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BCBA Annual Meeting and Installation Dinner, June 11, 2009



Broward County Bar Association Executive Committee sworn in by Chief Judge Victor Tobin. From left to right: Christopher M. "Chris" Neilson, Outgoing President; Carlos M. Llorente, Incoming President; Bruce A. Weihe, President-Elect; Jordana L. Goldstein, Treasurer; Deborah Poore FitzGerald, Secretary in Fort Lauderdale.

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BNY Mellon "The Lawyer's Bank" Joins BCBA Family of Annual Sponsors



Frank C. Wagner, second from right, Vice President of BNY Mellon, "The Lawyers Bank", presents annual sponsorship check to BCBA President Carlos M. Llorente. Also pictured are, from left, Bruce Hecker, BNY Mellon Executive Vice President, and Christopher M. "Chris" Neilson, immediate Past President of BCBA and Chair of the 2009 Bench and Bar Convention. At right is Rosy Rosario, Assistant Vice President of BNY Mellon. The bank is also a major sponsor of the BCBA Bench and Bar Convention scheduled for Friday, October 16 at the Broward County Convention Center.



PRESIDENT'S MESSAGE by Carlos M. Llorente

July 1st marks the start of a new fiscal year at your Broward County Bar Association. It also marks the start for a new Board and a new author for this President's message. Since this is my first President's message I would like to provide an overview of some of what's in store for this year. Before looking ahead, let's look back at one notable accomplishment of this past year. During President Barbara Sunshine's term (2007-2008) a goal was set to pay off the remaining mortgage on BCBA center. Although we came close during Barbara's term, it was Past President, Chris Neilson who officially lit the match that "burned the mortgage". A collective sigh of relief was breathed and to borrow a line from Forrest Gump, "...one less thing to worry about."

With one less thing to worry about, your Association will move forward with some major initiatives to improve the practice of law. We will continue to work toward achieving e-filing of all court documents for this Circuit. We will continue to oppose and hope to bring about the elimination of charges currently imposed to view court documents from the Clerk's web page. We will be working with and assisting our Judiciary as they move toward web-based motion calendar scheduling in all divisions where it is feasible. We will work with the Bench and Clerk to eliminate some expenses by advocating e-notices to attorneys wherever feasible.

It is no surprise that our central courthouse is in need of either demolition or major renovations depending on your point of view. Now more than ever, as recent proud owners of our own prime downtown real estate, we will endeavor to place our footprint on the changes being drawn up for the central courthouse. We should be proud of the fact that members of this Association have been, and will continue to be, at the forefront of bringing about the changes needed for the central courthouse. Your Association will continue to assist our members to bring about these much needed changes.

Having addressed the Clerk, Bench and courthouse initiatives let me now turn to initiatives designed especially to help meet the day to day practice needs of the Broward county lawyer wherever they may practice in the county. First, we are continuing to improve the BCBA website by adding features that highlight the achievements of our members and making it easier to find our members. We found that the BCBA receives an average of 500 hits per day and consistently appears in the top three spots when using a search engine to find a Broward lawyer. We decided to use this internet

advantage to benefit our members.

Whether you are a new member or an existing member renewing your membership this year, you will notice a section in the Membership Application allowing members to enhance the member listing in the "Members Section" of the BCBA website. The enhancement will allow the website visitor to find members by practice area and further allow the internet user to link unto the member's website or office information. Along with this enhancement, we invite our members to submit notices of significant achievements that may be posted on the BCBA site or newsletter. We also invite submission of articles or lectures from members on general topics of law that may be considered for internet or newsletter publication.

As noted above, we own our office building and conference center centrally located in the county. We invite all members wherever they may practice throughout the county, to make good use of the facility by scheduling events, conferences or meetings at the Normal Howard Conference Center. The Center typically has ample parking in the morning and in that regard for those that don't mind a brisk walk we invite members who display their membership cards to park at the Association's parking lot as a respite from the difficult or expensive parking around the central courthouse. Membership cards will be issued this year so please check the BCBA website for the available benefits and possible discounts.

Finally this year your Association will be taking a more active and visible role in charities, public legal education and promoting pro bono. The Board will soon vote on whether to establish and fund small scholarships for students or classrooms that demonstrate proficiency and advancement in the understanding of our legal system for those students or classrooms participating in the Supreme Court's Justice Teaching Program. Mindful that over 30 years ago this Association's membership founded Legal Aid of Broward County, we will take a more active role in assuring that Legal Aid can effectively carry out its mission in these difficult times of funding cuts and dwindling contributions.

The start of a new BCBA year brings new challenges, fresh ideas and new goals. It also brings about a resolve to do more for our members, for our community and to bring about change where change is needed.

