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FOCUS

ACC South Florida 2020: Midyear Reflection

Jessica DeBianchi Rivera

ACC South Florida 2020: Clarity in Purpose

Dear Members,

Challenges lead to changes. And when we're mindful, changes lead to transformative, positive growth.

2020 has been a crucible of challenges: a pandemic that can't yet be stopped ... a necessary, nationwide reckoning of race and civil rights ... an economic downturn that has rattled the security of so many families ... an ongoing ideological culture war that's left everyone anxious and exhausted.

And yet, within this maelstrom of fright and uncertainty are catalysts for great changes—changes within ourselves and the greater world. Personally, I've become more circumspect about my personal priorities and beliefs, and how my thoughts, words and actions impact others.

These strange, strained days can also beget professional growth. Indeed, the events of 2020 have messily yet perfectly embodied our ACC chapter's annual theme: **Clarity in Purpose.**

Consider these ways in which this year has brought the possibility of new purpose to our lives:

Purpose in Stillness: With so many meaningful life events and travel plans put on "pause"—and with work and education moving to virtual formats—the universe seems to have given us permission to unapologetically slow down.

If there was ever a time to re-evaluate our routines, commitments, goals and priorities, it's now. Take a deep breath and go inward, if you can. Within my own stillness, I've rediscovered the joy in the simplest of moments. Life need not be an IMAX adventure. Less truly is more.

Purpose in Connection: For many of us, social distancing has restored a lost feeling of community. It's clearer than ever that, on a global scale, people's commonalities far outnumber the things that separate us.

All divisiveness hails from one insidious emotion: fear. But when we connect with others with a genuine intent to understand, compassion often triumphs over fear. Seeking ways to regularly embrace curiosity and sincerity is essential in these times.

Purpose Only in the Present: Many of us had very different plans for 2020 before the pandemic struck. This year has offered lessons of humility for all us—especially those who firmly fix their attention toward the future.

The past is the past, and the future is not promised. But by *being joyfully and thoughtfully present*, we can avoid dwelling on the losses of this year and the uncertainty of what may come. Instead, we can grow in gratitude for life ... just as it is.

I believe that the disruptive events of this year will generate a seismic shift in our

collective ability to become more patient, resilient and kind. These qualities will make us better at our profession, and—more importantly—better at being good people.

Remain well.

Jessica

PS: Make sure you've bookmarked our [ACC chapter's webpage](#) to stay connected while we all remain apart. And be sure to join our [LinkedIn](#), [Facebook](#) and [Instagram](#) communities.



Jessica & Partner appreciating the outdoors.

M&A and the Never Normal

By Jose Sariego, Bilzin Sumberg Baena Price & Axelrod LLP

On the heels of record deal volume in 2018 and 2019, 2020 was supposed to be another banner year for M&A activity in the U.S. and worldwide. Then COVID-19 crashed the party, and the M&A locomotive came to a screeching halt. Deal volume in 2020 has dropped to a seven-year low, with deal value in the U.S. down 83% in the second quarter of 2020 from 2019. Moreover, as a result of the lockdowns and other emergency measures imposed during the pandemic, strategic buyers and private equity firms alike have had their hands full shoring up their own businesses and those of their portfolio companies, further diminishing the appetite for acquisitions.

Nonetheless, rumors of M&A's demise are greatly exaggerated. Cash idling on the sidelines was at record levels last year as private equity firms - holding a record \$1.5 trillion cash hoard in June 2019 - kept their powder dry. Well-heeled strategic buyers like Amazon, Apple, Google, Microsoft, and Walmart similarly are looking to take advantage of difficulties facing less fortunate competitors. What had been a seller's market for a decade has shifted to favor buyers, many of whom are preparing to step back into the fray with renewed fervor as soon as conditions stabilize, albeit under a drastically altered landscape.

Valuations, of course, have been materially affected, to the point that buyers committed to deals negotiated pre-pandemic are dusting off those seldom invoked "material adverse change" and "force majeure" clauses to renegotiate agreements. With respect to new deals, valuing a business and its future prospects has become much more complicated. Purchase price formulas based on trailing earnings that may now be largely irrelevant will have to be re-calibrated. In turn, earn-outs and other post-closing purchase price adjustment mechanisms will be affected. Formulas also will have to take into account the impact of Paycheck Protection Program loans, with sellers



wanting these loans not counted as debt or reimbursed once forgiven as permitted under the law. In contrast, buyers will want to exclude forgiven loans from earnings calculations as non-recurring income. Likewise, the expanded opportunity to apply net operating losses retroactively under the CARES Act may be a boon to buyers that sellers will want taken into account in pricing.

