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FOCUS

President's Message

Carlos I. Cardelle

Hello ACC South Florida Members,

I hope you have been enjoying your summer months with your loved ones and friends. Summer often gives us an opportunity to slow down,

take time off from the office and simply enjoy family time. I sincerely hope you had the chance – my family and I did! Traveling through Spain this summer was a wonderful experience – meeting extended family for the first time and watching my daughter explore (sights and foods) was exceptional. Life is captured in moments and these moments turn into the memories we never forget.

As much as we enjoyed our summer vacation in Spain, our ACC South Florida Chapter did not take any time off – we were quite busy! Since our last newsletter our amazing Sponsors treated us to some fun-filled events: Boies Schiller hosted a great wine testing event at the Miami Culinary Institute; Ford Harrison treated us to a “Beers, Burger & Barristers” event at NOBO Brewing Company in



Carlos Cardelle and family in San Sebastian, Spain

Palm Beach County; and we honored all of you, our members, at our annual Member Appreciation Event on July 31st in Ft. Lauderdale with dinner, drinks and a fascinating speaker, Debbie

Epstein Henry and her popular presentation, “Striking the Self-Promotion Balance, Building Relationships & Mastering the Art of the Ask.”

As we turn our attention to the Fall, we cannot wait for our 9th Annual CLE on September 27th celebrating the in-house counsel – *SUPERCOUNSELORS: Protectors of the Company!* Our entire Board, CLE committee and Executive Director have all been working diligently to make sure this year's event will be the best CLE yet! Please make sure you register and attend. Our CLE event will be followed by more social events and community service projects – so please stay tuned. You can always check our website <https://www.acc.com/chapters/sfl> for our calendar of events. I hope to see many of you at our CLE on September 27th. As always, please reach out to me, our Executive Director,

Christina Kim or Membership Chair, Alan Kramer if you have any event ideas.

See you soon!

Carlos I. Cardelle
President, ACC South Florida Chapter

ACC South Florida Upcoming Events

September 27, 2018

9th Annual CLE Conference -
SUPERCOUNSELORS: Protectors of the Company - Marriott Harbor Beach Resort & Spa

October 11, 2018

Art & Food Tour in Wynwood
Sponsored by Littler

November 2018

Social Event
Sponsored by Rumberger Kirk & Caldwell

CLE Workshop
Sponsored by Cozen O'Connor

Street Law Brings Together ACC Chapters and Local Schools for Legal Learning

The lack of diversity in the legal profession is not a new issue, but Street Law, ACC, the ACC Foundation, and ACC members are working to put the issue behind us once and for all.

The Corporate Legal Diversity Pipeline Program, a national partnership between Street Law and ACC, encourages diverse students to pursue careers in law. The hope is to foster a next generation of more diverse lawyers, bringing new and needed perspectives to the legal profession. Students gain exposure to the law and have the opportunity to receive counseling on the steps they can take to pursue a legal career. Corporate law departments share their knowledge and make connections with up-and-coming students. The hope is that these connections will serve as a pipeline for future diverse legal leaders.

The four tenets of the Corporate Legal Diversity Pipeline Program are: 1) training, 2) classroom visits, 3) a conference at a corporate legal department, and 4) extensions (mentoring, internships, etc.). While more than a dozen ACC chapters currently participate, ACC headquarters also undertook this initiative in the spring. As long champions of this program, it was wonderful for ACC staff to interact with students directly.

In late March, students from Potomac High School in Oxon Hill, Maryland, visited the new ACC national headquarters office to participate in their class of the ACC/Street Law Corporate Legal Diversity Pipeline Program. All of the students are members of the Law, Education, and Public Service Academy at their school.

Each of the legal volunteers spoke about how he or she became a lawyer. The students were able to hear first-hand that it's truly achievable if that is their goal. It's certainly hard to study, prepare, and be accepted into college and then law school. But it is attainable with planning, mentoring, and access to the right role models.

Much of the day was spent on legal simulations, interactive ways for the

students to learn about the practice of law. This included discussing and practicing how to review and analyze facts in a case, and how to present before a judge. The volunteers also covered other public speaking skills, like delivering information calmly and confidently.

Many of the students only knew about lawyers from what they'd seen on TV, so time with real lawyers provided them with a more realistic understanding of a legal career. It's not always as exciting as what's on TV, but it's also a lot more approachable. One student shared that he'd previously thought that all lawyers were always "aggressive," but the time spent with ACC showed that lawyers don't have to be aggressive – or at least that they are much more than just that!

Our program provided the opportunity to teach this class of students more about the law in a few days than they'd likely learned in their entire lives. It was a memorable, fulfilling day for both the students and all of the volunteer leaders.

