNATURE:_____ DATE:_____

PERSONAL PROPERTY DESCRIBED IN SECTION 222.25

LIST OF PROPERTY:_____

OBLIGOR'S SIGNATURE:_____ DATE:_____

(obligor's Signature) (Date Signed)

I have given a copy of this signed document to the obligor, and have requested that the obligor review it before signing it. The document was completed with the requisite information for every exempt asset category above, or the words "not applicable" written in the blank for the exempt asset category before the obligor signed the document.

(Creditor's Signature) (Date Signed)

(3) Notwithstanding anything in this Section 222.105 to the contrary, an exemption of earnings may only be waived pursuant to the requirements of Section 222.11.

Section 2. This act shall take effect upon becoming law.

EXHIBIT C-1

A bill to be entitled

An act relating to protection of Florida residents from unintentionally assigning, pledging, or waiving rights to assets that are otherwise exempt from legal process; creating s. 222.105, Florida Statutes to provide requirement for specific waivers of exemptions; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 222.105, Florida Statutes, is created to read:

222.105 – Requirement for specific waivers of exemptions.

(1) The exemptions set forth in Florida Statutes Chapter 222 cannot be waived unless the person who is entitled to such exemption has specifically agreed otherwise in a writing described in this section~~,~~ or, with respect to exemption of earnings, in Section 222.11. References in a writing purporting to pledge or encumber all of a person's "assets and rights, wherever located, whether now owned or after acquired, and all proceeds thereof", or words of similar import, are insufficient to pledge or encumber assets which are exempt under Chapter 222 or to waive the protections afforded to such person ~~and their family~~ by Chapter 222.

(2) Any agreement to pledge assets which are exempt under Chapter 222 or to waive protections provided by Chapter 222 must:

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(a) Be written in the same language as the contract or agreement to which the waiver relates;

(b) Be a separate document from the contract or agreement to which the waiver relates;

~~(c) In the case of the exemption of wages from garnishment described in Section 222.11, contain written agreement of the obligor pursuant to the requirements of Section 222.11.~~

~~(d~~

(c) In the case of an account described in Sections 222.21 or 222.22, refer to the name of the custodian of the account and the last four digits of the account number;

(~~c~~d) In the case of an annuity contract or life insurance policy described in Section 222.14, or the proceeds of life insurance described in Section 222.13, or benefits under disability insurance described in Section 222.18, refer to the name of the issuer or insurer and the last four digits of the annuity or policy number;

(~~d~~e) In the case of other property described in Section 222.25, refer specifically to the property; and

(~~e~~f) Contain the following language in at least 14-point type in capital letters stating:

WARNING – BY SIGNING THIS DOCUMENT YOU ARE PLEDGING YOUR EXEMPT ASSETS OR WAIVING YOUR RIGHT TO PROTECT YOUR EXEMPT ASSETS FROM ATTACHMENT, GARNISHMENT OR OTHER LEGAL PROCESS IN FAVOR OF YOUR CREDITOR. THIS WILL CAUSE YOU TO FORFEIT YOUR STATUTORY RIGHTS AND MAY CAUSE ADVERSE INCOME TAX

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CONSEQUENCES – PLEASE CONSULT YOUR ATTORNEY OR TAX ADVISOR BEFORE SIGNING THIS FORM.

FLORIDA LAW PROVIDES THAT YOUR RETIREMENT AND OTHER ACCOUNTS DESCRIBED IN FLORIDA STATUTES SECTIONS 222.21 AND 222.22, ANNUITY CONTRACTS AND THE CASH SURRENDER VALUE OF LIFE INSURANCE POLICIES DESCRIBED IN FLORIDA STATUTES SECTION 222.14, THE PROCEEDS OF LIFE INSURANCE DESCRIBED IN SECTION 222.13, THE BENEFITS UNDER DISABILITY INSURANCE DESCRIBED IN SECTION 222.18, AND CERTAIN PERSONAL PROPERTY DESCRIBED IN FLORIDA STATUTES SECTION 222.25 ARE EXEMPT FROM ATTACHMENT, GARNISHMENT OR OTHER LEGAL PROCESS IN FAVOR OF YOUR CREDITORS. Initial _____

ADDITIONALLY, THE PLEDGE OF YOUR RETIREMENT AND OTHER ACCOUNTS DESCRIBED IN FLORIDA STATUTES SECTIONS 222.21 AND 222.22, ANNUITY CONTRACTS AND THE CASH SURRENDER VALUE OF LIFE INSURANCE POLICIES DESCRIBED IN FLORIDA STATUTES SECTION 222.14 MAY CAUSE IMMEDIATE FEDERAL (AND STATE, IF APPLICABLE) INCOME TAX CONSEQUENCES AND PENALTIES IN ADDITION TO SURRENDER CHARGES UNDER CERTAIN LIFE INSURANCE POLICIES AND ANNUITY CONTRACTS. **YOU ARE ADVISED TO SEEK THE ADVICE OF YOUR ATTORNEY OR TAX ADVISOR PRIOR TO SIGNING BELOW.** Initial _____

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YOU CAN WAIVE THIS PROTECTION ONLY BY SIGNING THIS DOCUMENT. DO NOT SIGN A BLANK DOCUMENT. BY IDENTIFYING AN EXEMPT ASSET AND SIGNING BELOW, ~~AND UNDER EACH ASSET CATEGORY,~~ YOU AGREE TO WAIVE THE PROTECTION AS TO ~~THE FOLLOWING ASSETS~~THAT EXEMPT ASSET (CIRCLE ALL APPLICABLE AND COMPLETE ALL REQUIRED INFORMATION, OR WRITE "NOT APPLICABLE"):

RETIREMENT AND OTHER ACCOUNTS DESCRIBED IN SECTION 222.21 OR SECTION 222.22

NAME OF CUSTODIAN:_____

LAST FOUR DIGITS OF ACCOUNT NUMBER(S):_____

OBLIGOR'S SIGNATURE:_____ DATE:_____

ANNUITY CONTRACT DESCRIBED IN SECTION 222.14

NAME OF ISSUER OF ANNUITY CONTRACT:_____

LAST FOUR DIGITS OF CONTRACT NUMBER(S):_____

OBLIGOR'S SIGNATURE:_____ DATE:_____

LIFE INSURANCE POLICY DESCRIBED IN SECTION 222.14 (OR PROCEEDS DESCRIBED IN SECTION 222.13)

NAME OF LIFE INSURANCE COMPANY: _____

LAST FOUR DIGITS OF POLICY NUMBER(S): _____

OBLIGOR'S SIGNATURE:_____ DATE:_____

DISABILITY INSURANCE BENEFITS DESCRIBED IN SECTION 222.18

NAME OF INSURANCE COMPANY: _____

LAST FOUR DIGITS OF POLICY NUMBER(S): _____

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OBLIGOR'S SIGNATURE:_____ DATE:_____

PERSONAL PROPERTY DESCRIBED IN SECTION 222.25

LIST OF PROPERTY:_____

OBLIGOR'S SIGNATURE:_____ DATE:_____

(obligor's Signature) (Date Signed)

I have given a copy of this signed document to the obligor, and have requested that the obligor review it before signing it. The document was completed with the requisite information for every exempt asset category above, or the words "not applicable" written in the blank for the exempt asset category before the obligor signed the document.

(Creditor's Signature) (Date Signed)

(3) Notwithstanding anything in this Section 222.105 to the contrary, an exemption of earnings may only be waived pursuant to the requirements of Section 222.11.

Section 2. This act shall take effect upon becoming law.

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222.11 Exemption of wages from garnishment.—

(1) As used in this section, the term:

(a) "Earnings" includes compensation paid or payable, in money of a sum certain, for personal services or labor whether denominated as wages, salary, commission, or bonus.

(b) "Disposable earnings" means that part of the earnings of any head of family remaining after the deduction from those earnings of any amounts required by law to be withheld.

(c) "Head of family" includes any natural person who is providing more than one-half of the support for a child or other dependent.

(2)(a) All of the disposable earnings of a head of family whose disposable earnings are less than or equal to $750 a week are exempt from attachment or garnishment.

(b) Disposable earnings of a head of a family, which are greater than $750 a week, may not be attached or garnished unless such person has agreed otherwise in writing. The agreement to waive the protection provided by this paragraph must:

1. Be written in the same language as the contract or agreement to which the waiver relates;

2. Be contained in a separate document attached to the contract or agreement; and

3. Be in substantially the following form in at least 14-point type:

WARNING – BY SIGNING THIS DOCUMENT YOU ARE WAIVING YOUR RIGHT TO PROTECT YOUR EXEMPT EARNINGS FROM GARNISHMENT - SIGNING THIS DOCUMENT WILL CAUSE YOU TO FORFEIT YOUR STATUTORY RIGHTS. PLEASE CONSULT YOUR ATTORNEY BEFORE SIGNING THIS FORM.

IF YOU PROVIDE MORE THAN ONE-HALF OF THE SUPPORT FOR A CHILD OR OTHER DEPENDENT ALL OR PART OF YOUR ~~INCOME~~ EARNINGS IS EXEMPT FROM GARNISHMENT UNDER FLORIDA LAW. YOU CAN WAIVE THIS PROTECTION ONLY BY SIGNING THIS DOCUMENT. WAIVING YOUR PROTECTION FROM GARNISHMENT MEANS THAT YOUR CREDITORS CAN TAKE YOUR EARNINGS AND APPLY YOUR EARNINGS TO PAY YOUR DEBT. BY SIGNING BELOW, YOU AGREE TO WAIVE THE PROTECTION FROM GARNISHMENT.