CALENDAR OF EVENTS

JULY 2009

Tuesday, July 21st:

Grievance Committee 17H Meeting. 2:00p.m. Norma B. Howard Bar Center, 1051 SE 3rd Ave. Ft. Lauderdale, 33316.

Saturday, July 25th:

8 Hour Adult Guardianship Class. 9:00a.m. to 5:00 p.m. Norma B. Howard Bar Center, 1051 SE 3rd Ave. Ft. Lauderdale, 33316. Cost: \$180.00. Guardian for anyone over the age of 18. ATTORNEYS WELCOME, APPROVED BY THE FLORIDA BAR FOR CLE CREDIT. To sign up contact Tish at BCBA (954) 764- 8040 ext. 200.

Thursday, July 30th:

The Women of the Roundtable Networking Event and Dinner. 6:00p.m.- 8:00p.m. At the Coral Ridge Yacht Club. 2800 Yacht Club Blvd., Fort Lauderdale, FL 33304. Cash bar, open networking, full course dinner, as well as great opportunity to increase business, meet like-minded women and much more. For reservations visit: www.thewomenoftheroundtable.com.

Saturday, August 1st:

Paralegal CLE Seminar. Designed for paralegals in the Plaintiff and Insurance Defense Fields. Held At the Norma B. Howard Center, 1051 SE 3rd Ave, Fort Lauderdale, 33316. Cost: \$35 for paralegals who are not members of the Broward Chapter of the Paralegal Association of Florida. For RSVP and questions contact Lisa C. Bono, CP, FRP, at lbono@Krupnicklaw.com. Registration begins at 8:00a.m.

Monday, August 3rd:

Grievance Committee 17G Meeting. 2:00p.m. Norma B. Howard Bar Center, 1051 SE 3rd Ave. Ft. Lauderdale, 33316.

Monday, August 3rd:

Solo Small/ Law Firm Networking Lunch. Bimini Boat Yard, 1555 SE 17th Street, Ft. Lauderdale, FL (954) 525-7400, RSVP to: Beth Lindie (954) 764-5400 and or blindie@lawyers.com

Friday, August 7th:

Solo Small/ Law firm Networking Lunch. The Ark, 6255 Stirling Road, Hollywood, (954) 584-3075, RSVP to: David Silverstone (954) 367-0770 and or david@dsilverstone.com.

Monday, August 10th:

FREE CLE Seminar. Topic: Retirement Distribution Planning 72 (t) & 72 (q). 1 Hour CLE. 4:00p.m. at the Broward County Bar Association, 1051 SE 3rd Ave. Fort Lauderdale, FL 33316. Please RSVP to: (561) 961-9311.

Tuesday, August 11th:

BCBA Board of Directors Meeting. 5:15 p.m.

Friday, August 14th:

Solo Small/ Law Firm Networking Lunch. East City Grill, 1800 Bell Tower Lane, Weston Town Center, (954) 659-3339, RSVP to: Rick Woolf at (954) 252-0043 and or rwoolf@woolffinancial.com

Saturday, August 15th:

4 Hour Minor Guardianship Class. 9:00a.m. to 1:00p.m. Norma B. Howard Bar Center, 1051 SE 3rd Ave, Ft. Lauderdale, 33316. Cost \$100.00. Guardian for anyone under the age of 18. ATTORNEYS WELCOME, APPROVED BY THE FLORIDA BAR FOR CLE CREDIT. To sign up contact Tish at (954) 764- 8040 ext. 200.

Tuesday, August 18th:

Grievance Committee 17H Meeting. 2:00p.m. Norma B. Howard Bar Center, 1051 SE 3rd Ave. Ft. Lauderdale, 33316.

Wednesday, August 19th:

Solo Small/ Law Firm Networking Lunch. Olive Garden, 807 S. University Drive, Plantation (954) 424-7201, RSVP to: John Rizvi (954) 452-0033 and or johnrizvi@ideaattorneys.com.

Friday, August 21st:

Solo Small/ Law Firm Networking Lunch. At J. Marks Restaurant, 1490 Copans Road, Pompano Beach (954) 782-7000, RSVP to: Jane Bolin (954) 316-1339 and or jane@peytonbolin.com.

Friday, August 21st:

The Broward County Women Lawyers' Association 2009-2010 Installation Lunch. 12:00p.m. At the Riverside Hotel, 620 E. Las Olas Blvd. Fort Lauderdale. \$40 for non-members; \$35 BCWLA members. Check-in begins at 11:30a.m. Reservations should be made at rspv@bcwla.com.