More than a dozen ACC chapters are active in Street Law nationwide, and the program is now 17 years old. This year, we expect that approximately 5,300 students will participate in the Corporate Legal Diversity Pipeline Program through partnerships with more than 70 companies, law firms, and ACC chapters. Some companies that participate include Coca-Cola, Merck, Verizon, Nationwide, HP, GE, Turner, and Capital One. It's an opportunity for the entire law department, from attorneys, to paralegals, to administrative staff, to collaborate and share their knowledge with the next generation of legal and business professionals.

Volunteer leaders participate in Street Law's half-day training before they begin the program. Street Law helps the leaders to select topics that will interest the students and highlight the volunteers' expertise. The program at ACC focused on immigration and cyberbullying – legal

topics in the news today and relevant to the students' daily lives. Other topics frequently covered include: intellectual property, contracts, torts, alternative dispute resolution, employment law, and environmental law.

In addition to classroom learning on civil law and legal careers, the students truly enjoy the experiential components – seeing what a corporate law department looks like, observing the interactions between business colleagues, and even hearing about a typical "day in the life." They come away with a stronger interest in and knowledge of the law, with many new role models.

One of the highlights of the Street Law program is that many corporate law departments stay connected with the most promising students. In fact, these top students may return for another job shadow day, be asked to apply for internships or scholarships, or participate in mentoring. In many cases, it's the start of a strong relationship between the company and the students, a true pipeline for new, diverse legal talent.

If you're curious about starting your own Street Law program on behalf of your ACC chapter, you may find further encouragement in these results: In the post-program survey, between 67 percent and 75 percent (on average) of the participating students said they are more interested in pursuing a legal career than they were before the program. For the program at ACC, the Potomac High students were no exception. Seventy percent said they were more interested in pursuing a legal career than they had been prior to the Street Law/ACC program.

The hope is that more ACC chapters will participate in this worthwhile program. For more information, visit www.streetlaw.org. We are constantly inspired by the in-house community's efforts to give back and we are pleased to partner with so many of our volunteer leaders to increase the pipeline of diverse students entering the legal profession.

ACC News

2018 ACC Annual Meeting: Rates Increase After September 20

The 2018 ACC Annual Meeting, the world's largest gathering of in-house counsel, is scheduled for October 21-24 in Austin, TX. In less than three days you can choose from over 100 substantive sessions to fulfill your annual CLE/CPD requirements, meet leading legal service providers and network with your in-house peers from around the world. Group discounts are available. Visit am.acc.com for more information.

Drive Success with Business Education for In-house Counsel

To become a trusted advisor for business executives, it's imperative for in-house counsel to understand the business operations of your company. Attend business education courses offered by ACC and the Boston University Questrom School of Business to learn critical business disciplines and earn valuable CLE credits:

- Mini MBA for In-house Counsel, September 12-14, and November 7-9
- Finance and Accounting for In-house Counsel, September 5-7
- Project Management for in-house Law Department, November 14-15

Learn more and register at www.acc.com/businessedu.

ACC Law Department Leadership: A Transformational Leadership Program Presented by ACC and Queen's University

If you are an in-house lawyer looking to develop the transformational leadership behavior to influence, motivate, and inspire

your reports, peers, executives, and other stakeholders around you to move forward, this is the ideal opportunity for you. The program is taking place September 28 in Toronto. Register today at www.acc.com/LDL.

Are You Conducting Diligence on EVERY VENDOR and Third-party that has Access to Your Systems or Data?

Your vendors are now prime targets for data breaches and small vendors can provide easy access for hackers. Even cleaning crews, HVAC vendors, and food distributors, to name a few, can all lead to data breaches, but are often overlooked in the vendor diligence process. ACC's Exclusive third-party due diligence service should be in your arsenal. Visit www.acc.com/VRS for more information.

2018 ACC Global Compensation Report

For companies seeking to stay competitive in the marketplace and lawyers considering career moves, access to detailed compensation data for in-house counsel and legal operations professionals is absolutely essential. Based on responses from more than 5,000 lawyers in corporate legal departments from 65 countries and 39 different industry sectors, this first-ever ACC Global Compensation Report is precisely the resource you need. *Download the free Executive Summary.*

ACC Chief Legal Officers 2018 Survey

The ACC Chief Legal Officers Survey offers an opportunity to get data that supports the imperative for the CLO to report directly to the CEO. Other notable find-

ings include what keeps CLOs up at night, reporting structures, how CLOs view the future of departmental budgets and staffing, litigation and contract workload, and where data breaches and regulatory issues have the greatest impact. Download it today at www.acc.com/closurvey.

2018 ACC Foundation: The State of Cybersecurity Report is now available.

Cybersecurity touches every aspect of consumer and corporate culture and is a chief concern for individuals and corporate leaders. Learn what more than 600 corporate counsel say about their cybersecurity experiences, role, and practices. Download the free executive summary at www.acc.com/cyber.