(~~Consumer~~Obligor's Signature) (Date Signed)

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

I have ~~fully explained this document to the consumer obligor and have~~ given a copy of thise signed document to the ~~consumer~~ obligor, and have requested that the obligor review it before signing it.

(Creditor's Signature) (Date Signed)

The amount attached or garnished may not exceed the amount allowed under the Consumer Credit Protection Act, 15 U.S.C. s. 1673.

(c) Disposable earnings of a person other than a head of family may not be attached or garnished in excess of the amount allowed under the Consumer Credit Protection Act, 15 U.S.C. s. 1673.

(3) Earnings that are exempt under subsection (2) and are credited or deposited in any financial institution are exempt from attachment or garnishment for 6 months after the earnings are received by the financial institution if the funds can be traced and properly identified as earnings. Commingling of earnings with other funds does not by itself defeat the ability of a head of family to trace earnings.

History.—s. 1, ch. 2065, 1875; RS 2008; GS 2530; RGS 3885; CGL 5792; s. 1, ch. 81-301; s. 6, ch. 85-272; s. 2, ch. 93-256; s. 1, ch. 2010-97.

WHITE PAPER

PROTECTION OF FLORIDA RESIDENTS FROM UNINTENTIONALLY ASSIGNING, PLEDGING, OR WAIVING RIGHTS TO ASSETS THAT OTHERWISE ARE EXEMPT FROM LEGAL PROCESS UNDER CHAPTER 222 OF THE FLORIDA STATUTES BY IMPLEMENTING CLEARLY DEFINED REQUIREMENTS FOR WAIVING THE PROTECTION OF SUCH EXEMPTIONS

I. SUMMARY

This legislation protects Florida residents from unintentionally assigning, pledging, or waiving rights to, retirement accounts, annuities, and certain life insurance policies that otherwise are exempt from legal process under Chapter 222 of the Florida Statutes by imposing clearly defined requirements for a written agreement to constitute a valid and intentional assignment, pledge, or waiver of such exemptions. Because of the adverse economic impact of Covid-19, it is imperative to protect citizens from unknowing forfeiture of assets and potentially disastrous tax consequences. The bill does not have a fiscal impact on state funds.

II. CURRENT SITUATION

A. Current Florida Statutes

Chapter 222 of the Florida Statutes contains most of the statutory exemptions that protect certain assets from legal process under Florida law. Florida Statutes Section 222.21(2)(a) allows Florida Consumers to claim an exemption from creditors for funds held in individual retirement accounts ("**IRAs**"), 401(k) retirement accounts, and other tax-exempt accounts. Florida Statutes Section 222.14 provides that the cash surrender values of life insurance policies and the proceeds of annuity contracts issued to citizens or residents of the State of Florida are exempt from creditor attachment. Florida Statutes Section 222.22 and Fla. Stat. § 222.25 state that funds held in qualified tuition programs and other qualifying accounts and certain individual property are also protected from creditors.

Under Fla. Stat. § 222.11, wages are exempt from attachment or garnishment unless the Florida Consumer agrees to waive the protection from wage garnishment in a writing complying with the requirements set forth in Fla. Stat. § 222.11(2)(b). Florida Statutes Section 222.11(2)(b) provides that the agreement to waive the protection from wage garnishment must be in writing and be written in the same language as the contract to which the waiver relates, be contained in a separate document attached to the contract, and contain the mandatory waiver language specified in Fla. Stat. § 222.11(2)(b) in at least 14-point type. This writing ensures the Consumer understands they are waiving a statutory exemption.

It has been standard result for any asset which is exempt under Chapter 222 of the Florida Statutes to remain exempt from the reach of creditors, if the exempt asset is not specifically pledged. Long standing public policy of the Florida legislature promotes the financial independence of the retired and elderly by protecting their IRAs and pensions plans with an exemption, thus reducing the need for public financial assistance. This consumer protection built

into the framework of the existing law protecting Florida Consumers from overreaching creditors, unfair transactions, and retirement poverty was recently cast aside in the decision of *Kearney Constr. Co., LLC v. Travelers Cas. & Sur. Co. of Am.*, 2019 WL 5957361 at *3 (11th Cir. 2019). The *Kearney* result flies in the face of the intent of the Florida legislature and the current statutory framework which requires a Florida Consumer to understand and acknowledge any waiver of a statutory exemption under Florida law.

B. Kearney Holding

On October 27, 2011, the United States District Court Middle District of Florida, Tampa Division granted a motion for entry of final judgment in favor of Travelers Casualty & Surety Company of America and against Bing Charles W. Kearney ("**Kearney**") and others in the amount of $3,750,000. Magistrate Judge's Report and Recommendation, Case 8:09-cv-01850-JSM-TBM, Docket 711, at 1-2 (March 17, 2016). On March 1, 2012, Kearney executed a Revolving Line of Credit Promissory Note (the "**Promissory Note**") in favor of Moose Investments of Tampa, LLC ("**Moose Investments**"), which was an entity owned by Kearney's son. Magistrate Judge's Report and Recommendation, Case 8:09-cv-01850-JSM-TBM, Docket 865, at 9 (August 16, 2017). The Promissory Note was collateralized by a security agreement (the "**Security Agreement**"), in which Kearney pledged a security interest in

> **all assets and rights of the Pledgor,** wherever located, whether now owned or hereafter acquired or arising, and all proceeds and products thereof, all good (including inventory, equipment and any accessories thereto), instruments (including promissory notes), documents, accounts, chattel paper, **deposit accounts**, letters of credit, rights, securities and all other **investment property**, supporting obligation, any contract or contract rights or rights to the payment of money, insurance claims, and proceeds, and **general intangibles** (the "Collateral"). *Id.* at 9-10 (emphasis added).

On October 25, 2012, Kearney deposited funds into an IRA at USAmeriBank. *Id.* at 10. On July 23, 2015, the Magistrate Judge granted Travelers' motion for a writ of garnishment directed to USAmeriBank. Magistrate Judge's Report and Recommendation, Docket 711, at 2.

Magistrate Judge McCoun III submitted a Report and Recommendation on March 17, 2016 (Docket 711) and a Report and Recommendation on August 16, 2017 (Docket 865) addressing the numerous summary judgment motions related to the writ of garnishment directed to USAmeriBank. In the Report and Recommendation submitted on August 16, 2017, Magistrate Judge McCoun III issued a recommendation on three summary judgment motions related to determining whether the funds deposited into Kearney's IRA at USAmeriBank lost the exempt status because of Kearney's pledge of collateral in the Security Agreement with Moose Investments. Docket 865, at 7. Kearney argued the funds held in his IRA were exempt from garnishment under Fla. Stat. § 221.21(2). *Id.* at 8. Travelers countered that Kearney pledged the IRA as security to Moose Investments pursuant to the Promissory Note and Security Agreement, and such pledge of the IRA as collateral caused the funds in the IRA to both lose its tax-exempt status and its exempt status from garnishment. *Id.* at 8-9. Kearney responded that the Promissory

Note and Security Agreement did not specify the IRA was intended to be pledged as a "deposit account" as part of the collateral under the Security Agreement. *Id.* at 22- 23.

The Magistrate Judge determined that Kearney pledged all of his assets and rights in the Security Agreement securing the Promissory Note. *Id.* at 22. Thus, the funds held in Kearney's IRA lost their tax-exempt status and were not protected by Fla. Stat. § 221.21(2) or any other statutory exemption. *Id.* at 29. In arriving at this conclusion, the Magistrate Judge determined the language of the Security Agreement was "clear, unambiguous, and without exception." *Id.* at 26. Although Kearney's IRA was not specifically identified as part of the collateral, the Magistrate Judge noted that the broad language of the Security Agreement "encompassed potential retirement accounts or funds, such as the [IRA] at issue here." *Id.* at 28. The Magistrate Judge did not identify the collateral category in the Security Agreement that purportedly covered the IRA. The Magistrate Judge did not explain whether the IRA was a "deposit account," "investment property," a "general intangible," or something else. Furthermore, the Magistrate Judge did not reference Fla. Stat. § 679.1081(3), which provides that a description of collateral as "all the debtor's assets" or "all the debtor's personal property" or using words of similar import does not reasonably identify the collateral for purposes of the security agreement. Such general descriptions are legally inadequate to create a lien. The Magistrate Judge did not cite any Florida case law or the Florida Statutes in support of the Magistrate Judge's position that a pledge of IRA funds causes such funds to lose their creditor exempt status in Florida. In fact, the Magistrate Judge only cited cases from the United States Bankruptcy Court for the Southern District of Ohio and the Eastern District Court of Virginia to support the conclusion. *Id.* at 21-22 (citing *In re Roberts*, 326 B.R. 424, 426 (Bankr. S.D. Ohio 2004), and *XL Specialty Ins. Co. v. Truland*, 2015 WL 2195181, at *11–13 (E.D. Va., May 11, 2015)).