Saturday, August 22nd:

8 Hour Adult Guardianship Class. 9:00a.m. to 5:00 p.m. Norma B. Howard Bar Center, 1051 SE 3rd Ave. Ft. Lauderdale, 33316. Cost: \$180.00. Guardian for anyone over the age of 18. ATTORNEYS WELCOME, APPROVED BY THE FLORIDA BAR FOR CLE CREDIT. To sign up contact Tish at BCBA (954) 764- 8040 ext. 200.

Wednesday, August 26th:

Solo Small/ Law Firm Networking Lunch. Olive Garden, 1555 N. University Drive, Coral Springs, (954) 344-5226, RSVP to: Evan M. Ostfeld (954) 227-7529 and or Evan@Attorney4life.com.

Thursday, August 27th:

Worker's Compensation Seminar- Dealing with Contractor Violations. By James Francis Fee, Jr., Esq. At 12:00p.m. Held at the Norma B. Howard Bar Center, 1051 SE 3rd Ave. Fort Lauderdale, FL 33316. For more information contact the BCBA at (954) 764-8040 or Randall Gilbert at (954) 620-5000.

AUGUST 2009

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A Message from Michael B. Gilden, President, Young Lawyers' Section

I am honored and excited to begin my term as the President of the Broward County Young Lawyers Section for this upcoming year. Enough cannot be said about the outstanding leadership and job well done of our outgoing President, Scott Chitoff. The Bar Association, the Section and the community all owe Scott a great deal of appreciation.

Heading into this New Year the Young Lawyers Section is planning events that aim to build on the success that has been growing over the years past.

Our kick off event of the year will be a happy hour sponsored jointly with Emerge Broward which is being held at Yolo on Las Olas on Thursday, July 16th at 5:30 p.m. The Young Lawyers Section is always eager to co-host events with the other Bar Sections, as well as community groups and I welcome any such groups to contact me about setting up future events. The Young Lawyers Sections plans to hold frequent happy hour events to promote networking and other opportunities for both our members and non-members alike.

As always, the Young Lawyers Section will host its monthly luncheons each month at the Tower Club. Unless otherwise specially scheduled, our luncheons are held on the third Thursday of each month at 12:00 p.m. and all are invited. There is no lunch in the month of July, but the luncheons will resume starting August 20th.

It is never too early to start talking about one of the Young Lawyers Section's signature events, our annual charity golf tournament. This year's tournament will be held, as is traditional, at the Jacaranda Country Club in Plantation and is scheduled for November 14th. This year's charity is Forever Families and we expect this tournament to be our biggest and most successful ever. Special plans are in the works for a fantastic kick-off happy hour to precede the tournament and the Board of Directors of the Young Lawyers Section is looking forward to this entire event. If anyone is interested in

participating on the Golf Tournament Committee, please contact the event Chair-Person, Meghan Clary at (954) 525-6566.

After our golf tournament, the Young Lawyers Section will continue to host its traditional events, Holiday In January, Bowl-A-Thon, Judicial Reception, and Family Day, with a goal to make each one bigger and better than previous years. David Hirschberg, the President-Elect and Bart Ostrzenski, the Secretary/Treasurer, along with all of the Board of Directors, new and old, are committed to working hard for the Section and to bringing success in the year to come.

If anyone has any questions about how they can participate with or in the Young Lawyers Section, please feel free to call me at (954) 525-4100.

The Broward Barrister is published by the Broward County Bar Association a part of our commitment to provide membership with information relating to issues and concerns on the local level. Opinions and positions expressed in the signed materials are those of the author and may not necessarily reflect the views of this publication or the Broward County Bar Association.

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BROWARD COUNTY BAR ASSOCIATION
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The Consequences of Bankruptcy on Intellectual Property License Agreements

By Allen F. Bennett

In the past year every aspect of the economy has been impacted by the recent credit crisis and the slew of collapses of financial institutions that were once the solid pillars of our economy. Bankruptcy is on the rise in every industry. And even if your clients are not facing financial crises, they are contracting with those who are. Should a party to a contract file for bankruptcy, the impact on the other party can be substantial. This is particularly true for technology licensing. New technology is the basis of many high tech industries, including South Florida's nascent biotechnology industry, and many in-house attorneys for high-tech and biotech companies spend more time negotiating license agreements than drafting patent applications.

In the biotechnology and information industries, intellectual property is often a company's most valuable asset. And these assets, patents, trade secrets and copyrights, are almost always tied into licensing agreements of one sort or another. And regardless of the type of businesses your clients operate, it is likely they are at one end of a license agreement. Software-as-a-Service (SAAS) subscriptions have become common methods of managing information and often provide access, if not possession, of important information to an outside company. Management of customer databases, inventories and payroll are all highly valued trade secret information that are commonly placed in the hands of other companies over the internet, usually using proprietary software that is itself a part of a license agreement.