Thomson Reuters Practical Law Connect is the first-of-its-kind solution that integrates Practical Law legal know-how resources with essential Westlaw legal research. More than 230 Practical Law attorney-editors handpick resources and organize them into our proprietary task-based menus so you can get right to work. *Learn more about Practical Law Connect.*

NAVEX Global helps protect your people, reputation, and bottom line through a comprehensive suite of ethics and compliance software, consulting, and services. These include whistleblower hotlines, case management software, online training, policy management, and advisory services. ACC members receive an exclusive 10 percent discount off of their first year subscription fee when they purchase one of the Online Training Compliance courses. For More Information, visit <http://trust.navexglobal.com/ACC> or call +1.866.297.0224

Welcome New Members!

Renay F. Bloom

In-house Counsel, Dr. Morse's Herbal Health Club, LLC, Murdock

Carlos E. Nunez

Associate Counsel, American Express, Doral

Amalia Papadimitriou

Attorney, D.R. Horton, Inc., Coconut Creek

Kellyn Muller

General Counsel, International Materials, Inc., Boca Raton

Lucas R. Kurtz

President of Legal Affairs, United States Sugar Corporation, Clewiston

Kevin D Pardinias

General Counsel, UniPhy ACO, LLC, Miami

Claudia Oliva

Director of Corporate and Legal Affairs, Areas USA, Miami

Past Events

Boies Schiller Flexner Wine Tasting Event

Boies Schiller Flexner sponsored a wine tasting social on June 21st at the Miami Culinary Institute. Experts from the Florida Wine Academy gave a masters class to ACC South Florida on wines from around the world.



Ford Harrison Brewery Tour in Boynton Beach



ACC South Florida members joined Ford

Harrison at NOBO Brewery in Boynton Beach to sample of NOBO's craft beers. Members toured the NOBO brewery, tasted beers and enjoyed beef, shrimp and veggie sliders prepared by Tucker Duke's Barbecue.



Jackson Lewis and ACC South Florida Mix It Up

Jackson Lewis mixed it up with ACC South Florida at Hugh's Culinary in Oakland Park. Attorneys of Jackson Lewis and ACC South Florida members had an interactive evening of hand-crafted libations, delicious food and new connections as a master chef and mixologist coached them through preparing their own refreshments.

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15 Steps to Successful Corporate Entity Management A Professional's Guide to Governance and Compliance

Careful management of legal entity portfolios is essential to successfully identify, execute, and monitor necessary governance and compliance activities, ranging from staying on top of filing dates and statutory updates, to reacting to changes in jurisdictional rules.

Inconsistent or incomplete entity management can increase the risk of loss of good standing and the costly reinstatement fees that go along with it. Poor entity management can also threaten the success of transactions like mergers and acquisitions.

In this white paper, we'll provide an overview of the steps required to properly manage a legal entity portfolio. Topics include entity formation, entity record keeping, qualification, business licenses, Uniform Commercial Code (UCC) considerations, and entity dissolution.

Careful and comprehensive entity management is critical to ensure that the entities in a portfolio are kept in good standing.

1. Define the business objectives

Before tackling the task of entity management, it is important to clearly define the business objectives. This will help determine your next steps.

For example, are you forming a new entity? Are you trying to determine whether to qualify to do business in another state? Are you preparing for a merger or an acquisition?

Clearly defining plans will help to drive next steps, such as choosing an entity type, determining the need for qualification, or outlining the compliance tasks needed to prepare for a merger or acquisition.

2. Choose an entity type and jurisdiction

If you are forming a new entity, use the business objectives to determine the entity type—corporation, limited liability company, partnership, etc.—that best suits your needs. Ask these questions to help determine the appropriate entity type:

- Who will own the business?
- Who will make management decisions?
- Will the owner assume personal liability for any debt incurred by the business?
- Are there any restrictions or characteristics of a particular entity type that could impact the business activity? (For example, certain entity types may give rise to double taxation.)

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Once you have selected the entity type that is best suited for your business activity, select the jurisdiction(s) where the entity will do business. When choosing a jurisdiction, keep in mind such factors as where the company is located, where its customers are located, and whether it may be best served by a particular jurisdiction because of tax law or corporate governance regulations.

It's important to understand the tax implications of your choice of entity and jurisdiction. Your accounting or tax department can help identify tax obligations and advantages.

The shareholders will need to approve the entity formation. It may also be necessary to escrow funds if you are using the entity for transactional purposes.

3. Select a registered agent

You will need to name a registered agent or designate a registered office address for your entity. A registered agent is a business or individual that you appoint to receive service of process (SOP) and other state correspondence on behalf of the company. Most states require entities to name a registered agent upon formation, and require you to provide the name and address of the agent on the articles of incorporation/formation.