The United States District Court Middle District of Florida, Tampa Division adopted, confirmed, and approved in all respects the Reports and Recommendations submitted by Magistrate Judge McCoun III in Docket 711 and Docket 865. *Kearney Construction Company, LLC v. Travelers Casualty & Surety Company of America*, 2016 WL 1394372 at *1; *Kearney Construction Company, LLC v. Travelers Casualty & Surety Company of America*, 2017 WL 4244390 at *1. In 2019, the United States Court of Appeals for the Eleventh Circuit reexamined whether Kearney pledged his IRA as collateral under the Security Agreement. *Kearney Constr. Co., LLC v. Travelers Cas. & Sur. Co. of Am.*, 2019 WL 5957361 at *1 (11th Cir. 2019). The Eleventh Circuit agreed with the United States District Court Middle District of Florida, Tampa Division, and determined the language in the Security Agreement "constitutes an unambiguous pledge of 'all assets and rights of the Pledgor,' including his IRA Account . . . ." *Id.* at *2. The Eleventh Circuit concluded the District Court properly held the IRA was pledged as security for Kearney's loan with Moose Investments and "therefore was not exempt under § 222.21." *Id.* at *3. As with the Magistrate Judge, the Eleventh Circuit did not identify the collateral category in the Security Agreement that purportedly covered the IRA and did not reference how Fla. Stat. § 679.1081(3) provides that general descriptions of collateral are legally inadequate to create a valid lien.

As discussed in Footnote 7, the Eleventh Circuit rejected Kearney's argument that the IRA was protected by Fla. Stat. §§ 222.21(2)(a) 1 and 2 even if it was determined that the IRA was pledged under the Security Agreement. *Id.* at *2, n.7. The Eleventh Circuit asserted Fla. Stat. §

222.21(2)(a)(1) can be applied only if the Internal Revenue Service ("**IRS**") "pre-approved" the IRA as exempt from taxation. *Id.* The Eleventh Circuit also stated Fla. Stat. § 222.21(2)(a)(2) can be applied only if the IRS has "determined" an IRA is exempt from taxation. *Id.* The Eleventh Circuit concluded Kearney provided no evidence the IRS "pre-approved" Kearney's IRA as exempt from taxation, or that the IRS made a "determination" that Kearney's IRA was exempt from taxation. *Id.* Since Kearney had the burden of proving such "pre-approval" or "determination," the Eleventh Circuit concluded the funds held in Kearney's IRA lost their tax-exempt status and were not protected by Fla. Stat. § 221.21(2) or any other statutory exemption. *Id.* Although there is a procedure for obtaining a determination letter from the IRS for a qualified plan, employers who sponsor retirement plans are generally not required to apply for a determination letter from the IRS. Furthermore, effective January 1, 2017, Revenue Procedure 2016-37 provides the limited circumstances under which plan sponsors may submit determination letter applications to the IRS. In general, a sponsor of an individually designed plan may submit a determination letter application only for initial plan qualification and for qualification upon plan termination. Thus, the custodians of IRAs rarely seek determination of tax-exempt status from the IRS. Furthermore, it is both absurd and impossible to require all Florida Consumers owning IRAs to obtain the IRS's approval regarding the status of their IRAs as exempt in order to be protected by Florida's statutory exemption.

C. <u>Issues Resulting from Kearney Holding</u>

Chapter 222 of the Florida Statutes contains most of the statutory exemptions that protect certain assets from legal process under Florida law. The Magistrate Judge, the District Court, and the Eleventh Circuit concluded that Kearney forfeited the exempt status of the funds held in the IRA by pledging the funds as collateral because the Security Agreement provided Kearney pledged all of his "assets and rights." In arriving at this conclusion, the three courts ignored Fla. Stat. § 679.1081(3), which provides that a description of collateral as "all the debtor's assets" or words of similar import does not reasonably identify the collateral for purposes of the security agreement. Such general descriptions are legally inadequate to create a lien. Historically, when an individual signs a general pledge of "all assets" in a security agreement, a creditor can only recover those assets specifically pledged to the creditor in such agreement. The Security Agreement did not specifically identify the IRA as part of the collateral. It has been standard practice for any asset which is exempt under Chapter 222 of the Florida Statutes to remain exempt from the reach of creditors, if the exempt asset is not specifically pledged. The three courts did not identify the collateral category in the Security Agreement that purportedly covered the IRA, and never explained whether the IRA was a "deposit account," "investment property," a "general intangible," or something else.

The three Florida courts did not cite any Florida case law or relevant statute in the Florida Statutes to support the conclusion that Kearney waived his exemption from creditors for funds held in the IRA by signing the Security Agreement containing a broadly worded security interest provision. The Magistrate Judge cited cases from the United States Bankruptcy Court for the Southern District of Ohio and the Eastern District Court of Virginia to support the conclusion that a pledge of IRA funds causes such funds to lose their creditor exempt status. However, those cases were not decided under Florida law, are not binding on a Florida court, and rest in jurisdictions that do not necessarily have state law creditor exemptions similar to Florida for IRAs.

The Eleventh Circuit, in the *Kearney* decision, without citing any Florida case law supporting its conclusion:

- blind-sides millions of Florida Consumers by rendering moot numerous statutory exemptions from creditors under Florida law for anyone who has signed a contract containing a blanket security interest provision that includes deposit accounts, general intangibles, and/or investment property;

- causes citizens to unintentionally remove the exempt protection they have from their IRAs and qualified retirement plans which may cause them to become so destitute they must become wards of the state;

- creates a toxic environment for business because all business loans requiring a general pledge of assets would force business owners to give their creditors total access to their retirement savings, children's college funds, life insurance cash surrender values and coin collections as collateral; and

- potentially triggers a ruinous immediate financial result for Florida Consumers by causing the loss of the pledged amount of a Consumer's IRAs and qualified retirement plans, plus up to 40% of the full value to taxes and penalties upon making a general pledge of assets.

1. Forfeiture of Exempt Status for Pledged Assets: Chapter 222 of the Florida Statutes contains most of the statutory exemptions that protect certain assets from legal process under Florida law. For example, Fla. Stat. § 222.21(2)(a) allows Florida Consumers to claim an exemption from creditors for funds held in IRAs, 401(k) retirement accounts, and other tax-exempt accounts. Florida Consumers have long operated under the belief any asset which is exempt under Chapter 222 of the Florida Statutes is exempt from the reach of creditors unless such exempt asset is specifically pledged in a security agreement. The Magistrate Judge, the District Court, and the Eleventh Circuit cast aside this widely held belief in concluding that Kearney forfeited the exempt status of the funds held in the IRA by pledging the funds as collateral because the Security Agreement provided Kearney pledged all of his "assets and rights." In arriving at this conclusion, the three courts ignored Fla. Stat. § 679.1081(3), which provides that a description of collateral as "all the debtor's assets" or words of similar import does not reasonably identify the collateral for purposes of the security agreement. Such general descriptions are legally inadequate to create a lien. Furthermore, the Security Agreement at issue in *Kearney* did not specifically identify Kearney's IRA as part of the collateral. The three courts did not identify the collateral category in the Security Agreement that purportedly covered the IRA, and never explained whether the IRA was a "deposit account," "investment property," a "general intangible," or something else. A long standing public policy of the Florida legislature is the promotion of the financial independence of the retired and elderly through the protection of their IRAs and pensions plans with an exemption, thus reducing the need for public financial assistance. However, the *Kearney* decision may result in Florida Consumers unintentionally removing the exempt protection they have from their IRAs and qualified retirement plans, which could then cause them to become so destitute they must become wards of the state.

2. Application of *Kearney* Decision Beyond IRAs: The *Kearney* decision creates a dangerous precedent by permitting funds held in an IRA or other qualified plans to be garnished by creditors without a Consumer making an express and knowing waiver of the Fla. Stat. § 222.21(2)(a) exemption. The holding in *Kearney* appears to be in contravention with the intent of the Florida legislature to protect the assets of IRAs and pension plans from creditors. *See Dunn v. Doskocz*, 590 So. 2d 521, 522, n.2 (Fla. Dist. Ct. App. 1991) ("It appears the legislature has made the policy decision that it should protect the assets of IRA's and pension plans, thereby promoting the financial independence of IRA and pension plan beneficiaries in their retirement years—in turn reducing the incidence and amount of requests for public financial assistance"). The ripple effects of the *Kearney* decision go beyond the loss of the statutory exemption for funds held in IRAs or other qualified retirement plans. In *Kearney*, the Eleventh Circuit only examined whether Kearney waived the statutory exemption for his IRA. However, the *Kearney* holding is not necessarily limited to the waiver of the statutory exemption for IRAs. The *Kearney* decision can be used by creditors to pursue other purportedly exempt assets. *Kearney* potentially renders moot numerous statutory exemptions from creditors under Florida law for anyone who has signed a contract containing a broadly worded security interest provision that includes a general reference to deposit accounts, general intangibles, and/or investment property. For example, funds in other tax-exempt accounts protected under Fla. Stat. § 222.21(2)(a), such as 401(k) retirement accounts, are potentially vulnerable to creditors. Since the Eleventh Circuit did not identify which collateral category in the Security Agreement covered the IRA in *Kearney*, it is not unreasonable to believe that the cash surrender values of life insurance policies and the proceeds of annuity contracts protected under Fla. Stat. § 222.14 could be classified as "deposit accounts" or "investment property" in a different security agreement, and thus, potentially accessible to creditors. A similar analysis applies to funds held in qualified tuition programs and other qualifying accounts and certain individual property currently protected by Fla. Stat. § 222.22 and Fla. Stat. § 222.25, respectively.

