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FOCUS

President's Message

Kathleen Mac Mahon Crannell

President, Central Florida Chapter of the Association of Corporate Counsel

Greetings fellow members!

I'm sure that you all recognize that the volunteer board of directors devotes considerable time and effort into providing more value to its members. However, the regularly scheduled board meetings generally last only about two hours. That amount of time has consistently proven insufficient to address the challenges the chapter faces. The board recognized the need for strategic, in-depth planning sessions in order to identify the chapter's long-term goals and put the structure in place to achieve them. So, this year, the board decided to meet for a weekend retreat. The retreat provided the perfect opportunity for the board to dig deep into topics and discuss the direction the chapter should take in the upcoming year.

The additional time allowed the board to explore many project ideas, membership goals and initiatives that will allow the leadership to provide the types of services our

members seek. We also had the honor of welcoming ACC Director of Member Development & Chapters, Tori Payne, to the retreat. She provided valuable insight into the programs that other chapters are offering and guided our board through a maze of national initiatives and administration.

The board spent a considerable amount of time discussing how we can increase interest in the programs for our members. Although we have always offered the best substantive legal programs (and will continue to do so), we recognize that our members may be interested in programs that help them develop professionally. Some great new ideas were offered and you can expect to see them presented next year. The schedule will be enhanced to offer events such as a "General Counsel Roundtable" that will allow members to meet with area GCs and discuss career paths to the top; networking events for those members in transition; and career counseling/personal enrichment sessions.

The board also recognized the need to select dates for next year's programs

in advance, which led to the creation of "ACC Third Thursdays!" Next year, the board will schedule its programs on the third Thursday of each month, allowing our members and sponsors to plan accordingly. We believe this initiative will increase attendance by offering a predictable schedule.

The retreat was an overwhelming success. However, much work lies ahead for the chapter's leadership. We want to encourage all of you to get involved. The quality of this organization depends on your support!

Regards,
Kathy Crannell



The Bounty Boondoggle: Dealing A Devastating Blow To Corporate Compliance

Susan Hackett, Senior Vice President and General Counsel, ACC
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Like many of you, I attend all kinds of corporate counsel meetings — industry legal group meetings, CLE sessions, ACC networking and education events through our chapters and committees. At these gatherings, we hear about the myriad laws, regulations, rulemakings, litigation and management issues that impact and challenge us in our work everyday. At ACC, I also think about how this growing tsunami of issues impacts our members in more than 70 countries. Given the noise and number of issues competing for corporate counsel's attention, it can be hard to discern the truly momentous "global" issues from the more mundane and routine requirements.

But at this point in time, I have to say — *never* have I seen a single issue generate such singular commonality of concern and negative response as the whistleblower/bounty hunter provisions in the US Congress' new financial reform law, otherwise known as Dodd-Frank [<http://financial-reform.weil.com/wp-content/uploads/2010/07/Dodd-Frank-House-and-Senate-Final.pdf>].

Dodd-Frank was intended to address the maladies stemming from the financial implosions of 2008 and 2009. While most of the provisions were aimed at financial service issues, the legislation was amended in the final hours of passage to include a broader provision (Section 922) authorizing the Securities and Exchange Commission to expand its whistleblower/bounty program to better encourage the submission of useful information about the violation of securities laws.

In a nutshell, under this provision, a provider of "original information" about securities law violations (broadly writ) can now be awarded between 10 percent and 30 percent of a large settlement

or verdict. Moreover, whistleblowers — who believe that they have suffered retaliation for contributing information to the SEC — can bring cases against their employers. And while the general concept of whistleblower bounty provisions is not new, this one is particularly pernicious to the efforts of in-house lawyers as it could upend the compliance and reporting systems they have worked hard to create in order to provide avenues and protections for whistleblowers within the corporate structure, and upon which they rely in order to help the company effectively police and remedy its own behaviors.

ACC members are the strongest supporters and facilitators of internal reporting and employee whistleblower protections. Indeed, it is in-house counsel who have envisioned, championed, implemented, managed, and assured that such systems are vibrant and offer robust mechanisms by which companies can assure better compliance and maintain a healthy ethical culture. It is key to note in reviewing the provisions of Dodd-Frank, that we have premised all of our efforts to date on the very internal corporate reporting mechanisms which this law threatens to gut: if employees are financially incented by the promise of large amounts of money to go *outside* to report potential violations — rather than to communicate these concerns through established internal company channels — then the employer will be *the last* to know about problems it could have investigated and addressed immediately. Even more ironically, the company will be held liable for addressing failures, losses or problems they could have prevented.