If your business is likely to require significant online marketing or supply chain management, you may also want to choose an accredited domain name registrar to officially register your website URL. Look for a registrar that is accredited by the Internet Corporation for Assigned Names and Numbers (ICANN).

4. Check for name availability

Conduct a corporate name availability search in the business name registry in the jurisdiction you have chosen to confirm that your company name is available.

If a company name is already registered in your jurisdiction, or if the state believes that the name could be confused with a name that is already registered, your entity filing will be rejected and you will need to select a new name and resubmit the filing.

It is also a good idea to check the availability of domain names and trademarks related to your business objectives. UCC and real property searches can help determine domain name availability. Your registered agent service provider can assist with these searches.

5. Reserve a corporate name

Consider filing a name reservation to protect your desired name for up to 365 days. Although not a requirement for formation, this step could save you time and trouble later.

If you find that your name is not available, you may be able to get consent from your state to use a similar name, or you may need to choose a fictitious name.

Be aware of naming restrictions in your jurisdiction(s). Most states restrict the use of specific words such as bank, finance, trust, cooperative, credit union, insurance, or savings, and instead require a "corporate indicator" in the name, like Inc. or LLC.

Once you have filed formation documents, consider protecting your company name in foreign state jurisdictions by checking name availability and reserving your name in those jurisdictions too.

6. Obtain supporting documents

Find out which supporting documents your jurisdiction requires for formation/qualification. For example, you may need to obtain such documents as a certificate of good standing or its equivalent, certified copies, a tax status certificate, a "bring-down" letter, a legalized authenticated document, and an apostille.

If your company decides to do business outside of its state of formation, you will be required to present a certificate of good standing from your home state as evidence of your company's status in order to qualify to do business in foreign states.

During closings, you may need to provide lenders with good standing certificates.



7. File formation/qualification documents

Once you have confirmed name availability and gathered the necessary documents, you are ready to prepare and file articles of incorporation/formation, or qualification documents.

Be sure to follow your jurisdiction's guidelines carefully so that your filing is received and approved timely.

You will also need to prepare and file industry-specific licenses and supporting documentation with the necessary governing authorities at the federal, state, county, and municipal levels. There are more than 160,000 jurisdictions in the United States that issue licenses, and each has its own rules and regulations, making it complicated and time consuming to determine which licenses you need to operate your business. Your service provider can help identify and expedite the licenses and permits needed.

Plan to register relevant domain names and trademarks and file a UCC financing statement at the time you form your entity.

NOTE: It is critical to develop and document a process for preparing, completing, and tracking your company's filings and renewals, including the responsible parties and required resources.

8. Register for an EIN number

You will need to obtain a federal Employer Identification Number (EIN), also known as a Federal Tax Identification Number, from the Internal Revenue Service.

Your jurisdiction may also require a state tax ID number for reporting state sales taxes and other purposes. Check with the state's corporate division to learn whether you need additional state or local tax ID numbers.

9. Organize foundational documents

It is essential to create and organize all foundational documents for each entity formed, and to perform other corporate governance activities to make sure that the entity remains in good standing.

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Tasks include:

- Draft the entity bylaws/operating agreement
- Create stock/membership certificates
- Draft resolutions for corporate actions, banking resolutions, delegation of authority, intercompany agreements
- Name officers and directors
- Appoint independent directors

Use standardized formats for all materials. This will simplify your ongoing management responsibilities.

10. Maintain corporate governance data

Conduct periodic or annual shareholder and board meetings as required by your jurisdiction and your entity's governing documents. Establish a system to record, distribute, and archive corporate activities and documents such as minutes, consents, capital contributions, and dividends.

Meeting compliance and comprehensive recording keeping demonstrate that proper entity procedures have been followed, which is critical to keeping your company in good standing and the corporate veil intact.

Entity record keeping has become increasingly complex and laborious as the rules and regulations impacting corporate governance have increased and become more complex. An entity management solution can be invaluable in helping you manage and maintain your corporate governance data.

11. Monitor your corporate entity portfolio

Establish procedures to monitor your corporate entity portfolio for status changes, including tracking your domain renewal deadlines.

You should also carefully monitor your UCC portfolio for changes in financing statement status, debtor financing, debtor corporate status, and debtor bankruptcy, as changes may require additional action to protect assets or ensure that financing contracts remain in good standing.

12. Complete annual filings

Be sure to complete all annual filings correctly and timely, and pay annual report fees, renewal fees, and franchise taxes on time.

Annual filings may include:

- Annual reports
- Corporate annual tax returns
- Licensing renewals
- UCC financing statement continuations
- Domain name renewals

Many companies outsource this highly administrative renewal process, allowing their employees to focus on more substantive work.

13. Update corporate documents

Changes to your entity's structure must be approved by the board. Decisions should be recorded using resolutions or written consent, and the appropriate filings, such as corporate amendments or amended certificates of authority, should be filed in the entity's jurisdiction.