3. Creates a toxic environment for new business: Mortgages, credit card applications, home equity line of credit agreements, security agreements, financing statements, and personal guarantees on business loans are only a few examples of documents that typically include a general pledge of assets as collateral similar to the provision at issue in *Kearney*. Millions of Florida Consumers are parties to at least one (if not more) of these contracts secured by their assets, which may now, unbeknownst to them, include a pledge of their exempt assets. The *Kearney* holding creates a toxic environment for business because almost all business loans require a general pledge of assets, which forces business owners to unknowingly give their creditors total access to their retirement savings, children's college funds, life insurance cash surrender values, and coin collections as collateral.

4. Triggers early distribution taxes and penalties of up to 40%: The tax result of the *Kearney* decision makes it even worse. Under federal law, if an IRA owner uses the account or any portion of such account as security for a loan, the portion used as security is deemed distributed to the owner. IRC § 408(e)(4). The IRA owner is required to include any amount paid or distributed out of the IRA in gross income and to pay federal income taxes on such gross income. IRC § 408(d)(1). The same federal income tax results will occur if a Consumer pledges an interest in a qualified employer plan. Pursuant to § 72(p)(1)(B) of the Code, if a Consumer "pledges (or agrees to pledge) any portion of his interest in a qualified employer plan, such portion shall be treated as

having been received by such individual as a loan from such plan." IRC § 72(p)(1)(B). A loan from a qualified employer plan is treated as being received as a deemed distribution for purposes of § 72. IRC § 72(p)(1). Additionally, the Code imposes penalties depending on when the deemed distribution from an IRA or qualified employer plan is made. Like an actual distribution, a deemed distribution is subject to the 10% additional tax on certain early distributions under § 72(t). Treas. Reg. § 1.72(p)-1, Q&A 11(b). For example, if a Consumer is under the age of 59 ½ and not disabled, the deemed distribution under § 408(e)(4) is also subject to the 10% penalty tax under § 72(t). IRC § 72(t).

The *Kearney* holding generates a calamitous financial result for Florida Consumers. If a Consumer signs a document containing a broadly worded security interest provision that includes a general reference to deposit accounts, general intangibles, and/or investment property, that Consumer, under *Kearney*, has arguably pledged the entirety of all such funds owned in an IRA, as well as their other exempt assets, such as cash surrender values of life insurance policies and the proceeds of annuity contracts. If a Consumer pledges an IRA, potentially the entirety of the pledged funds held in the IRA will be treated as a loan to the Consumer and thus taxable as a deemed distribution. If a creditor can garnish the funds held in an IRA, the debtor Consumer would, in addition to losing the pledged funds, be required to pay federal income taxes on all of the funds along with possibly the additional tax penalty for making an early distribution of the IRA!

D. Legislative Fix Needed

The Eleventh Circuit, without citing any Florida case law supporting its conclusion, potentially rendered moot numerous statutory exemptions from creditors contained in Chapter 222 of the Florida Statutes for any Florida Consumer who has signed any contract containing a blanket security interest provision that includes deposit accounts, general intangibles, and/or investment property. The *Kearney* result flies in the face of the current statutory framework requiring a Consumer is to be made aware of, understand, and acknowledge that such Consumer is waiving a statutory exemption under Florida law. In light of the serious issues resulting from the *Kearney* holding, Chapter 222 requires a legislative fix. In the absence of legislative action, a Consumer, by signing a document containing a broadly worded security interest provision, unknowingly places their IRA, pension plan, annuity, life insurance contract, or personal property at risk of forfeiture and confiscatory taxation.

III. EFFECT OF PROPOSED CHANGES

Florida Statutes Section 222.105

Current Situation: In Fla. Stat. § 222.11(2)(b), for a Consumer to waive protection from wage garnishment, the Consumer must consent to garnishment of such Consumer's wages in writing. This written waiver document must be written in the same language as the contract to which the waiver relates, be contained in a separate document attached to the contract, and contain the mandatory waiver language specified in Fla. Stat. § 222.11(2)(b) in at least 14-point type. Pursuant to Fla. Stat. § 732.702, a surviving spouse can waive his or her homestead rights by a written contract, agreement, or waiver, signed by two subscribing witnesses, that contains a waiver of "all

rights," or equivalent language in the homestead property. There is currently no law in the Florida Statutes that discusses when and how a Consumer can waive the statutory exemptions from garnishment set forth in Fla. Stat. § 222.14, Fla. Stat. § 222.21, Fla. Stat. § 222.22, and Fla. Stat. § 222.25.

Effect of Proposed Changes: The Committee proposes the insertion of proposed Fla. Stat. § 222.105, which will clarify a Consumer can only waive the exemption from garnishment for funds held in an IRA or other qualified retirement account (Fla. Stat. § 222.21), funds held in qualified tuition programs and other qualified accounts (Fla. Stat. § 222.22), proceeds from an annuity or life insurance contract (Fla. Stat. § 222.14), and individual property exempt from the legal process (Fla. Stat. § 222.25) by making an express and knowing waiver in a writing containing similar terms to those set forth in Fla. Stat. § 222.11(2)(b). The proposed legislation protects Florida residents from unintentionally assigning, pledging, or waiving rights to, assets that otherwise are exempt from legal process under Chapter 222 of the Florida Statutes by imposing clearly defined requirements for a written agreement to constitute a valid and intentional assignment, pledge, or waiver of such exemptions. A general pledge of assets should not allow a creditor to attach to those assets otherwise exempt under Florida law without a waiver in writing specifying the specific exempt asset being pledged. This writing ensures the Consumer understands they are waiving the exemptions from garnishment. The committee is not proposing changes to the waiver process governing the homestead exemption or the wage exemption because they are clear and consistent with proposed Fla. Stat. § 222.105 and contain protections similar to those being proposed herein.

The written waiver in proposed Fla. Stat. § 222.105 must specifically reference the accounts or contracts in which the Consumer is waiving the exemption. In the case of an individual retirement or other qualified retirement identified in Fla. Stat. § 222.21 or a qualified tuition program or other qualified account specified in Fla. Stat. § 222.22, the waiver should identify the custodian of the account as well as the last four digits of the corresponding account number. In the case of an annuity or life insurance contract as identified under Fla. Stat. § 222.14, the waiver should identify the name of the issuer or insurer and the last four digits of the annuity or policy number. In the case of other individual property specified in Fla. Stat. § 222.25, the waiver should make a specific reference to the individual property. The proposed Fla. Stat. § 222.105 includes Fla. Stat. § 222.25 within its purview, because the general pledge language in *Kearney* included "goods" as part of the collateral.

The written waiver must also contain language in at least 14-point type in capital letters notifying the Consumer that pledging an exempt asset causes the Consumer to forfeit their statutory rights and may cause adverse income tax consequences. The Consumer must initial two paragraphs and sign the waiver in order to effectively waive the protection for such exemptions included in the waiver. The proposed Fla. Stat. § 222.105 ensures a Consumer has sufficient notice and understanding regarding the decision to waive their right to the statutory exemptions from garnishment under Florida law.

As it is currently proposed, new Fla. Stat. § 222.105 would be effective prospectively upon becoming law.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposal does not have a fiscal impact on state or local governments.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

Millions of Florida Consumers are parties to at least one (if not more) contracts secured by their assets, which may now, unbeknownst to them, include a pledge of their exempt assets. Today, especially given the devastating economic hardships caused by Covid-19, citizens of the state of Florida have but few assets which they can rely upon for a modicum of financial security. The proposed Fla. Stat. § 222.105 protects Florida residents from unintentionally assigning, pledging, or waiving rights to, assets that otherwise are exempt from legal process under Chapter 222 of the Florida Statutes by imposing clearly defined requirements for a written agreement to constitute a valid and intentional assignment, pledge, or waiver of such exemptions. Without having a Consumer sign a written waiver waiving their statutory exemptions, the *Kearney* decision unknowingly places a Consumer's IRA, pension plan, annuity, life insurance contract, or personal property at risk of forfeiture and confiscatory taxation. For example, if a Consumer pledges the funds held in an IRA, the portion used as security is deemed distributed to the Consumer. The Consumer must pay federal income taxes on this deemed distribution. The Consumer may also be required to pay a 10% additional tax for making an early distribution of the IRA. This proposal saves Florida Consumers from unknowingly losing the pledged funds and paying federal income taxes on the total balance of the pledged funds.

VI. CONSTITUTIONAL ISSUES

There are no constitutional issues that may arise as a result of the proposal.

VII. OTHER INTERESTED PARTIES

Tax Section of The Florida Bar
Name:
Contact Information:
Support, Oppose or No Position: Support pending finalization of language

Business Law Section of The Florida Bar
Name:
Contact Information:
Support, Oppose or No Position: Support pending finalization of language

A bill to be entitled

An act relating to protection of Florida residents from unintentionally assigning, pledging, or waiving rights to assets that are otherwise exempt from legal process; creating s. 222.105, Florida Statutes to provide requirement for specific waivers of exemptions; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 222.105, Florida Statutes, is created to read:

222.105 – Requirement for specific waivers of exemptions.

(1) The exemptions set forth in Florida Statutes Chapter 222 cannot be waived unless the person who is entitled to such exemption has specifically agreed otherwise in a writing described in this section. References in a commercial instrument to all of a person's "assets and rights, wherever located, whether now owned or after acquired, and all proceeds thereof", or words of similar import, shall not include assets which are exempt under Chapter 222.