Internal reporting systems, the focus of so much time and investment by in-house lawyers, **must** be given an opportunity to identify and resolve problems first, or sophisticated compliance

programs will be toothless. How else will companies uncover their problems if their employees have no incentive to report concerns and companies can't make it a condition of continued employment that they report and contribute to internal investigations? Isn't it the *job* of every employee to act responsibly within the entity to promote its appropriate behavior?

In recent years, government has passed laws and enacted policies that require companies to create effective internal compliance and reporting programs — in recognition that such programs lead to more legally compliant companies. In fact, it is the standard by which companies are judged in the event that there is a failure and the company would like to demonstrate that they did everything possible to prevent rogue actors from succeeding (see, e.g., Chapter 8 of the US Sentencing Guidelines and the many cases resolved either through settlement with the government or in the courts).

So, it will be interesting to see in the coming weeks, as the SEC, under its authorization in Dodd-Frank, now turns its attention to the language implementing Dodd-Frank and particularly, Section 922's whistleblower provisions. If you were able to listen to the SEC webcast featuring SEC leaders discussing the rule-making process [<http://sec.gov/news/openmeetings/2010/spch110310mls-whistleblowers.aspx> for the webcast, and <http://sec.gov/news/press/2010/2010-213.htm> for the press release], and then read the proposed rule issued by the SEC staff for comments a few hours later on the same day — November 3, 2010 [<http://www.sec.gov/rules/proposed/2010/34-63237.pdf>], you will have noticed a clear and unfortunate disconnect. At this stage, it seems that officials are willing to establish two inherently contradictory tracks — one placing value on compa-

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nies owning their own internal reporting process, and the other on a newer and more problematic inclination to address failures by inciting employees to come to the government with their concerns first, and not voice their concerns through internal mechanisms.

As these regulations unfold, ACC will actively represent our members in the comment process. **Our comments are due to the SEC on Friday, December 17, 2010. We will be asking ACC leaders to co-sign our comment letter to the Commission not only to reiterate our ongoing support for the integrity and viability of internal reporting processes, but also to clarify the importance of encouraging employees to step forward internally without fear of retaliation.**

Here are some issues for you to consider:

- The government cannot possibly police all corporate misconduct; therefore continued self-policing and reporting is essential. And while Dodd-Frank applies to public companies, just as Sarbox set the standard for reasonable behaviors and responses, so too will these provisions' impact bleed into the standards by which every companies reporting mechanisms are judged.
- The SEC has no practical means by which to investigate the countless claims they will now receive from employees hoping for a huge financial windfall. Anyone familiar with sophisticated in-house corporate whistleblowing systems can tell you that the vast majority of the numerous reports into their systems are not in fact flags of serious corporate misconduct. They are often rather mistaken or uninformed employee reporting, imagined conspiracies, or personnel matters that do not uncover fraud or larger misconduct. And, those few reports that do give vital notice of percolating problems will be difficult to distinguish or weigh without context, given that the SEC staff won't know what they're looking for without intimate knowledge of the company and industry from which the report

emanates. In its proposed rule, the SEC has suggested that they will send complaints back to the company for evaluation and investigation, while the Commission opens a matter to investigate each and every one. One can only imagine the chaos this will create in compliance matters.

- Dodd-Frank contains multiple whistleblower provisions: the aforementioned one involving the SEC and bounty awards; a parallel program to be managed by the Commodity Futures Trading Commission; and a final one that the newly-created Consumer Protection Financial Bureau will initiate when it is up and running next summer. Each of these whistleblower bounty provisions was modeled on similar language in the False Claims Act. In its proposed rule, the SEC draws heavily on caselaw interpreting the FCA and companies seeking best practices would do well to rely on that caselaw as well. One long-term thought for the in-house counsel bar is whether there should be rationalization of all these various whistleblower programs so that they work hand-in-hand.