Section 365 of Title 11 of the Bankruptcy Code allows the debtor or his trustee in bankruptcy to "assume or reject any executory contract" of the debtor. An "executory contract" is generally defined by the code as any contract in which the obligations of each party are continuing in nature such that failure to fulfill performance still due by either party would constitute a material breach. That is, any contract that is ongoing, such as a lease, a subscription service or a license to make, use and/or sell a patented product, are "executory contracts." Practically all contracts involving intellectual property licensing are "executory" for bankruptcy purposes. As a result, they are generally governed by the lengthy and sometimes convoluted § 365 of the Bankruptcy Code.

A debtor or his trustee in bankruptcy has the option of either rejecting or assuming any executory contracts of the debtor. If the trustee rejects a debtor's license agreement, then the contract is breached, but not necessarily terminated, and the non-debtor party has an unsecured pre-petition claim for breach of contract. In addition, the debtor will lose any benefits it received under a rejected license.

If a debtor or trustee chooses to assume a license, then it must cure or provide adequate assurances that it will promptly cure any default, and also compensate any third parties injured by any default. In addition, § 365(n) of the Bankruptcy Code provides special safeguards to protect intellectual property relied upon by the non-debtor party. This means that if your client outsources its inventory tracking to a company that subsequently files for bankruptcy, your client is usually able to recover all of his data, and often may continue, for a limited time, using SAAS software.

A trustee under Chapter 7 generally has 60 days to accept or reject a license, while a filer under Chapter 11 has no time limit other than the confirmation of its reorganization plan. This can at times leave the non-debtor party in limbo waiting to learn whether its license agreement is alive or dead.

When a licensee files for bankruptcy, the licensor's first concern is usually whether it will continue to receive royalties. Often the costs to the licensor of a licensing agreement are slight. A patent holder's costs of maintaining a patent are small and will

likely be incurred with or without the license in question. A company licensing software, data management or other subscription services similarly does not expend substantial costs from day to day performance under a license. In these situations, it is probably wisest to "sit and wait." Attempting to pressure a money strapped company fresh in bankruptcy into committing to the assumption of a contract may scare them into rejecting a contract they would have assumed upon more thoughtful consideration. It is generally worth the risk of allowing a bankrupt licensee to continue receiving the benefit of the license and give them the opportunity to appreciate its value.

There are some cases in which a licensor will want to push the debtor licensee into rejecting the license agreement. If a licensor is expending a considerable amount in performing under the contract, it may wish to apply pressure to the newly bankrupt debtor in order to induce it into rejecting the license agreement. This may be the case when the non-debtor licensor has provided an exclusive license to a now defunct licensee who has had questionable success in making the patented technology profitable. By inducing the bankrupt licensee into rejecting the licensing agreement, the licensor will have the ability to negotiate a new license with a company better able to exploit the technology and realizing its potential in the marketplace.

A potentially more dangerous situation arises when a debtor licensee assumes a license only to assign it to a third party, perhaps a competitor or customer of the licensor. § 365(f)(1) of the Bankruptcy Code allows a debtor or trustee in some situations to ignore clauses limiting assignment in the original contract. An exclusive licensing agreement may be assignable by a trustee even when the license agreement itself expressly forbids assignment, so long as assurances of performance can be made by the assignee.

While the prospect of a bankrupt licensor can sound quite scary to the licensee of SAAS subscription services and other technologies that require frequent or ongoing maintenance, the bankruptcy code has many built in safeguards protecting licensees in just this situation. It is important to note, however, that these safeguards provided by section § 365(n) apply only to technology that is copyrightable and/or patentable. Trademarks, database compilations and other trade secret material is generally not protected by these provisions.

When a licensee debtor files for bankruptcy, the licensee has two choices. First, it may consider the agreement terminated. This leaves it without the use of the technology and only an unsecured, pre-petition claim against the licensor. However, the licensee is then free to license technology from another provider.

Alternatively, the licensee under section 365(n) can continue its use of and access to the technology in the same manner as it was prior to the licensor's filing of bankruptcy. The licensee must continue to make royalty payments, but still receives the services and has the right to enforce the exclusivity of any license agreement it wishes to retain. It is important in these situations to remember that a patent licensor, having rejected the license agreement, does not have continuing obligations it must honor, other than providing use of the patent. Specifically, it no longer must police or enforce the patent.

Allen Bennett is a registered Patent Attorney at Santucci, Priore & Long, LLP, Fort Lauderdale, www.spl-law.com, his email address is afb@spl-law.com



LEARNING, EARNING, YEARNING: ONE LAWYER'S JOURNEY TO MEDIATION

By Mike Christiansen

I started feeling the tug a few years ago. Thirty plus years of practice with good partners, good clients, no problems really.... yet the strain of

advocacy began to wear a bit, hanging a little heavier around my neck. I began to think perhaps there was something more out there, something less confrontational, something a bit more rewarding. Something something.

