

**Business Law Section of the Florida Bar**

**Business Litigation Committee**

WINTER MEETING  
Thursday, January 26, 2022  
1:15 pm – 3:00 pm  
Renaissance Orlando at SeaWorld, Biscayne 3

Chris DeCort, Chair  
Brian Barakat, First Vice Chair  
Joseph Van de Bogart, Second Vice Chair  
**Judge Darrin Gayles**, Federal Judicial Chair  
**Judge Edward LaRose**, State Judicial Chair

**AGENDA**

- 1. Call to Order – Open meeting at 1:18 pm by Chris DeCort**
- 2. Pro Bono Pledge – Reading by Chris DeCort**  
*The mission of the Pro Bono Committee is to achieve 100% participation in Pro Bono Service by Business Law Section members and attorneys in their firms.*
- 3. Introduction of Judicial Chairs – Chris DeCort**
- 4. Committee Member Introductions – Intro of all Committee Members**
  - a. Executive Committee Introductions – EC report ready for today**
  - b. No current section administrator –**
  - c. If anything sent to them send to Doug Bates and he will make sure it goes to the correct person**
- 5. Housekeeping Matters:**
  - a. Review of Website and Resources – Christ D - Website issues and committee page for this committee- will pass around a signup sheet to get on the list serve to also sign up through the website. Meeting agenda and other resources are posted on the website**
    - i. Email sign up for new committee members**
    - ii. Manny Farach's case law update (also through mailing list)**
  - b. Review of Committee Level Listserv**
    - i. Sign up: <http://lists.flabizlists.org/listinfo.cgi/bizlit-flabizlists.org>**
  - c. Review of Legislation Subcommittee / Listserv**
    - i. Overview and call for volunteers**
    - ii. Sign up: <http://lists.flabizlists.org/listinfo.cgi/bizlitlegislation-flabizlists.org>**
    - iii. Legislative Session starts March 7, 2023**
- 6. Action Items:**

- a. Approval of Labor Day Retreat (Sept. 2022) Meeting Minutes **Approved.**
- b. ~~Series LLC Task Force~~
  - i. ~~Discuss necessity of vote to approve triple motion to EC supporting proposed revised legislation drafted by task force based upon the Uniform Protected Series Act (materials attached)~~ *Removed from agenda because this had previously passed and will be taken up by corporations and securities*
- c. Study Group - change from PDFs to links for service of court documents – **Close study group as there are no problems with this – disbanded group**
- d. **Phil Schwartz on 605/607 Direct or Derivative action issue – and statute that creates what is allowed to be a direct or derivative action – standard in the statute under former 608 did not deal with the current state of the law on that issue – case law tried to define these issues with respect to when an action is direct or derivative on an issue**
  - i. **Biz Lit to create task force to study – Giacomo Bossa to lead**
  - ii. **Task force will re take up this issue and gain input from as many lawyers and judges as possible – if the standard is wrong we need to fix the standard –**
  - iii. **Need litigators to help with this issue who have experience on it – important for the section to take another look at the statute for another fix**
  - iv. **Sign-up sheet circulated and study group on this issue for the section – unique project and opportunity to be involved on an issue –**
  - v. **David Valorie – Many other issues come up in litigation with Direct and Derivative – such as**
    - 1. **90-day window to buy shares and dismissal of claims?**
    - 2. **For a derivative claim – is a full dismissal allowed only with the court’s permission – or can any individual claim be dismissed in a derivative action without the court’s permission.**
- e. **Phil wants this to only be on the one issue of the Direct or Derivate statute and not on the issues of procedurally how the 605/607 are dealt with during litigation**
- f. **Look at the two statutes for clarity or unclarity of those words is what he is focused on**
- g. **Nero and Sruzzul – cases with issues and concerns about statutes as it was prior to the adoption of the LLC statute – No case law dealing with the new amendment**

## **7. Discussion Items:**

- a. **HOT Topic – Brian Barakat**
  - i. **FTC Proposes Rule to Ban Noncompete Clauses / 542.335 Task Force update**
  - ii. **Biden signed executive order – all gone except when you sell a business**
  - iii. **Does not deal with issue of consideration for signing non-compete**
  - iv. **Gives a ton of energy for justifying itself – many examples of people who should not be subject to non competes**
  - v. **Large potion explaining why the FTC has the power to enact this legislation**
  - vi. **March 10 or Mach 20 as deadline – we think it is March 20 – many people think comment period will be extended 60 days**