Finally, it is important to point out that there are other perverse implications of this rule:

- It is conceivable that it not only incents employees to report outside the company first, but to wait until a problem festers sufficiently that the likelihood of a higher penalty or award because of increased culpability and damage goes up, increasing the whistleblower's take.
- What about the impact on corporate personnel manuals and policies that universally state that not cooperating in an internal investigation could lead to dismissal, or that employees will be dismissed for engaging in or not reporting on fraudulent behavior? Given the anti-retaliation language of the bill, the employee who's reporting may not be disciplined for the underlying problems they've contributed to or facilitated. The bill suggests that payments should not be made to those who perpetrate the crime, but specifically notes that some involve-

ment in the fraud doesn't necessarily prevent the whistleblower from collecting. The proposed rule attempts to remedy this by preventing wrongdoers from collecting bounties on any portion of the verdict caused by their misconduct.

- What about the rules of ethics? The proposal authorizes the SEC staff to communicate directly with whistleblowers who are directors, officers, members, agents or employees of an entity that has counsel, without first seeking the consent of the entity's counsel. The rule attempts to create an exemption under state bar ethics rules forbidding lawyers from communicating directly with represented persons by permitting the SEC's lawyers to communicate with a whistleblower under these circumstances. The rules of professional responsibility should apply to all lawyers, not just those in the private sector.

Going forward, in response to the SEC's recently announced comment process and to prepare our letter, ACC's advocacy team will:

Engage with in-house counsel working on this issue through the Association. You are the infantry on the ground overseeing internal compliance and investigations. Your input will enable us to propose better solutions, while also better educating the SEC about the multiple minefields inherent in permitting whistleblowers to have the option of an end-run around internal reporting systems.

Coordinate with other like-minded groups. ACC will work with trade associations and outside counsel-leading client groups in an effort to ensure that we stay apprised of the latest developments and strategies.

We hope you will join us. Contact me at hackett@acc.com, or ACC's new staff director on advocacy issues, Associate General Counsel Amar Sarwal at sarwal@acc.com, if you are interested in signing on or have thoughts/comments to share with us to help us better fulfill our role as the Voice of the In-House Bar on this important topic.

Corporate Claims In Probate

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This article provides a very general outline of the steps involved in pursuing a claim (whether already in suit or not) against a defendant that has died. Failure to adhere to these steps may have disastrous consequences.

Creditor claims in probate are governed by Fla. Stat. §§ 733.701-733.710. Generally speaking, claims against an estate are barred if they are not filed, in the probate proceeding, on or before the later of three months after the time of the first publication of the notice to creditors or, as to any creditor required to be served with a copy of the notice to creditors, thirty days after the date of service of such notice on that creditor. Fla. Stat. § 733.702. It is important to note that a claim must be filed

even if there is an action pending against the decedent at the time of the decedent's death. See Fla. Stat. § 733.702(2). This claim must be filed in the probate proceeding. See *Spoehr v. Berryman*, 589 So.2d 225 (Fla. 1991).

The time to file a claim may be extended on the basis of fraud, estoppel or insufficient notice of the claims period. Fla. Stat. § 733.702(3). Pursuant to *Tulsa Professional Collections Services, Inc. v. Pope*, 485 U.S. 478, 108 S. Ct. 1340, 99 L. Ed. 2d 565 (1988), Fla. Stat. § 733.2121 has now been established to require, in subsection 3(a) thereof, that the personal representative make diligent search to determine the names and addresses of creditors of the decedent who are reason-

ably ascertainable and to provide actual notice to them by service of a copy of the notice of creditors.

Additionally, Fla. Stat. § 733.710 bars any claims made 2 years or more after the death of the decedent, unless a claim had previously been filed in the probate administration. This 2-year period is not subject to extension for fraud, estoppel, or any other reason.

If there is no estate administration pending, the creditor may utilize Fla. Stat. § 733.301 to itself petition the court for an appointment of a personal representative and commence administration. See *In re*

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Estate of Read v. A.D.K. Properties, 766 So. 2d 393 (Fla. 2d DCA 2000).

Once a claim is timely filed, the personal representative is limited to a time period of the later of four months from the first publication of notice to creditors or thirty days from the timely filing or amendment of a claim to file a written objection to the claim. Fla. Stat. § 733.705. Failure to object to a timely filed claim admits the claim. The probate court is thereafter without power to reject the claim. See *Goggin v. Shanley*, 81 So. 2d 728 (Fla. 1955) (asserted statute of limitations bar); *Rainier v. Calhoun*, 310 So. 2d 999 (Fla. 3d DCA 1987) (alleged illegal contract). For good cause a court may extend the time for filing or serving an objection to any claim. Fla. Stat. § 733.705(2).