Someone a lot smarter than me once said we proceed from the learning years - where we educate ourselves and get our vaunted degrees - to the earning years - where we cash in on all that education and make our financial mark in the world, providing for our families, our kids, our charities of choice. Finally, it is said we enter the yearning years - when we assess where we have come, what we've achieved and then say to ourselves "Is that it? Is that all there is?" And so we enter the yearning years, some of us more than others, searching for something to give a little more meaning to a life otherwise hopefully well spent.

For me, the light snapped on when someone said "become a mediator". A small epiphany, if you will. I thought about it. And thought about it again. And again.

Mediation is, I think, the new face of American justice. Non-confrontational, non-adversarial, lacking that forced cadence of direct and cross examination, and indifferent to the labyrinth of evidence rules keeping this fact in, that fact out. I have often marveled that the juror who can cast a vote for the person who will hold the nuclear trigger is somehow incapable of assessing the veracity and weight of various pieces of evidence in civil trials. Oh well...

And so it goes, as Kurt Vonnegut would say. Thirty years of mediation as a party's lawyer

and invariably thinking to myself "I could do better than this guy". Forty hours of mediation training and now ... well, I hope that's the case. In any case I am jazzed - excited to begin a new facet of my career, a new role. Corny as it may sound, I am eager to help people resolve their own disputes, take control of their own futures, wrest control from indifferent juries and busy judges. Effecting justice. Making a difference. Does that sound familiar? Does it sound like what you thought about and aspired to in law school?

Me, too.


About the Author: Mike Christiansen is a founder of Mastriana & Christiansen, PA and has practiced in Fort Lauderdale since 1979


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Crime Victims' Institute

<http://www.crimevictimsinstitute.org/>

Originally created in 1995 by the Texas State Legislature, and moved eight years later from the office of the Attorney General to Sam Houston State University, the Crime Victims' Institute provides studies of crime victims, online local and national resources for crime victims and links to criminal justice education. The "Publications" available on the site can be accessed on the far left hand side of the menu and include Legislative Briefs, Research Briefs, Survey Reports, and General Information. "Videos", also available on the far left hand side of the menu, include a video entitled "Stalking: Real Fear Real Crime" that is a training tape inspired by a real crime victim. The left hand menu also contains three important categories for all victims: "Victim Compensation", "Victim Impact Statement", and "Victim Rights", which provide links in English and Spanish, as well as victim impact forms.

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Wet-Foot, Dry-Foot: A Misguided Policy

By Ira J. Kurzban

Originally published in Americas Diplomatist Magazine

The television cameras in helicopters picture below what appears to be a bizarre game of water football. Tall, barrel-chested men in uniform are running in the water tackling dazed and exhausted men and women before they can get to the shoreline. The events, however, are not a sport, but a serious, and for some, a deadly political policy of the United States government. The uniform men in the water are officers of the United States Border Patrol or Customs and Border Protection, a branch of the Department of Homeland Security. The people struggling in the water have often made a long trip by boat from Cuba or Haiti and their boats may have capsized or smugglers may have dumped them near the shore and fled. The immigration officers have been instructed by their superiors to prevent the struggling people in the water from stepping on the U.S. shore. If they can prevent them from physically touching the beach or shoreline, U.S. policy permits immigration authorities to send them back to their own country without a hearing. If they reach shore, they will be entitled to a hearing on their claims for political asylum or other immigration benefits such as the Cuban Adjustment Act. This water spectacle has been dubbed the "wet-foot, dry-foot" policy.

The origin of the wet-foot, dry-foot policy is more obscure. The policy is, in part, a reaction to Cuban and Haitian migration to the United States in the 1980s and 1990s, and the treatment of those Cubans and Haitians during the Mariel boatlift in 1980 and the exodus of Haitians during the Duvalier dictatorship and the coup d'etat against President Jean Bertrand Aristide. The Cuban aspect of this policy is also related to the Cuban Adjustment Act of 1966, Pub. L. 89-732. This law provides that a Cuban citizen who has been inspected and admitted or paroled into the United States may become a lawful permanent resident of the U.S. if he or she is physically present in the United States for more than a year and is otherwise admissible. Traditionally, Cubans who left their country by boat have landed on U.S. shores and have been paroled into the United States, thereby making them eligible for the Cuban Adjustment Act. Haitian citizens, although never accorded the benefits of the Cuban Adjustment Act, have the right to claim political asylum if they land on the shores of the United

States.