(2) The agreement to waive the protection provided by this Section must:

(a) Be written in the same language as the contract or agreement to which the waiver relates;

(b) Be a separate document from the contract or agreement to which the waiver relates;

(c) In the case of an account described in Sections 222.21 or 222.22, refer to the name of the custodian of the account and the last four digits of the account number;

(d) In the case of an annuity contract or life insurance policy described in Section 222.14, refer to the name of the issuer or insurer and the last four digits of the annuity or policy number;

(e) In the case of other individual property described in Section 222.25, refer to the individual property; and

(f) Contain the following language in at least 14-point type in capital letters stating:

WARNING – PLEDGING YOUR EXEMPT ASSETS WILL CAUSE YOU TO FORFEIT YOUR STATUTORY RIGHTS AND CAUSE ADVERSE INCOME TAX CONSEQUENCES – PLEASE CONSULT YOUR TAX ADVISOR BEFORE SIGNING THIS FORM.

FLORIDA LAW PROVIDES THAT YOUR RETIREMENT AND OTHER ACCOUNTS DESCRIBED IN FLORIDA STATUTES SECTIONS 222.21 AND 222.22, ANNUITY CONTRACTS AND THE CASH SURRENDER VALUE OF LIFE INSURANCE POLICIES DESCRIBED IN FLORIDA STATUTES SECTION 222.14, AND CERTAIN PERSONAL PROPERTY DESCRIBED IN FLORIDA STATUTES SECTION 222.25 ARE EXEMPT FROM CREDITOR ATTACHMENT, GARNISHMENT OR OTHER LEGAL PROCESS IN FAVOR OF YOUR CREDITORS. Initial _____

ADDITIONALLY, THE PLEDGE OF YOUR RETIREMENT AND OTHER ACCOUNTS DESCRIBED IN FLORIDA STATUTES SECTIONS 222.21 AND 222.22, ANNUITY CONTRACTS AND THE CASH SURRENDER VALUE OF LIFE INSURANCE POLICIES DESCRIBED IN FLORIDA STATUTES SECTION 222.14 IS LIKELY TO CAUSE IMMEDIATE FEDERAL (AND STATE, IF APPLICABLE) INCOME TAX CONSEQUENCES AND PENALTIES IN ADDITION TO SURRENDER CHARGES UNDER CERTAIN LIFE INSURANCE POLICIES AND ANNUITY CONTRACTS. **YOU ARE ADVISED TO SEEK THE ADVICE OF YOUR TAX ADVISOR PRIOR TO PLEDGING SUCH ASSETS AND SIGNING BELOW.** Initial _____

BY INITIALING ABOVE AND SIGNING BELOW, YOU AGREE TO WAIVE THE PROTECTION FOR SUCH EXEMPTION AS TO THE FOLLOWING ASSETS (CIRCLE ALL APPLICABLE):

RETIREMENT AND OTHER ACCOUNTS DESCRIBED IN SECTION 222.21 OR SECTION 222.22

NAME OF CUSTODIAN:_____

LAST FOUR DIGITS OF ACCOUNT NUMBER(S):_____

ANNUITY CONTRACT DESCRIBED IN SECTION 222.14

NAME OF ISSUER OF ANNUITY CONTRACT:_____

LAST FOUR DIGITS OF CONTRACT NUMBER(S):_____

LIFE INSURANCE POLICY DESCRIBED IN SECTION 222.14

NAME OF LIFE INSURANCE COMPANY: _____

LAST FOUR DIGITS OF POLICY NUMBER(S): _____

PERSONAL PROPERTY DESCRIBED IN SECTION 222.25

LIST OF PROPERTY:_____

(Consumer's Signature) (Date Signed)

I have fully explained this document to the consumer.

(Creditor's Signature) (Date Signed)

Section 2. This act shall take effect upon becoming law.

EXHIBIT C-3

The Florida Bar

651 East Jefferson Street
Tallahassee, FL 32399-2300

Joshua E. Doyle
Executive Director

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LEGISLATIVE OR POLITICAL POSITION REQUEST FORM

GENERAL INFORMATION

(RPPTL Approval Date 8/___/2020)

Submitted by: *(list name of section, division, committee, TFB group, or individual name)*
Business Law Section

Address: *(address and phone #)* 651 E. Jefferson Street, Tallahassee, FL 32399
(850) 561.5630

Position Level: *(TFB section/division/committee)* TFB Section

PROPOSED ADVOCACY

- All requests for legislative and political positions must be presented to the Board of Governors by completing this form and attaching a copy of any existing or proposed legislation or a detailed presentation of the issue.
- Select Section I below if the issue is legislative, II is the issue is political. Regardless, Section III must be completed.

If Applicable, List the Following:

(Bill or PCB #) (Sponsor)

N/A

Indicate Position: ☑ Support ☐ Oppose ☐ Technical or Other Non-Partisan Assistance

I. Proposed Wording of Legislative Position for Official Publication

Supports changes to Chapter 222 F.S. that protect Florida residents from unintentionally assigning, pledging, or waiving rights to assets that are otherwise exempt from legal process.

II. Political Proposals:

N/A

III. Reasons For Proposed Advocacy:

A. Is the proposal consistent *with Keller vs. State Bar of California*, 110 S. Ct. 2228 (1990), and *The Florida Bar v. Schwarz*, 552 So. 2d 1094 (Fla. 1981)?

Yes

B. Which goal or objective of the Bar's strategic plan is advanced by the proposal?

Enhance and improve the vaule of Florida Bar Membership and the Bar's relationship with its members.

C. Does the proposal relate to: *(check all that apply)*

____	Regulating the profession
____	Improving the quality of legal services
✓	Improving the functioning of the system of justice
____	Increasing the availability of legal services to the public
____	Regulation of trust accounts
✓	Education, ethics, competency, and integrity of the legal profession

D. Additional Information:

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section/divisions/committee positions on this issue, to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position

TFB Section/Division/Committee	Support/Oppose	Date

Others *(attach list if more than one)*

TFB Section/Division/Committee	Support/Oppose	Date

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

A request for action on a position must be circulated to sections and committees that might be interested in the issue. The Legislation Committee and Board of Governors may delay final action on a request if the below section is not completed. Please attach referrals and responses to this form. If you do not believe other sections and committees are affected and you did not circulate this form to them, please provide details below.

Referrals

Name of Group or Organization	Support, Oppose or No-Position
Real Property, Probate and Trust Law Section	Support
Public Interest Law Section	
Tax Section	

Reasons for Non-Referrals:

CONTACTS

Board & Legislation Committee Appearance *(list name, address and phone #)*

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Appearances before Legislators *(list name and phone # of those having direct contact before House/Senate committees)*

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Meetings with Legislators/staff *(list name and phone # of those having direct contact with legislators)*

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Submit this form and attachments to the Office of General Counsel of The Florida Bar – mailto:jhooks@floridabar.org, (850) 561-5662. Upon receipt, staff will schedule your request for final Bar action; this may involve a separate appearance before the Legislation Committee unless otherwise advised.

Exhibit

D

542.335 Valid restraints of trade or commerce.—

(1) Notwithstanding s. 542.18 and subsection (2), enforcement of contracts that restrict or prohibit competition during or after the term of restrictive covenants, so long as such contracts are reasonable in time, area, scope of restricted activity, and line of business, is not prohibited. In any action concerning enforcement of a restrictive covenant:

(a) A court shall not enforce a restrictive covenant unless it is set forth in a writing signed by the person against whom enforcement is sought.

(b) (i) In the case of a restrictive covenant sought to be enforced against a current or former employee, agent or independent contractor, a court shall apply a rebuttable presumption that a postterm covenant is not enforceable unless the employee's or agent's or independent contractor's earnings from the party seeking enforcement, when annualized, exceeds the Threshold Annual Earnings Amount.

(ii) The "Threshold Annual Earnings Amount" shall initially be $60,000 and beginning September 30, 2021, and annually on September 30 thereafter, the Department of Economic Opportunity shall calculate a new Threshold Annual Earnings Amount by increasing the then applicable Threshold Annual Earnings Amount by the rate of inflation for the 12 months prior to September 1. In calculating the new Threshold Annual Earnings Amount, the Department of Economic Opportunity shall use the Consumer Price Index for Urban Wage Earners and Clerical Workers, not seasonally adjusted, for the South Region, or a successor index as calculated by the United States Department of Labor. Each new Threshold Annual Earnings Amount shall take effect on the next following January 1.

(iii) The term "earnings" in subsection (1)(b) means (i) for an employee, the compensation reflected on box one of the United States Internal Revenue Service form W-2 that is paid to an employee over the prior year, or portion thereof for which the employee was employed, annualized and calculated as of the earlier of the date of enforcement of the restrictive covenant is sought or the date of separation from employment, and (ii) for an agent or independent contractor other than an employee payments reported on United States Internal Revenue Service form 1099-MISC.

(iv) The presumption set forth in subsection (1)(b) may be rebutted by the person seeking enforcement of the covenant only by clear and convincing evidence that the person against whom enforcement is sought holds directly or indirectly, at or about the time of the end of the term of employment, agency or engagement, a significant profit-sharing, equity, contingent right to sales commissions or other similar significant contingent consideration interest in the employer.

(v) Notwithstanding anything to the contrary in subjection 1, a court may enforce a restrictive covenant precluding such employee, agent, or independent contractor from using or disclosing trade secrets, as defined in s. 668.002(4), or valuable confidential business or professional information that otherwise does not qualify as a trade secret.