Thereafter, the claimant has thirty days from the date of service of the objection to

bring an independent action on the claim, or declaratory action to establish the validity and amount of an unmatured claim, or a declaratory action to establish the validity of a contingent claim. Fla. Stat. § 733.705(5); see also *In re Estate of Cadgene*, 938 So.2d 581 (Fla. 2d DCA 2006) (claimant still required to file independent action even if personal representative's objection is only to a small portion of the claim). The court may extend the time for filing an independent action for good cause. Fla. Stat. § 733.705(5). Also, the time for filing an independent action may be extended by the personal representative in writing before that time expires.

The independent action may not be filed in the probate court. See *Williams v. Estate of Williams*, 493 So. 2d 44 (Fla. 5th DCA 1986). Additionally, it does not have to be filed in the circuit court in the same circuit where the probate proceeding is occurring, nor even in any court in Florida.

See *Poulsen v. First National Bank of Palm Beach*, 407 So. 2d 338 (Fla. 4th DCA 1981); *S.J. Landau Corp. v. Estate of Riesner*, 372 So. 2d 1134 (Fla. 2d DCA 1979).

Fla. Stat. § 733.702(4) provides exceptions to the filing, service and time requirements set forth above, and should be consulted to determine whether the particular case or proceeding comes within one or more exceptions.

Keith J. Hesse is a shareholder with Carlton Fields in its Orlando office. He is a member of the firm's business litigation practice group. In addition to handling commercial litigation in state and federal courts, Mr. Hesse focuses on probate and trust litigation and fiduciary representation. He can be reached at 407-244-8221 or khesse@carltonfields.com.



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National Community Service Day 2010

On Saturday, Nov. 13, 2010 volunteers from the Central Florida Chapter met at the Coalition for the Homeless of Central Florida to paint and freshen up their community room. The Coalition for the Homeless of Central Florida has grown from a church outreach program into a full-service agency and the largest provider of homeless services in Central Florida. These services include providing food, shelter, education and children's services—all focusing on offering the tools to return homeless people to self-sufficiency.

The community room where Central Florida Chapter volunteers spent the day is a place to relax—with a television for residents to watch movies, tables and games for children, and now (thanks to our talented in-house painters) an entire chalkboard wall for all to enjoy drawing on. The Central Florida Chapter has also set aside funds for new blinds and built-in bookshelves for the community room (anyone know a good carpenter?). For more information about the Coalition for the Homeless, or if you would like to contribute, visit their website at <http://www.centralfloridahomeless.org/>



Central Florida Board Member and Sr. Counsel and VP with Hilton Grand Vacations, Kelly Lodde



Russ Reader with Siemens



Chapter Secretary and CLO with Travel Holdings, Inc., Wendy Friedberg



Chapter Administrator Marshall Schirtzer with her two girls, Olivia and Emily, painting the chalkboard wall



(Left to right) Dawn Rodda, Wendy Friedberg, David Bolton, Russ Reader, Kelly Lodde, Marshall Schirtzer, Jana Croft, Ron Schirtzer (Greenberg Traurig), Sonia Williams, Jae Im, Olivia Hutto, Emily Schirtzer.

The Lump in My Throat

After watching news warnings of temperatures dropping to freezing levels, I knew I couldn't wait any longer to deliver the blankets to the Coalition for the Homeless. As I turned onto Central, there was a man walking down the street in the middle of my lane. I went around him and he never looked up—he looked so empty. As I approached the entrance there were so many (far more than usual) waiting for the men's pavilion to open up. It's not

enclosed mind you, but the floor is heated. The blankets were distributed right away, and the director told me that she thought they would have enough for the evening. Was this true or was she trying to make me feel better? Once the blankets are given out they are not recollected, so there is ALWAYS a need. If you or your organization is interested in doing a blanket drive for the Coalition, please contact Marty Vevera, Director of Volunteer Services, at

407-872-5784 or by email at marty.vevera@cflhomeless.org.

Food for thought—The homeless are not just the men you see under I-4, or in the doorways of buildings downtown. On any given night, the Coalition provides services to nearly 200 children, with an average age of seven years old.