Traditionally, a Haitian or Cuban who was within the three mile territorial limit of the United States had his or her boat towed into the country and processed for immigration purposes. The territorial limits were expanded in 1988 when President Reagan issued a proclamation extending U.S. territorial waters to 12 miles. Proclamation 5928 (Dec. 27, 1988), 54 Fed. Reg. 777 (Jan. 9, 1989). Although the U.S. government had an open arms policy toward Cubans, their fellow citizens of the Caribbean from Haiti were not welcome and were often incarcerated while awaiting their political asylum hearings. Nevertheless, they were permitted to have a hearing before an immigration judge on their claims for asylum if their boats were stopped within the territorial limit because they were brought to land.

The policy of transporting Haitians and Cubans within territorial limits to land began to erode in 1981 when a bilateral agreement was signed between the U.S. and Haiti. In that year, the United States government entered into an agreement with the Duvalier dictatorship to permit U.S. ships to interdict Haitian boats fleeing the island. Haitians would henceforth be returned to their country without a full hearing on their claims for political asylum, if their boats were stopped at sea. Although the agreement called for a cursory hearing before an asylum officer on-board a U.S. ship, as they were transporting the refugees back to Haiti, the process was recognized as a sham and virtually no Haitians were brought to the U.S. after being interdicted. This agreement was ended after Jean Bertrand Aristide became Haiti's first democratically elected president, but the U.S. has ignored the termination of the agreement and continues to return Haitians who are interdicted.

In 1995 a similar agreement was entered into with the government of Cuba. The Cuba-United States: Joint Statement on Normalization of Migration was issued on May 2, 1995. This agreement provided that: "Effective immediately, Cuban migrants intercepted at sea by the United States and attempting to enter the United States will be taken to Cuba." This agreement remains in effect and Cubans who are intercepted at sea are returned to Cuba.

In both cases, a Cuban or Haitian

interdicted "at sea" will be returned to his or her country without a full hearing on his claim for asylum or without, in the case of Cubans, obtaining the benefit of the Cuban Adjustment Act. The question remained, however, whether the "at sea" provision would be interpreted to include the 12-mile territorial waters of the United States.

The answer was provided in a legal memorandum to the Attorney General by the Office of Legal Counsel of the Department of Justice. Titled "Immigration Consequences of Undocumented Aliens Arrival in United States Territorial Waters," the October 13, 1993 memorandum concluded that any person interdicted within the 12-mile territorial limits was not entitled to a hearing before an immigration judge and therefore would not be brought to the U.S. Ironically, the memorandum discusses the opposition to its position by the General Counsel for the then Immigration and Naturalization Service who concluded that persons within the 12-mile limit were clearly entitled to a hearing before an immigration judge where they could raise a political asylum claim. The Legal Counsel's position, however, was bolstered by a decision in the United States Supreme Court several months before. In *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), the Court determined that neither the immigration statutes, nor the refoulement provision (Article 33) of the United Nations Convention and Protocol Relating to the Status of Refugees, prevented the interdiction and return of Haitians in international waters to Haiti, without the benefit of a hearing on their claims for political asylum. The Legal Counsel made extensive reference to this decision. He then took the decision one step further by arguing that its reasoning applied to persons within the territorial limits of the United States who had not reached the shoreline.

The result of this misguided policy has turned U.S. policy into a cat-and-mouse game of whether a Haitian or Cuban can touch the U.S. shoreline before being tagged by the immigration authorities. The policy reached its nadir in 1996 when a boat of Cuban migrants landed on the famed Seven Mile Bridge in the Florida Keys. The Cubans stood for hours on a portion of the bridge that was unconnected to land. The U.S. Coast Guard determined that landing on the moorings of the Seven Mile Bridge was not U.S. territory for purposes of the Immigration and Nationality Act. The Cubans had "wet feet" the Coast Guard determined, because that part of the bridge was

unconnected to land. A federal court disagreed and found that the structure was not made to assist immigrants to reach U.S. shores and that the bridge was U.S. land. *Movimiento Democracia In. v. Chertoff*, 417 F.Supp.2d 1343 (S.D. Fla. 2006). The Cubans were taken back to Cuba before the judge entered his order and efforts were made for many months to obtain their return to the U.S.