Likewise, be sure to register additional domains or trademarks as they are developed for use by the company, and update UCC financing statements in the case of continuations, rights assignment, termination, releases, or to add a party to a statement.

14. Dissolve an entity or withdraw from a jurisdiction

If you decide to dissolve an entity or withdraw an entity from a jurisdiction, you must follow the formal legal steps required to "wind up" the entity. Winding up typically involves these steps:

- File tax returns
- Obtain a tax clearance
- File voluntary dissolution or withdrawal documents
- Retire domain names and trademarks
- Terminate UCC financing statements

Internationally, the process of dissolving or withdrawing an entity can be much more complex. Be sure to research the requirements for the dissolution process

in the country(ies) where your entity operates or does business.

15. Manage entity documents and records

Each of the tasks outlined in this paper requires proper management and archival of documents and records in a centralized and secure location.

Designate and train the parties responsible for recordkeeping, and establish clear protocols for day-to-day management of all legal entities and legal eSecurity. A clear chain of command, as well as comprehensive and secure recordkeeping, are critical to maintaining your entity in good standing.

Conclusion

Proper entity management requires careful planning and continued diligence to ensure that entities remain in good standing from formation through dissolution.

Implementation of an entity management system is sound practice to maintain your entities' data and documents.

About CSC

CSC Entity ManagementSM is the industry's most capable entity management system for receiving, indexing, and safeguarding all of your corporate entity data. Every time you conduct a corporate transaction with CSC®—from annual report filings and business license renewals to service of process—your entity and jurisdictional data are automatically added to your online portfolio.

You'll get a clear view of your company-wide governance and compliance activities, as well as valuable insight into the health and status of all your entities.

CSC® provides knowledge-based solutions for every phase of the business life cycle, helping businesses form entities, maintain compliance, execute transaction work, and support real estate, M&A, and other corporate transactions in hundreds of U.S. and international jurisdictions.

We are the unwavering partner for 90% of the Fortune 500®, nearly 10,000 law firms, and more than 3,000 financial organizations. Headquartered in Wilmington, Delaware, USA, since 1899, we are a global company capable of doing business wherever our clients are—and we accomplish that by employing experts in every business we serve.

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Supreme Court: Class Action Waivers in Employment Arbitration Agreements Do Not Violate Federal Labor Law

By Jeffrey Schwartz, Daniel D. Schudroff, Collin O'Connor Udell, Samia M. Kirmani, Jenna Rinehart Rassif, Jennifer A. Schwartz, Sherry L. Swieca, Stephanie L. Goutos

Class action waivers in employment arbitration agreements are enforceable under the Federal Arbitration Act (FAA), the U.S. Supreme Court has held in a much-anticipated decision in three critical cases. *Epic Systems Corp. v. Lewis*, No. 16-285; *Ernst & Young LLP et al. v. Morris et al.*, No. 16-300; *National Labor Relations Board v. Murphy Oil USA, Inc., et al.*, No. 16-307 (May 21, 2018).

The Supreme Court's decision resolves the circuit split on whether class or collective action waivers contained in employment arbitration agreements violate the National Labor Relations Act (NLRA). In a 5-4 decision authored by Justice Neil Gorsuch, the Court held that the FAA states that arbitration agreements providing for individualized proceedings are enforceable and neither the FAA nor the NLRA require otherwise. Chief Justice John Roberts and Justices Anthony Kennedy, Clarence Thomas, and Samuel Alito joined in that decision.

Background

Arbitration agreements requiring employees to pursue work-related claims in arbitration, rather than in court, have long been enforced pursuant to the FAA. However, in 2013, the National Labor Relations Board (NLRB) ruled that employers violate the NLRA when they require employees, as a condition of employment, to assent to an agreement to resolve work-related disputes pursuant to an arbitration provision containing a class or collective action waiver.

The U.S. Court of Appeals for the Fifth Circuit rejected the NLRB's rulings, first in *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013), and, subsequently, in *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015). The Fifth Circuit, thereafter, was joined by the U.S. Courts of Appeals for the Second and Eighth Circuits, which enforced arbitration agreements requiring employees

to submit their employment claims to individual, as opposed to class or collective, arbitration. (For more on *D.R. Horton*, see our article, [Employer's Mandatory Arbitration Clause Waiving Employee's Right to Sue in Court Upheld.](#))

The U.S. Court of Appeals for the Seventh Circuit reached the opposite conclusion on May 26, 2016, thereby creating a circuit split. In *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), the Seventh Circuit held arbitration agreements that prohibit employees from bringing or participating in class or collective actions violate the NLRA. In *Morris v. Ernst & Young*, 834 F.3d 975 (9th Cir. 2016), the Ninth Circuit agreed with the Seventh Circuit and the NLRB. (For more on these decisions, see our articles, [Supreme Court Review Likely After Seventh Circuit Creates Split on Class and Collective Action Waivers under NLRA](#) and [Holding Class Waivers Violate the NLRA, Ninth Circuit Joins Circuit Split.](#))