(~~b~~c) The person seeking enforcement of a restrictive covenant shall plead and prove the existence of one or more legitimate business interests justifying the restrictive covenant. The term "legitimate business interest" includes, but is not limited to:

1. Trade secrets, as defined in s. 688.002(4).

2. Valuable confidential business or professional information that otherwise does not qualify as trade secrets.

3. Substantial relationships between the party against whom the restrictive covenant is sought to be enforced and ~~with~~ specific prospective or existing customers, patients, referral sources, or clients.

4. Customer, patient, or client goodwill associated with:

a. An ongoing business or professional practice, by way of trade name, trademark, service mark, or "trade dress";

b. A specific geographic location; or

c. A specific marketing or trade area.

5. Extraordinary or specialized training.

Any restrictive covenant not supported by a legitimate business interest is unlawful and is void and unenforceable.

(~~c~~d) A person seeking enforcement of a restrictive covenant also shall plead and prove that the contractually specified restraint is reasonably necessary to protect the legitimate business interest or interests justifying the restriction. If a person seeking enforcement of the restrictive covenant establishes prima facie that the restraint is reasonably necessary, the person opposing enforcement has the burden of establishing that the contractually specified restraint is overbroad, unreasonably restricts or limits certain types of conduct or activities, is overlong, or is otherwise not reasonably necessary to protect the established legitimate business interest or interests. If a contractually specified restraint is overbroad, unreasonably restricts or limits certain types of conduct or activities, is overlong, or is otherwise not reasonably necessary to protect the legitimate business interest or interests, a court ~~shall~~ may modify the restraint and grant only the relief reasonably necessary to protect such interest or

interests or in its discretion it may decline to enforce the restriction except as provided for in subsection (g).

(~~d~~e) In determining the reasonableness in time of a postterm restrictive covenant not predicated upon the protection of trade secrets, a court shall apply the following rebuttable presumptions:

1. In the case of a restrictive covenant sought to be enforced against a former employee, agent, or independent contractor, and not associated with the sale of all or a part of:

a. The assets of a business or professional practice, or

b. The shares of a corporation, or

c. A partnership interest, or

d. A limited liability company membership, or

e. An equity interest, of any other type, in a business or professional practice,

a court shall presume reasonable in time any restraint 6 months or less in duration and shall presume unreasonable in time any restraint more than ~~2 years~~ 18 months in duration.

2. In the case of a restrictive covenant sought to be enforced against a former distributor, dealer, franchisee, or licensee of a trademark or service mark and not associated with the sale of all or a part of:

a. The assets of a business or professional practice, or

b. The shares of a corporation, or

c. A partnership interest, or

d. A limited liability company membership, or

e. An equity interest, of any other type, in a business or professional practice,

a court shall presume reasonable in time any restraint 1 year or less in duration and shall presume unreasonable in time any restraint more than 3 years in duration.

3. In the case of a restrictive covenant sought to be enforced against the seller of all or a part of:

a. The assets of a business or professional practice, or

b. The shares of a corporation, or

c. A partnership interest, or

d. A limited liability company membership, or

e. An equity interest, of any other type, in a business or professional practice,

a court shall presume reasonable in time any restraint 3 years or less in duration and shall presume unreasonable in time any restraint more than 7 years in duration.

(~~e~~f) In determining the reasonableness in time of a postterm restrictive covenant predicated upon the protection of trade secrets, a court shall presume reasonable in time any restraint of 5 years or less and shall presume unreasonable in time any restraint of more than 10 years. All such presumptions shall be rebuttable presumptions.

(g) Except with respect to a restrictive covenant against a former employee, agent, or independent contractor described in subsection (e)1 above:

1. If the contractually specified restraint is overbroad, unreasonably restricts or limits certain types of conduct or activities, is overlong, or is otherwise not reasonably necessary to protect the legitimate business interest or interests, a court shall modify the restraint and grant only the relief reasonably necessary to protect such interest or interests.

2. A court shall not consider any individualized economic or other hardship that might be caused to the person against whom enforcement is sought.

3. A court shall not employ any rule of contract construction that requires the court to construe the restrictive covenant narrowly, against the restraint, or against the drafter of the contract.

(~~f~~h) The court shall not refuse enforcement of a restrictive covenant on the ground that the person seeking enforcement is a third-party beneficiary of such contract or is an assignee or successor to a party to such contract, provided:

1. In the case of a third-party beneficiary, the restrictive covenant expressly identified the person as a third-party beneficiary of the contract and expressly stated that the restrictive covenant was intended for the benefit of such person.

2. In the case of an assignee or successor, the restrictive covenant expressly authorized enforcement by a party's assignee or successor.

(~~g~~i) In determining the enforceability of a restrictive covenant, a court:

~~1. Shall not consider any individualized economic or other hardship that might be caused to the person against whom enforcement is sought.~~

~~2~~1. May consider as a defense the fact that the person seeking enforcement no longer continues in business in the area or line of business that is the subject of the action to enforce the restrictive covenant only if such discontinuance of business is not the result of a violation of the restriction.

~~3~~2. Shall consider all ~~other~~ pertinent legal and equitable defenses and principles, including balancing the equities with regard to requests for injunctive relief.

~~4~~3. Shall consider the effect of enforcement upon the public health, safety, and welfare.

(~~h~~j) A court shall construe a restrictive covenant in favor of providing reasonable protection to all legitimate business interests established by the person seeking enforcement. ~~A court shall not employ any rule of contract construction that requires the court to construe a restrictive covenant narrowly, against the restraint, or against the drafter of the contract.~~

(~~i~~k) No court may refuse enforcement of an otherwise enforceable restrictive covenant on the ground that the contract violates public policy unless such public policy is articulated specifically by the court and the court finds that the specified public policy requirements substantially outweigh the need to protect the legitimate business interest or interests established by the person seeking enforcement of the restraint.

(~~j~~l) A court shall enforce a restrictive covenant by any appropriate and effective remedy, including, but not limited to, temporary and permanent injunctions. The violation of an enforceable restrictive covenant creates a presumption of irreparable injury to the person seeking enforcement of a restrictive covenant. No temporary injunction shall be entered unless the person seeking enforcement of a restrictive covenant gives a proper bond, and the court shall not enforce any contractual provision waiving the requirement of an injunction bond or limiting the amount of such bond.

(~~k~~m) In the absence of a contractual provision authorizing an award of attorney's fees and costs to the prevailing party, a court may award attorney's fees and costs to the prevailing party in any action seeking enforcement of, or challenging the enforceability of, a restrictive covenant. A court shall not enforce any contractual provision limiting the court's authority under this section.

(2) Nothing in this section shall be construed or interpreted to legalize or make enforceable any restraint of trade or commerce otherwise illegal or unenforceable under the laws of the United States or of this state.

(3) ~~This~~ Laws Chapter 96-257 ~~act~~ shall apply prospectively, and it shall not apply in actions determining the enforceability of restrictive covenants entered into before July 1, 1996.

(4) Laws Chapter _____ shall apply prospectively, and it shall not apply in actions determining the enforceability of restrictive covenants entered into before _____ 2021.

Comment: The purpose of the elimination of the last sentence of paragraph (1)(j), formerly 1(h) with regard to contracts that restrict or prohibit competition in the context of employees, agents or independent contractors not in connection with the sale of a business is to help ensure that such contracts are interpreted in accordance with customary rules of general contract construction under Florida law rather than any special rules of contract construction that some courts in Florida have applied in evaluating such contracts.

Comment:

The elimination of the prohibition subsection (g)1., against considering any individualized or other hardship that might be caused to the person against whom enforcement is sought- with regard to contracts that restrict or prohibit competition in the context of employees, agents or independent contractors not in connection with the sale of a business should not be interpreted to mean that a court in that situation is required to give overriding weight to any such hardship in determining whether to grant injunctive relief enforcing a restrictive covenant. Rather, the intent is that the court, in addressing requests for injunctive relief in that context, apply general and customary considerations involved in balancing the equities, including a consideration of any hardships that may be caused by the issuance of the injunction as well as any other appropriate equitable circumstances and legal principles. *See, e.g., Transunion Risk and Alternative Data Solution, Inc. v. Maclachlan*, 625 Fed. Appx. 403 (11th Cir. 2015); *Lucky Cousins Trucking, Inc. v. QC Energy Resources Texas, LLC*, 223 F.Supp.3d 1221 (M.D. Fla. 2016).

Comment:

The additional language pertaining to restrictions or limitations of certain types of conduct or activity is intended to clarify the analysis of the legitimate business interest or interests that a court should undertake in determining whether a restrictive covenant should be enforced and, if so, whether a restriction should be enforced in whole or in part, or should be modified by the court and enforced as modified. A restrictive covenant should not be enforced to preclude any type of competitive conduct or activity broader than that reasonably necessary to support the specific legitimate business interest or interests demonstrated by the party seeking enforcement to require protection. *See Dyer v. Pioneer Concepts, Inc.*, 667 So.2d 961, 963-964 (Fla. 2d DCA 1996); *Austin v. Mid State Fire Equip. of Cent. Fla., Inc.*, 727 So.2d 1097, 1098 (Fla. 5th DCA 1999). The requirement that a court "shall" modify an overbroad restraint has also been changed to provide that a court "may" in its discretion modify or "may" decline to enforce such restrictions under the particular facts and circumstances of the case.