The legal issues aside, the wet-foot, dry-foot policy is bad public policy. Running down refugees in the water solely to prevent them from touching U.S. soil, so that we may send them back to the country they are fleeing, turns border enforcement into an international spectacle. The image of U.S. officers tackling hungry, dazed and exhausted people in the water, solely to prevent them from stepping on the U.S. shore, degrades the national image of the United States as a haven for freedom and opportunity. A more reasoned and nuance policy would allow those who are stopped within the former three mile territorial limit to be brought to the United States as they were previously. The number of boats that are caught within the three mile limit are small in comparison to those stopped beyond that limit, as the U.S. Coast Guard has cutters stationed in the Windward Passage between Haiti, Cuba and the United States. The ability of refugees from other countries to stand before an impartial immigration judge and plead their cases enhances the rule of law and the U.S. government's position as a world leader. Other safeguards may be put in place to ensure the Haitians and Cubans receive a fair, expeditious hearing, and that they are removed if they do not qualify. The solution however does not lie in tossing people back into the hands of those they fled prior to giving them a fair hearing. Just as the Obama Administration has moved forward to close Guantanamo, so should it end the wet-foot, dry-foot policy and restore confidence in the U.S. as a moral leader and legal supporter of the rights of refugees everywhere.

Mr. Kurzban is the past national president of the American Immigration Lawyers Association; the author of Kurzban's Immigration Law Sourcebook, and a partner in the Miami firm of Kurzban, Kurzban, Weinger and Tetzeli, P.A.

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THE BROWARD COUNTY HISPANIC BAR ASSOCIATION recently celebrated its 20th Anniversary with an installation gala featuring keynote speaker Justice Jorge Labarga, Supreme Court of Florida. This past year, the Broward County Hispanic Bar donated over \$26K to outstanding nonprofit organizations serving the underprivileged such as Unity 4 Teens, Pace Center for Girls, The Pantry of Broward, J.P. Taravella High School Marching Band, Neighbors 4 Neighbors, Jewish Federation of Broward County, and the Marlins Community Foundation. The Broward County Hispanic Bar also awarded \$10K in scholarships to deserving law school students. (Pictured from left: Juan Carlos Arias, outgoing president of the Broward County Hispanic Bar; Justice and Mrs. Labarga; and Carmen J. Cuetos, incoming president of the Broward County Hispanic Bar.)

Broward County Construction Lawyer's Committee volunteering at Habitat for Humanity, June 20, 2009

Left to right: Heather Gilbert, Randall Gilbert, Esq. (president), Bryce Gilbert, Esq. Lawrence Telfort, Maria Perez (new habitat for humanity homeowner), Robert Zelmer, Diane Zelmer, Esq., and Brian Wolf, Esq. (past president).



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Honorable O. Edgar Williams, Jr. has wide experience in all phases of commercial litigation and is available for arbitration and certified for Circuit Court mediation and Federal Court mediation. He graduated from the University of Florida (B.A. - 1949)(J.D. 1950). He served as Court of Record Judge (1960-63), Circuit Judge (1963-70) and Senior Circuit Judge (1999-2006). Judge Williams has been a **Qualified Arbitrator and Certified Circuit Court Mediator** since 1994.

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BCBA Annual Meeting and Installation Dinner, June 11th Photo Gallery

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RECENT DEVELOPMENTS IN THE LAW

by Nancy Little Hoffmann



1. Arbitration/Waiver Greentree Servicing, LLC v. McLeod, 34 Fla. L. Weekly D1311 (Fla. 2nd DCA June 26, 2009).

In an en banc opinion, the Second District receded from a prior decision and held that a party waived arbitration by serving multiple discovery requests relating to the merits of the pending litigation. After examining authority from other DCAs, the court concluded that a party's participation in discovery related to the merits is activity that is "generally inconsistent with arbitration" and will generally be sufficient to support a finding that the party has waived its right to arbitration.

2. Attorney's Fees/Non-Binding Arbitration Cooper v. Marriot International, Inc., 34 Fla. L. Weekly D1344 (Fla. 4th DCA July 1, 2009).

In a two-to-one opinion, the Fourth District held that a party who incurred attorney's fees during court-ordered, non-binding arbitration, conducted pursuant to section 44.103, Fla.Stats., is not required to plead entitlement to attorney's fees in order to recover them. Likening the right to such fees to fee requests pursuant to section 57.105 and to offers of judgment, the majority concluded that it would be extremely difficult, if not impossible, for a party to plead in good faith its entitlement to fees, since it is only after the case has been terminated that a party can determine whether the fee-shifting provision of section 44.103 has become effective.

3. Interference with Business Relationship/Defamation Palm Beach County Health Care Dist. v. Prof. Medical Education, Inc., 34 Fla. L. Weekly D1379 (Fla. 4th DCA July 8, 2009).

The Fourth District set aside a judgment for damages based on a jury verdict and directed that a judgment be entered in favor of the defendant, in an action for interference with a business relationship, defamation, and conspiracy to commit defamation and tortious interference. The court concluded that the defendant District had absolute immunity as to the defamation claim. As to the tortious interference claim, the court held that the District's "interference" was not unjustified, which is a required element of that tort; the District had a supervisory interest in the contract since it was the ultimate source of funds for the contract. The court further noted that allegations of malice did not transform the District's actions, otherwise legal, into one for unjustified interference, because "it was not a stranger to the crucial business relationships."