- vii. Draft a comment by February 21 – to file with March 20 deadline
  - viii. Judge LaRose – confidentiality – trade secrets – non-solicitation of current employees – comments about whether is a non-compete appropriate at an executive level of employment
- b. Business Law Section Legislative Update
- i. 2023 Session: Tuesday, March 7, 2023 – Friday, May 5, 2023 – Many items going up – nothing from this committee but things from other committees – Chris Presents
  - ii. Judgment Lien – Bankruptcy UCC issue
  - iii. ABC – Bankruptcy UCC issue – house drafting and we have sponsors on this
  - iv. Warehouse Liens – Working on a white paper there
  - v. Motor Vehicle Exemption – Open issue not going forward in this session
  - vi. Financial Literacy – Jim Murphy commenting on Financial Literacy task force – going up this session to make April Financial Literacy Month
  - vii. Kearney fix – Amy and Doug with Reptiles looking for sponsors
  - viii. Data Privacy – Private cause issue to push forward last year not on this year’s agenda because we lost the sponsor
  - ix. UCRERA Glitch Bill – FTLA is not happy – want language that this is a final order – so same issues with the Title Companies
  - x. UCC Article 12 – Robert Kain – CLEs how to use UCC 12 – and how UCC 12 functions – going to be different than a UCC 1 statement – CER will be attached to the digital asset – ALI is doing a CLE on January 30 on Everything you need to know about article 12.
  - xi. Expected special session issues:
    - 1. Abortion
    - 2. Constitution Right to Carry
- c. Statutory Settlement Agreements (Rep. Beltran request) – Brian Barakat (*materials attached*) – Form prepared – may be submitted this session – we may need to respond very quickly
- d. FDUTPA fix (Bankruptcy/UCC) – Scott Shuker (*materials attached*) – *retreat reached out and formed a study group to look at a ruling in a case called Pearlman – that despite language that was meant to illuminate the in pere delicto issue for receivers in FDUPTA – language was not sufficient to get around it even for a receiver – similar language in the ABC statute that removes it for an action that is brought by an assignee – after that ruling we all got together and*

Adds language to make clear that receiver can bring FDUPTA claims even though stockholders or directors may have taken actions that were negative – Florida business bar law section and EC will request and support the amendment to FDUPTA to deal with this issue – and fix the problem with the ruling by the 11<sup>th</sup> circuit that did not allow there receiver in the FDUPTA case and hurt the innocent creditor or stakeholders from recovering.

- e. Substantive Committees Update
  - i. Bankruptcy/UCC - no update provided
  - ii. Computer & Technology Law - no update provided
  - iii. Corporations, Securities & Financial Services – Heard from Phil already
    - iv. Bret Gatlief – annual Federal Securities Institute March 2 and 3 – in Miami
  - v. Intellectual Property – March 30 and 31 annual symposium – GP meeting – CLE being put on for trademarks
  - vi. Blockchain & Digital Assets
- f. Task Force Update
  - i. Business Courts – Jon Polenberg - no update provided
  - ii. Civil Rules – Russell Landy – Florida Supreme Court has issued opinion directing groups to adopt certain rule amendments by July 3
  - iii. Ch. 517, Florida Securities and Investor Protection Act – Jason Sherry - no update provided
  - iv. Ch. 542 Restrictive Covenants – Brian Barakat
  - v. Financial Literacy – Amanda Finley - no update provided
  - vi. Fla. Stat. § 607.0750 and Fla. Stat. § 605.0801 – Phil Schwartz
  - vii. Scholar and Fellows Retention Task Force – Katherine Van de Bogart – looking for new people to be fellows
- g. Standing Committees Update
  - i. Pro Bono – *\*Volunteer Needed\** - Angelique Gulla volunteered to be Biz Lit liaison to Pro Bono
  - ii. Communications - no update provided
  - iii. CLE – Joseph Van de Bogart - (see below)
  - iv. IMF/Membership – Katherine Van de Bogart- (see above)
- h. Florida Bar Committee Updates
  - i. Civil Rules Committee – Allison Leonard
  - ii. Rules of Evidence Committee – Scott Janowitz
- i. Biz Lit CLE update – Joseph Van de Bogart
  - i. CLE on Tuesday on UCRERA – 1 hour version – or a 3 hour version
- j. Additional reports on old matters - none

**8. New Business - none**

**9. Adjournment Meeting adjourned at 2:56 pm by Chris DeCort**