Given the issue's importance and the requests by both employers and the NLRB to have the Supreme Court decide the issue, it is unsurprising the Supreme Court granted *writs of certiorari* in January 2017 and consolidated all three cases from the Fifth, Seventh, and Ninth Circuits. In the past, Supreme Court's decisions on the enforceability of class action waivers (albeit outside the employment context) were decided by 5-4 and 5-3 votes and were authored by the late-Justice Antonin Scalia. Immediately following his passing, the likelihood of a 4-4 tie was expected, until Justice Gorsuch joined the Court in April 2017.

Moreover, in June 2017, the Office of the Solicitor General, which previously had filed a petition for a *writ of certiorari* on behalf of the NLRB seeking to overturn the Fifth Circuit's decision in *Murphy*

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Oil, reversed course and advised the Supreme Court that it would join

the employers' positions in this case. The NLRB was permitted to represent itself before the Supreme Court, creating the novel scenario where the United States government presented arguments on both sides of this issue.

During the oral argument, Justices Thomas and Gorsuch did not ask any questions. Otherwise, the Justices' questions to counsel can be seen in hindsight as foreshadowing the majority and the dissenters. Chief Justice Roberts and Justices Kennedy and Alito primarily challenged NLRB General Counsel Richard Griffin, while Justices Ginsberg, Breyer, Kagan, and Sotomayor mostly queried the employers' counsel.

Supreme Court's Decision

The comprehensive opinion is succinct in its ultimate conclusion that the NLRA does not trump the FAA. Further, in applying common rules of statutory construction, the Court stated that Section 7 of the NLRA is focused on employees' rights to unionize and engage in collective bargaining and that it does not extend to protecting an employee's right to participate in a class or collective action.

Now, employers can be certain that class or collective action waivers in arbitration agreements do not violate the NLRA.

Jackson Lewis has represented *Murphy Oil* since the inception of the company's case. At the *certiorari* stage, Jackson Lewis attorneys Jeffrey Schwartz, Daniel Schudroff, and Collin O'Connor Udell filed the brief for Respondent *Murphy Oil* in support of granting the petition for a *writ of certiorari*, an unusual procedural posture. Jackson Lewis also assisted on the briefs and in oral argument preparation and was present at the argument.

Ransomware: What lawyers need to know and why.

By Al Saikali and Camila Tobón

Companies of any size can be victims of ransomware, which is malicious software that freezes a computer or network, encrypts all data, and threatens to block access until a ransom is paid. Lawyers, in particular, are prime targets (whether in-house or at a law firm) because they collect, store and rely upon large amounts of sensitive client data. In other words, a cybercriminal is more likely to influence a lawyer to pay the ransom because the lawyer regularly works with information that is of great value to clients. Given that ransomware is a growing threat, it is important that companies and their lawyers understand what ransomware is, how to prevent infection, and what to put in place now to deal with future security incidents.

What is Ransomware?

Ransomware is a type of malicious software – known as malware – that infects a computer or network and restricts access. Ransomware attempts to extort money from victims by alerting the user that their files have been encrypted. The cyber-criminal then demands that a ransom be paid to restore access. The consequences of ransomware include:

- Temporary or permanent loss of sensitive or proprietary information;
- Disruption to operations;
- Financial losses incurred to restore systems and files; and
- Potential harm to an organization's reputation.

How are computers and networks infected?

Like most malware, ransomware is typically spread through phishing emails that contain malicious attachments. There are also reports of “drive-by” ransomware infections which occur when an employee unknowingly visits an infected website and malware is downloaded and installed without their knowledge.

Should I pay the ransom?

No. While payment of the ransom is tempting given the low amounts (less than

\$1,500) often requested by attackers, payment does not address the underlying security vulnerability that may allow the attacker to implement a subsequent ransomware attack. Additionally, payment encourages the attacker to do it again. Instead, retain a security forensic firm to help you identify and remediate the malicious ransomware files and restore your system with a secure backup file.

What two things can I put in place now to protect my company's computer network from ransomware?

Training – The first line of defense against a ransomware infection is a well-trained workforce. Employees should be trained to identify potentially suspicious emails. In addition, policies should be put in place and employees should be trained regarding the types of websites appropriate to visit in the workplace, and the signs that a seemingly safe website may in fact be a repository for malware.

Update Software – The most basic structural protection against infection is to maintain up-to-date anti-virus software and ensure that your operating system and any other software is updated with the latest security patches.

What three things can my company do now to prepare for a ransomware infection?