ANALYSIS OF PROPOSED LEGISLATION TO AMEND SECTION 542.335, FLORIDA STATUTES

White Paper

Submission by the Business Law Section of the Florida Bar

September 25, 2020

I. Section 542.335 Background and Introduction

In 2018, the Business Law Section of the Florida Bar empaneled a Task Force of more than 40 business law specialists to undertake a comprehensive review and modernization of Florida's restrictive covenant statute, Section 542.335. The Task Force has undertaken a comprehensive review of the restrictive covenant legislation in all 50 states, has carefully considered the competing interests of the parties to non-competition and non-solicitation contracts over the past nearly two years, and has drafted proposed revisions to the statute addressing perceived and identified issues presented by the current restrictive covenant law. The result is a proposed revised statute that is designed to shift the law in the direction of increased protection for employees, while simultaneously seeking to ensure that the reasonable interests of businesses are appropriately safeguarded. This proposal represents, in the view of the Task Force, a more balanced and fair approach.

In 1996, the Business Law Section of The Florida Bar developed Section 542.335 in response to uncertainty and inconsistency in the application of Florida's previous laws governing restrictive covenants. During the nearly 25 years since its enactment, Section 542.335 has developed a robust body of case law. However, in some instances courts in other states have criticized our statute or even refused to enforce Florida-based covenants. The proposed revisions are designed to address issues raised inside and outside the state, while retaining the best parts of the 1996 statute.

II. Revisions Made by the Task Force

In undertaking its analysis, the Task Force focused on statutory provisions applicable to enforcement of restrictive covenants against former employees, agents and independent contractors,[1] which the Task Force believed had proven to be problematic. Oftentimes, these

[1] References in this White Paper to employees therefore also include agents and independent contractors.

contractual restrictive covenants are not truly negotiated between parties of equal bargaining positions. Moreover, the freedom of mobility of employees in our economy and their ability to earn a living in their chosen occupations or professions are important social concerns as are the protection of employers against unfair competition. In balancing these competing interests, the Task Force maintained the provisions of the current statute with respect to covenants associated with (i) the sale of a business and business interests, and (ii) restraints upon former distributors, dealers, franchisees, and trademark licensees.

A. General Terms of Validity

To avoid the statutory prohibition against unreasonable restraints of trade, sub-section (1) of Section 542.335 provides that a restrictive covenant must be reasonable in time, area, and line of business. The Task Force proposes adding "scope of restricted activity" to the reasonableness aspects that are prerequisites to enforcement of a restrictive covenant. The proposed additional language is consistent with the change the Task Force has proposed to subsection 1(c) of the statute relating to the legitimate business interests necessary to enforce a restrictive covenant, and with the analysis of courts that have limited enforcement of restrictive covenants specifically to the type of activities or conduct that is reasonably necessary to protect the specific legitimate business interest or interests.

B. Rank & File Exception

The foremost proposed amendment is the so-called "rank & file" exception that would limit the enforcement of restrictive covenants against certain lower wage level employees, except in certain limited circumstances. This exception creates a rebuttable presumption that any post term covenant asserted against an employee that had earned not more than a threshold amount (initially, set at $60,000 on an annualized basis) from the employer, is unenforceable. The "rank and file" exception is consistent with similar exceptions adopted in a number of other states.

Moreover, except for the potential disclosure of trade secrets and confidential information, the prohibition of which remains a protected employer interest, in most cases, such employees, upon termination, are substantially less likely to be able to unfairly impact the legitimate business interests of their former employers. However, the Task Force recognizes that there are circumstances, for example where an employee may be compensated in nonmonetary or contingent

ways that have significant value such that a strict monetary threshold for enforcement of a restrictive covenant may not be appropriate. The Task Force has therefore proposed that the failure to meet the threshold for monetary compensation only creates a presumption of invalidity, which can be rebutted by a showing that such employee holds a significant profit sharing, equity, contingent right to sales commissions, or other contingent interest in the former employer.

The exception for identified lower wage level employees does not affect the employer's current statutory right to enforce reasonable post term restrictive covenants that protect trade secrets and/or confidential business or professional information. Regardless of the level of compensation of the employee, the misappropriation and misuse of this type of information obtained during the course of employment creates a potential for substantial harm to businesses and this important protection for employers has been retained.

The initial $60,000 threshold amount is to be adjusted for inflation annually based on calculations made by the Florida Department of Economic Opportunity. The Task Force spent considerable time determining the appropriate threshold for the exception. Washington uses a $100,000 standard. The Task Force believed that Washington's amount was too high. Illinois employs an hourly wage figure, e.g. $13 per hour, which the Task Force considered to be too low and too difficult for employers to reasonably keep track of on an annual basis. The $60,000 figure arrived at was considered to be a fair approximation of the current cut-off point between "rank and file" employees and those with more senior and substantive responsibilities for whom restrictive covenants may be much more important.

C. Legitimate Business Interests

The Task Force has proposed to revise the enumeration and application of "legitimate business interests" subject to protection through restrictive covenants. Under existing Section 542.335, the requirement that the party seeking enforcement of a restrictive covenant plead and prove a legitimate business or protectable interest is a bedrock requirement to enforce a restrictive covenant under the statute. The proposed amendments retain that fundamental requirement while adding language to specify and clarify how the requirement is to be applied.

Unreasonable Restrictions: The proposed amendments would clarify and expand upon the necessary relationship between the contractual restraint and the legitimate protectible interest or interests alleged by the party seeking enforcement. In addition to precluding the enforcement

of restrictions which are "overbroad, overlong, or otherwise not reasonably necessary to protect the established legitimate business interest," the Task Force has proposed to add language to subsection (1)(g) (former subsection (1)(c)) that would explicitly preclude enforcement of a restrictive covenant that "*unreasonably restricts or limits certain type of conduct or activities*." The amendment is consistent with the interpretation of the statute by several courts. *See, e.g.*, *Austin v. Mid-State Fire Equipment of Central Florida, Inc.*, 727 So. 2d 1097, 1097 (Fla. 5th DCA 1997); *see also Dyer v. Pioneer Concepts, Inc.*, 667 So. 2d 961, 964-965 (Fla. 2d DCA 1996). In the employment context, the amendment will generally require a court to consider whether a restriction entirely precluding competitive employment is really necessary to protect the legitimate interests of the employer, or whether a more limited form of restriction (such as non-solicitation of customers with whom the employee had substantial contact) will suffice.

Specific Relationships: The revised section (1)(f)(3) (existing section (1)(b)(3)) includes an important clarification as to the substantial business relationships that qualify for protection. Specifically, the proposal clarifies that the protected relationships are "*between the party against whom the restrictive covenant is sought to be enforced*" and *specific customers, patients, referral sources, or clients*. The intent of this modification is to resolve the current division and confusion among the courts in determining which "relationships" qualify for protection. The revised provision makes clear that the court must focus on the relationship between the party sought to be enjoined and the customer, patient, referral source or client, and not on the general relationship between the customer, patient, referral source or client with the employer. The Task Force believes the intent of the statute is to preclude "*unfair competition*" by preventing an employee, from misappropriating or taking advantage of a customer, patient, referral source or client relationship in which the employee significantly engaged while working for the party seeking to enforce the restriction. *See* John A. Grant, Jr. & Thomas T. Steele, *Restrictive Covenants, Florida Returns to the Original "Unfair Competition Approach for the 21st Century*, 70 FLA. B. J. 53, 54 (Nov. 1996).

Referral Sources: In Section (1)(f) (former s. (1)(b)), dealing with the protection of substantial business relationships, the proposal has added relationships with "referral sources" to the list of legitimate business interests. This addition codifies the Florida Supreme Court's decision in *White v. Mederi Caretenders Visiting Services of Southeast Florida, LLC*, 226 So. 2d 774 (Fla. 2017).

D. Rules of Judicial Construction

Current Section 542.335 includes certain mandatory rules that courts must follow in considering the validity of restrictive covenants, some of which are not applicable to other types of contracts, which restrict the court's ability to consider all relevant facts and circumstances. The Task Force proposes to bring restrictive covenant interpretation and application back within the purview of traditional contract interpretation and equitable principles in the context of post-employment restrictive covenants.

Individual Hardship: Section (1)(g) of the statute is proposed to be revised to eliminate the provision stating that a court "shall not consider any individualized economic or other hardship that might be caused to the person against whom enforcement is sought" in the context of restrictive covenants against former employees. This provision has been held by some Federal courts in Florida to be contrary to principles of equity and to the factors courts are required to consider in connection with applications for injunctive relief and has been severely criticized or ignored by other courts outside of Florida. By removing this provision, courts will be empowered in evaluating restrictive covenants on former employees, to consider all of the equities involved (including hardship on the employee) in determining whether to issue an injunction to enforce the post-employment restraint.

Contract Construction: The proposed revision eliminates the language in revised section (1)(h) that precludes a court from "employ[ing] any rule of contract construction that requires the court to construe a restrictive covenant narrowly, against the restraint, or against the drafter of the contract" in the context of restrictive covenants on former employees. Nevertheless, in light of the paramount consideration regarding the protection of legitimate business interests under the statute, the Task Force has proposed to retain the requirement from that section applicable to all restrictive covenants that "A court shall construe a restrictive covenant in favor of providing reasonable protection to all legitimate business interests established by the person seeking enforcement."