4. Judges/Mandamus Pleus v. Crist, 34 Fla. L. Weekly S389 (Fla. July 2, 2009).

The supreme court granted the petition for mandamus filed by a retiring Fifth District judge, seeking to require Governor Crist to appoint a replacement judge to fill the vacancy created by his retirement. The court held that the governor did not have the right to reject the certified list of nominees, that he was required by

statute to make an appointment within 60 days of receiving the certified list, and that the governor does not have the discretion to refuse or postpone making an appointment.

5. Medical Negligence/Constitutionality of Amendment 7 Columbia Hospital Corporation of S. Broward v. Fain, 34 Fla. L. Weekly D1223 (Fla. 4th DCA June 17, 2009).

Denying a hospital's petition for certiorari seeking to quash a discovery order, the Fourth District upheld the constitutionality of Amendment 7 and rejected the hospital's constitutional challenge based on federal preemption and impairment of contracts. The Fourth District concluded that the trial court had not departed from the essential requirements of law in allowing the estate of a patient, who died after falling from the hospital bed, to obtain all adverse medical incident reports involving falls of patients within the last five years.

6. Real Property/Vendor's Lien Golden v. Woodward, 34 Fla. L. Weekly D1281 (Fla. 1st DCA June 24, 2009).

Following a 1936 supreme court case, the First District held that where a seller of real property had executed a warranty deed prior to receiving the full purchase price, upon the seller's death his estate was entitled to a vendor's lien for the unpaid amount. The court rejected arguments that a vendor's lien had not been specifically sought in the complaint, since the facts alleged sufficiently stated a cause of action for unjust enrichment.

7. Statute of Limitations/Action for Deficiency Arvelo v. Park Finance of Broward, Inc., 34 Fla. L. Weekly D1297 (Fla. 3rd DCA June 24, 2009).

Five years after repossessing a consumer's automobile, the finance company filed an action against her for a deficiency judgment, and thereafter convinced both the county court and the circuit court on appeal that the statute of limitations had not commenced until the repossession and sale. Quashing the circuit appellate opinion, the Third District held that the five year statute of limitations began when the loan defaulted and all sums due were automatically accelerated, and the finance company's action was thus time barred. The opinion concluded that "a creditor holding a security interest in personal property can and should initiate its various remedies within the generous five-year period allowed by our Legislature."

Nancy Little Hoffmann is a Board-Certified Appellate Lawyer practicing in the Fort Lauderdale area since 1974. She may be contacted at 954-771-0606 or by e-mail at NLHappeals@aol.com.

Broward County Bar Association Annual Meeting and Installation Dinner, June 11, 2009



Broward County Bar Association Outgoing President Christopher M. "Chris" Neilson with J. David Bogenschutz, Lynn Futch Professionalism Award recipient.



Chris Neilson with 17th Judicial Circuit Chief Judge Victor Tobin, recipient of the Stephen R. Booher Award.



Chris Neilson presenting the President's Award to Broward County Bar Association's President-Elect, Bruce Weihe.



Chris Neilson with Angel Petti Rosenberg, recipient of the 2009 Committee Chair of the Year Award.



Broward County Bar Association Executive Director Art Goldberg with William G. Crawford, Jr., recipient of the Executive Director's Award.



Broward County Bar Association Young Lawyers Section Board of Directors being sworn in by 17th Judicial Circuit Chief Judge Victor Tobin,



Chris Neilson with Juliette Lippman, recipient of the Joseph J. Carter Professionalism Award. From left to right: Shari (Mrs. Joseph) Carter, James Cobb Jr., Chair of the BCBA Professionalism Committee, Juliette Lippman, and Chris Neilson.



Scott Chitoff, Outgoing president of BCBA's Young Lawyers Section with Juan Carlos Arias, Outgoing President of the Broward County Hispanic Bar Association, Recipient of the Young Lawyers Section Paul May Professionalism Award.



Michael B. Gilden, incoming President of the Broward County Bar Association Young Lawyers Section with Scott Chitoff.



Carlos Llorente, Incoming President of the Broward County Bar Association, with Chris Neilson, Outgoing President of the Broward County Bar Association.

Broward County Bar Association staff with incoming President Carlos M. Llorente. From left to right: Mike Ortiz, Art Goldberg - Broward County Bar Association Executive Director, Anya Rot, Carlos Llorente, Bernard Morin, Tish Guiffreda, Lyssette Quiles-Lopez.