Incident Response Plan – Every company should have a plan in place to deal with a data security incident. The team that prepares the plan should be led by outside counsel (to maximize potentially applicable privileges) and include key stakeholders from information security, operations, compliance, legal, marketing, and HR. As part of this process, the company should pre-engage outside vendors such as security forensic firms, credit monitoring services, and call center/ mailing services. A tabletop exercise is a good way to test your plan on an annual basis.

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Data Back-Up and Testing – Every company should perform regular back-ups of

all critical information. This will limit the impact of data or system loss and will help expedite the recovery process. Segregate back-ups from the network in multiple places including a file server, a local hard disk, a cloud based backup and/or a remote access center. Further, to minimize the risk of disruption, test back-ups on a regular basis to confirm that the data is restorable with full functionality of the replicated network systems.

Compromise Assessment – Every company should retain an outside security firm, at the direction of counsel, to perform a compromise assessment. These assessments allow the company to know whether they are, have recently been, or are about to be the victim of a cyberattack. The average time from when a hacker penetrates your system to when your information is exfiltrated is 209 days. A compromise assessment minimizes this risk.

Need additional information?

The FTC website (www.ftc.gov) has informative reference materials, including tips on how consumers and business can protect devices and respond to ransomware.

About the Author

Meredith Schultz is counsel at Boies Schiller Flexner LLP in Ft. Lauderdale, Florida. Her practice focuses on antitrust, securities, defamation, and class action litigation.

Ms. Schultz is a leading authority on electronic discovery law and emerging e-discovery trends, and is often consulted by Fortune 500 companies in that capacity. Prior to joining Boies Schiller Flexner LLP, Ms. Schultz attended the University of Chicago Law School and served as a law clerk for the Hon. Donald M. Middlebrooks in the Southern District of Florida.



Top 9 Considerations in Evaluating Arbitration of Employment Disputes

In May, the U.S. Supreme Court ruled that employers may require employees to waive class and collective actions in arbitration clauses in employment agreements without violating the National Labor Relations Act. In *Epic Systems Corp. v. Lewis*, the Supreme Court considered whether a class action waiver in an arbitration agreement was a violation of the National Labor Relations Act's provisions protecting employee concerted activity. In a 5-4 decision, the Court reaffirmed the strength of the Federal Arbitration Act in allowing employers to compel its employees to resolve disputes through arbitration, rather than in court.

The decision has left many employers reassessing their employment agreements and questioning whether they should include an arbitration provision with a class action waiver. Before updating employment agreements to include an arbitration clause, companies should carefully consider the pros and cons surrounding arbitration. Below are the top 9 considerations every company should review (with counsel) before deciding to arbitrate.

- 1. Privacy** – Court proceedings, including the court record, are generally open to the public. This means complaints that contain salacious or damaging allegations will be available for public consumption. By contrast, arbitration proceedings are private, meaning there is no public record of the proceedings.
- 2. Formality** – Traditionally, arbitration proceedings were considered less formal than taking a case through the court system. While arbitration is still a more informal forum than court, over time arbitration proceedings have become more complex, mirroring court rules and procedures. Arbitration associations such as AAA, JAMS, or FINRA now handle the bulk of arbitrations, including employment disputes, and have developed employment-specific rules and procedures to govern arbitration. These rules may include pre-hearing motions, discovery, depositions,

pre-hearing briefs, and post-hearing briefs. The result is a more formal process and, often, a larger bill.

- 3. Speed** – Arbitration proceedings typically proceed to a final hearing faster than a case in the court system. However, depending on your venue (state vs. federal court, for example), this may not always be the case. With arbitration proceedings becoming more formal, arbitration may now take just as long to come to a final hearing.
- 4. Flexibility** – Arbitration proceedings are a creature of contract, meaning you can decide issues such as venue, number of arbitrators, and even limits on discovery in advance. A well-crafted arbitration provision can layout the procedure for selecting an arbitrator, place limits on discovery, and layout a specific timeline for getting to final hearing. You should consult with legal counsel regarding the enforceability of any restrictions you place on the process.
- 5. Limited Discovery** – Even without written limitations, discovery in arbitration is typically more limited than in court. This reduces costs for attorneys' fees, shortens the time needed for discovery before the final hearing, and keeps plaintiffs and their attorneys at bay from "fishing expeditions."
- 6. Avoiding Class Litigation** – As confirmed by the U.S. Supreme Court in May, a class action or collective action waiver in an arbitration provision is valid and enforceable for employment claims. This means a company can avoid class action or collective action litigation in court and instead require each employee to resolve his or her dispute individually.
- 7. Costs** – Arbitrators charge by the hour to review materials, attend hearings, and make a final determination. Additionally, fee-splitting clauses (where each party pays a portion of



the forum fees) have been largely invalidated in employment disputes under the

theory that it prohibits plaintiffs from exercising their substantive legal rights. As a result, the cost burden for arbitration is borne almost exclusively on the employer and the majority of arbitration associations will require this payment up front. While some costs can be minimized through well-crafted provisions (e.g. one arbitrator versus a panel of three and limitations on discovery), arbitration can still become a costly prospect for an employer.