ACC Central Florida Annual Holiday Celebration & Board Member Elections

This year's festive gala was held on December 1 at a fabulous new Sand Lake Road venue—Dragonfly. The food and libations were plentiful and delicious, but the camaraderie and networking opportunities with our fellow members, guests and sponsors is what this celebration was truly all about. Sandra Chen and Steve Kaplan were the lucky winners of fifty dollar gift certificates that were donated by Dragonfly—Itadakimasu! (Japanese for bon appetite) Throughout the evening our annual "Blanket Drive" collected several blankets for the Coalition for the Homeless of Central Florida, which will certainly be of good use to those in need as the cold season is upon us. Thank you all for your generosity.

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Gerry Hartman with GAI Consultants, Marshall Schirtzer, Chapter Administrator and Mike Hornreich with Greenberg Traurig



From left to right: Randy Schwartz, Tom Jones, Tom Schneider, Nancy Schneider, Teri Johnson, Judy Schwartz and Olga Simmons

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Later in the evening the presidential gavel was passed from Kathleen Crannell to Jae Im. Thank you Kathy for another successful year of service and congratulations to Jae as he steps in. Thank you as well to all our sponsors, board members and members for a delightful evening and an efficacious year.

**Kathy Crannell
passing on the
presidential gavel
to Jae Im.
ALL HAIL JAE
- ALL HAIL JAE!!!**



**Jae Im – 2011 Chapter
President with Wyndham
Worldwide and
Jenn Gohlke with Marriott
International**

Welcome Board Members of 2011

We would like to welcome our elected board members for 2011:

President

Jae Im
Wyndham Worldwide Corporation

Treasurer

David Bolton
United Space Alliance, LLC

Board of Directors

Tom Jones
ACC Member

Vice President

Steve Kaplan
Connexions, Inc.

Immediate Past President

Kathleen Mac Mahon Crannell
Orion Aerospace, LLC

Patricia Leonard

Walt Disney World Company

Secretary

Wendy Friedberg
Travel Holdings, Inc.

Kelly Lodde

Hilton Grand Vacations Company

Dawn Rodda

Darden Restaurants, Inc.

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Desmond Jordan
Stephen Kaplan
Patricia Leonard
Kelly Lodde
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ACC-CENTRAL FLORIDA CHAPTER MISSION STATEMENT

ACC Central Florida Chapter supports its members and community through:

Informing and educating members on significant topics integral to in-house practice;

Interacting with the legal community to increase visibility for the chapter, to increase focus on in-house issues, and to increase awareness of ACC as a whole; and

Improving the Central Florida community through acts of pro-bono programming, community service and leadership.

Welcome New Members

We wish to welcome the following new members who have recently joined the ACC Central Florida Chapter:

Bruce A. Brown with Darden Restaurants, Inc.

Tina Joseph with Wyndham Vacation Ownership, Inc.

Sonia O. Williams with Mitsubishi Power Systems Americas, Inc.

Elizabeth A. Cleveland with W.S. Badcock Corporation

Christopher Mark Bennie Rossi with Travel Holdings, Inc.

Norman Nash with Windgate Global LLC

Kim Nash with Harris Corporation

Call for Articles

Do you have an interesting story to share? A challenging court case? Do you know an in-house lawyer who has made a difference in their community or in someone's life? Please share your stories by sending them to mschirtzer@cfl.rr.com.

ACC Central Florida Wants You!

If you are interested in serving on the chapter board or one of the chapter committees next year, please let us know. The best way to keep our chapter fresh is to bring new faces to our leadership!

Have a program topic you would like to share? Your program chairs are always looking for proposals of new topics that would benefit chapter members.

For more information, email Marshall Schirtzer at mschirtzer@cfl.rr.com.

Job Opportunities

Is your company looking to fill an in-house position? Do you know about a current in-house job opening? If so, please let us know so we can help you find a qualified candidate in Central Florida. Please send information to mschirtzer@cfl.rr.com.

Help Us Reach Our Membership Goal – 200!

Our chapter is only as strong as its membership. Our goal this year is to have the Central Florida Chapter reach a membership total of 200! How can you help? Simple, just spread the word: Inviting current or former colleagues to a Central Florida Chapter event is a great way to reestablish or advance a relationship with your peers. Each new member that joins adds valuable expertise to the growing network of in-house counsel in the Central Florida Chapter. For information on membership, or to download an application for a friend or colleague, visit www.acc.com/join.