E. 18 months as Presumptively Reasonable Duration for Restrictive Covenants Against Employees

Subsection (1)(d)(1) of the current statute is proposed to be amended by reducing the outside time period that a restraint against an employee is presumed to be unreasonable. The

current statute creates a presumption of unreasonableness for any restraint that is more than two years in duration. The proposal reduces that presumptive period from 24 months to 18 months.

Existing data pertaining to the duration of existing restrictive covenants as well as anecdotal experience of Task Force members indicates that restrictive covenants involving even high-ranking employees are usually 18 months or less in duration. *See, e.g.*, Norman D. Bishara, Kenneth J. Martin & Randall S. Thomas, *An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants*, 68 Vanderbilt Law Review 1, 36 (Jan. 2015). The Task Force did not believe that restrictive covenants of longer than 18 months are necessary in most cases to protect legitimate business interests of the employer. In any situations where a longer restriction may be warranted, the employer of course will still have the ability to present evidence to rebut the presumption.

F. Judicial Revision of Covenants

If a court finds a restrictive covenant to be overbroad or not reasonably necessary to protect the employer's legitimate business interests, Section (1)(c) of the current statute mandates that the court "shall" modify the covenant to grant the employer relief that the court deems reasonably necessary. In many states, the Court is given the discretion to either (i) refuse to enforce an unreasonable restrictive covenant, or (ii) modify the unreasonable restrictive covenant to allow some form of restriction on the employee. The proposed amendment changes the current statute, with regard to restrictive covenants against former employees from "shall" to "may"; "a court ~~***shall***~~ ***may*** modify a restraint."

The Task Force believes that there may be circumstances where a mandatory requirement that a court modify or rewrite any restrictive covenant that it finds to be unreasonable could inequitably result in enforcement, albeit as modified, of a restrictive covenant negotiated or imposed by an employer on its employee unfairly or in bad faith. The current statutory mandate on the court to revise a covenant allows employers to exact restraints that are not reasonably justifiable under the circumstances, knowing that they could have an *in terrorem* effect on their workers, and knowing that, even if the restraints were challenged, they would be required to be enforced at least to some extent by a court. The proposed amendment allows courts to have the discretion, depending upon the specific circumstances of the case, to either modify the covenant or invalidate the employment restriction entirely.

However, the Task Force has proposed to retain the mandatory "blue pencil"[2] requirement in connection with restrictive covenants in contexts involving the sale of a business and with respect to distributors, dealers, franchisees and licensees of a trademark or service mark.

G. Continuing Protections

As noted above, the proposed amendments are principally directed at covenants affecting former employees. Therefore, the proposals specifically retain the provisions precluding the consideration of individualized hardship and requiring courts to modify covenants that are unreasonably broad with respect to restrictive covenants entered into with distributors, dealers, franchisees and licensees of a trademark or service mark, and covenants in connection with the sale of a business or business assets or shares or other entity membership interests, where the bargaining positions between the parties are usually more equal.

H. Effective date

The proposal includes a provision that the amendments will only apply prospectively to covenants entered into after the effective date of the changes.

III. CONCLUSION

The proposed amendments are intended to (i) provide needed clarification to the existing statute, (ii) modify the restraints currently imposed upon low level employees (iii) eliminate or modify provisions precluding courts from applying traditional equitable considerations in the employment context where bargaining positions between the parties may be widely disparate, (iv)

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[2] In *White v. Mederi Caretenders Visiting Serv. of S.E. Fla., L.L.C.*, 226 So.3d 774, 785 (Fla. 2017) and in identifying what is meant by "blue pencil," the Florida Supreme Court stated:

> Section 542 .335 commands courts to modify, or blue pencil, a non-competition agreement that is "overbroad, overlong, or otherwise not reasonably necessary to protect the legitimate business interest," instructing courts to "grant only the relief reasonably necessary to protect such interest." § 542.335(1)(c), Fla. Stat.; see PartyLite Gifts, Inc. v. MacMillan, 895 F.Supp.2d 1213, 1227 (M.D. Fla. 2012) (applying Florida law). Thus, section 542.335's phrasing of the business interests that may be protected in broad terms and its restricting courts from applying certain rules of contract construction, the statute grants trial courts fairly wide discretion to fashion the appropriate context-dependent remedy. See § 542.335(1)(c), (h), (j), Fla. Stat.

The Task Force's proposal would, generally, further broaden the court's discretion when evaluating restrictive covenants against former employees while restricting the ability to enforce restrictive covenants against rank and file employees subject to the provisions discussed in this White Paper.

provide courts with more guidance in determining the reasonableness of restrictive covenants while providing the courts with additional discretion to modify or invalidate restrictive covenants in employment that are unreasonable or overbroad under the specific circumstances of individual cases, and (v) retain existing provisions necessary in the sale of businesses, franchises, and other specified contexts where the bargaining positions of the parties are generally more equal. The Task Force believes that the recommended amendments provide a needed balance, particularly in the employment context, to Florida's statute governing the enforcement of restrictive covenants, while ensuring that the considerations of both employers and their employees and workers will be adequately protected.

EXHIBIT D-3

The Florida Bar

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Joshua E. Doyle
Executive Director

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SECTION LEGISLATIVE OR POLITICAL ACTIVITY REQUEST FORM

- This form is for committees, divisions and sections to seek approval for section legislative or political activities.
- Requests for legislative and political activity must be made on this form.
- Political activity is defined in SBP 9.11(c) as "activity by The Florida Bar or a bar group including, but not limited to, filing a comment in a federal administrative law case, taking a position on an action by an elected or appointed governmental official, appearing before a government entity, submitting comments to a regulatory entity on a regulatory matter, or any type of public commentary on an issue of significant public interest or debate."
- Voluntary bar groups must advise TFB of proposed legislative or political activity and must identify all groups the proposal has been submitted to; if comments have been received, they should be attached. SBP 9.50(d).
    - The Legislation Committee and Board will review the proposal unless an expedited decision is required.
    - If expedited review is requested, the Executive Committee may review the proposal.
    - The Bar President, President-Elect, and chair of the Legislation Committee may review the proposal if the legislature is in session or the Executive Committee cannot act because of an emergency.

General Information

Submitted by: *(list name of section, division, committee, TFB group, or individual name)*
The Business Law Section of The Florida Bar

Address: *(address and phone #)* 651 E. Jefferson Street, Tallahassee, FL 32399
(850) 561.5630

Position Level: *(TFB section / division / committee)* TFB Section

Proposed Advocacy

Complete Section 1 below if the issue is legislative, 2 if the issue is political. Section 3 must be completed.

1. Proposed Wording of Legislative Position for Official Publication

The BLS supports amending Florida Statute 542.335 relating to restrictive covenants in a manner to provide exemptions to employees receiving limited compensation and to provide the court additional discretion in those same cases to interpret restrictions in a manner consistent with traditional contract rules of construction.

2. Political Proposal

3. Reasons For Proposed Advocacy

a. Is the proposal consistent with *Keller v. State Bar of California*, 496 US 1 (1990), and *The Florida Bar v. Schwarz*, 552 So. 2d 1094 (Fla. 1989)? Yes

b. Which goal or objective of the Bar's strategic plan is advanced by the proposal?
Enhance and improve the vaule of Florida Bar Membership and the Bar's relationship with its members.

c. Does the proposal relate to: *(check all that apply)*

- ____ Regulation and discipline of attorneys
- ✓ Improvement of the functioning of the courts, judicial efficacy, and efficiency
- ____ Increasing the availability of legal services to the public
- ✓ Regulation of lawyer client trust accounts
- ____ Education, ethics, competency, integrity and regulation of the legal profession

d. Additional Information: See attached white paper.

Referrals to Other Committees, Divisions & Sections

The section must provide copies of its proposed legislative or political action to all bar divisions, sections, and committees that may be interested in the issue. SBP 9.50(d). List all divisions, sections, and committees to which the proposal has been provided pursuant to this requirement. Please include with your submission any comments received. **The section may submit its proposal before receiving comments but only after the proposal has been provided to the bar divisions, sections, or committees**. Please feel free to use this form for circulation among the other sections, divisions and committees.

Trial Laywer Section of The Florida Bar

Real Property Probate & Trust Law Section (RPPTL) of The Florida Bar

Tax Section of The Florida Bar

Contacts

Board & Legislation Committee Appearance *(list name, address and phone #)*

Brian Barakat, 2701 Ponce de Leon Blvd, Suite 202, Coral Gables, FL 33134
Aimee Diaz Lyon, 119 S. Monroe St, Suite 200, Tallahassee, FL 32301 - (850) 205-9000
Doug Bell, 119 S. Monroe St, Suite 200, Tallahassee, FL 32301 - (850) 205-9000

Appearances before Legislators *(list name and phone # of those having direct contact before House/Senate committees)*

Brian Barakat, 2701 Ponce de Leon Blvd, Suite 202, Coral Gables, FL 33134
Aimee Diaz Lyon, 119 S. Monroe St, Suite 200, Tallahassee, FL 32301 - (850) 205-9000
Doug Bell, 119 S. Monroe St, Suite 200, Tallahassee, FL 32301 - (850) 205-9000

Meetings with Legislators/staff *(list name and phone # of those having direct contact with legislators)*

Brian Barakat, 2701 Ponce de Leon Blvd, Suite 202, Coral Gables, FL 33134
Aimee Diaz Lyon, 119 S. Monroe St, Suite 200, Tallahassee, FL 32301 - (850) 205-9000
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Submit this form and attachments to the OGC, jhooks@floridabar.org, (850) 561-5662.