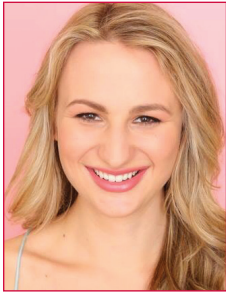
- 8. (Un)predictability** – Many companies prefer arbitration over court because juries are unpredictable. The thinking is typically that an arbitrator, who is often a retired judge or lawyer, will have experience in business and in the law and will be less likely to issue a high award and large punitive damages. However, depending on the selection process of your arbitrator, you may not always get the arbitrator of your dreams and you could still get hit with an unpredictable award.
- 9. Limited Rights to Appeal** – In arbitration, your appellate rights are severely limited. There are very limited grounds under which a court can overturn an arbitration award and, as a matter of practice, it happens only rarely. This limited right to appeal is the biggest risk associated with taking a case to arbitration, rather than court.

After reviewing these considerations, you may decide that arbitration is the right option for your company. Before putting pen to paper, you should consult with legal counsel to discuss enforceable provisions in your jurisdiction and craft an agreement that works best for your company.

ACC Ambassador Program

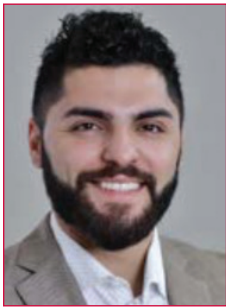
ACC South Florida selected 8 law students for its 2018 Ambassadors Program. The Ambassador Program is a unique networking and educational opportunity that provides rare access to ACC South Florida's in-house counsel membership and its law firm sponsors.

Selected law students, or "ACC South Florida Ambassadors": receive a scholarship in the amount of \$1,000.00; and volunteer at various community service/pro bono events during the year. ACC South Florida Ambassadors are also invited to attend all ACC South Florida events. Below are biographies of three representative ACC South Florida Ambassadors.



Sara Ptachik

Sara Ptachik '19 is pursuing her J.D. at the University of Miami having graduated with a Master of Music (2016) and Bachelor of Music (2014) in Vocal Performance from the Manhattan School of Music. Sara has excelled at UM Law earning the Honorable Theodore Klein Endowed Scholarship, a Dean's Merit Scholarship, and being elected to the Student Bar Association. Sara aspires to build a strong legal career in South Florida is honored to be selected as an ACC South Florida Ambassador.



Sean Fard

Sean Fard holds a degree in Finance and Marketing from the University of Central Florida and is a current JD-MBA candidate at the University of Miami, School of Law. At UM Law, Sean is a member of the Charles C. Papy, Jr., Moot Court Board and the International and Comparative Law Review. During law school, Sean has garnered experience working with in-house counsel for various fortune 500 companies in Banking, Construction, and Insurance industry. His attention to detail, and ability analyze issues and implement unique corrective measures helped him

succeed as both a law student and as a law clerk."



Juliee Conde Medina

Juliee Conde Medina is a second-year law student at University of Miami School of Law. Born and raised in Cali, Colombia, she graduated from Florida State University in International Affairs and Political Science, and worked for two years as a case clerk for the toxic torts and products liability team of Alston & Bird in Atlanta. Last summer, Conde interned with the Honorable William Matthewman of the United States District Court for the Southern District of Florida and worked as a research assistant

for Professor Donna Coker at the University of Miami School of Law. During the 2017-2018 year, she served as the President of the Hispanic Law Students Association, and is the Hispanic National Bar Associate Association Intern for the Compliance and Ethics Section. Conde will be summer associate at the United States Government Accountability Office in Washington D.C.

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Executive Director Letter

Hello Members and Sponsors!

What?! Summer is ending already?! As much as I love summer, I am secretly excited for school to begin, cooler weather to descend on South Florida, pumpkin spiced lattes, AND for our 9th Annual CLE Conference on September 27th! We are all very excited for our Superhero themed conference this year and we've made a few tweaks based on our member feedback to make it the best conference yet. Registration closes September 11th so there is still time to get online and register!

We also have some very fun social events and a workshop planned to wrap up the year so there is still time to come out and experience all great networking and education ACC South Florida has to offer. We hope to see MANY of you in the coming months.

The ACC South Florida Board will begin it's planning for 2019 - if you have any ideas, feedback or would like to be involved in the chapter, please do not hesitate to reach out to myself (southflexec@accglobal.com) or any of our Board members.

Happy Fall!
Christina Kim

Christina Y. Kim
Executive Director, ACC South Florida



Christina Kim on a family vacation in Naples