Sellers will be required to explain how their companies are weathering the COVID-19 storm and the effect on future earnings streams and expenses. A seller's contingency plans and risk mitigation strategy for COVID-19 and other risks will be closely scrutinized and may become fodder for additional pre-closing covenants. Working capital requirements are likely to increase, as is the definition of "working capital" itself to exclude deferred payroll taxes and other payroll tax credits under the CARES Act that do not constitute cash. With so little predictability, many of these mechanisms will largely be guess-work and will challenge deal lawyers to craft provisions that are flexible and far-seeing.

The pace of deals has been significantly slowed. Each stage of the transaction is taking longer due to communication logistics and other factors. The days of "getting everyone in the room" to get a deal done are probably over, replaced with interminable virtual meetings to resolve issues. Third-party consents and regulatory approvals will take longer to obtain and require the satisfaction of additional conditions. Finding scarce third-party acquisition financing will be challenging, and nervous lenders may require terms that are tougher than the parties deem necessary.

Letters of intent and non-disclosure agreements may now require a greater

degree of initial due diligence before an offer is even put on the table, and certainly between signing and executing a definitive agreement. Exclusivity provisions during this period will be hard-fought, as sellers try to limit the period during which a buyer must fish or cut bait. Buyers understandably will want additional time to conduct due diligence in trying circumstances.

Agreements will take longer to finalize as attorneys for buyers and sellers alike will be anxious to provide maximum protections for their respective clients in an era of great uncertainty. Representations and warranties, the bane of every sell-side lawyer's existence, will become more complex as buyers demand additional representations as to how COVID-19 has affected and will continue to affect the business.

Due diligence has been transformed. Although much due diligence already was conducted virtually through digital "data rooms," kicking the tires of a potential seller is still an important part of a buyer's due diligence process. How this will work in the age of face coverings, social distancing, and mandatory quarantines for travelers from shifting COVID-19 "hot spots" is a work in process. Lien and litigation searches, surveys, background checks, title searches, and other similar due diligence procedures will take much longer than is typical to complete.

Pre-closing covenants requiring the seller to conduct the target's business "in the ordinary course" until closing will become more difficult to comply with because of the stretched period between signing and closing and fluid governmental and other requirements on businesses. Terms such as "commercially reasonable efforts," "past practice," "consistently applied," and other terms implying con-

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tinuity or adherence to a prior objective standard will be more problematic to define and interpret in the new normal. Post-execution governmental restrictions or other requirements implemented as a result of the on-going pandemic may conflict with these covenants, placing sellers on the horns of a dilemma between complying with these new requirements or violating covenants.

Indemnity escrows and holdbacks are likely to increase, as is the survival period of representations and warranties. Caps and baskets, on the other hand, are likely to shrink as buyers become increasingly unwilling to absorb risks from breaches of representations and warranties. The cost, availability, and requirements of reps and warranties insurance also are likely to tighten, as carriers assess the impact of the pandemic on underwriting risks.

Closings, too, will be an adventure. Face-to-face closings already were becoming an anachronism, and COVID-19 is likely the death knell for these quaint gatherings.

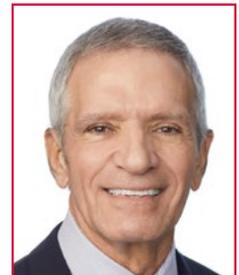
However, delivering "wet ink" documents required for certain instruments such as deeds and notes, as well as the notarization and recording of the same, are now a major challenge. Online notarizations have not been universally embraced, and many government offices continue to require traditional notarizations and other requirements. The advent of electronic signatures mercifully had commenced before the pandemic hit, and the trend toward totally virtual closings will now accelerate.

Lastly, post-closing efficiencies and synergies, to which every buyer aspires, will become more difficult to achieve and may take longer to materialize. Companies are still adjusting to employees working from home and the changes demanded by governments, clients and suppliers. Achieving efficiencies and synergies in this fluid environment will require patience and ingenuity, often in short supply with buyers trying to hit quarterly IRR and other benchmarks.

The M&A world has endured and recovered from past economic crises, including the burst of the dot-com bubble in 2000-2002 and the Great Recession of 2007-2009. M&A will survive this crisis also, but survival will require patience, flexibility, and ingenuity from M&A participants working collaboratively to put deals together successfully.

Author:

Jose Sariego is a corporate partner at Bilzin Sumberg with over 30 years of experience negotiating and closing domestic and international mergers and acquisitions, investments, joint ventures, divestitures and other transactions. In 2020, Jose was ranked as one of the top International M&A lawyers in America by Best Lawyers. He is fluent in both Spanish and Portuguese.



Precursors and Alternatives to Litigation: 8 Ways to Prepare for Your Counterparty's Adverse Situation

Michael B. Green, Jonathan Kent Osborne, Traci H. Rollins, Gunster

At this point in time, COVID-19 continues to swirl, the economy is on a continual roller coaster, and you've put to good use whatever dollars were available under the CARES Act or elsewhere. As a landlord, a creditor, or more simply a counterparty to contracts – you likely have renewed (or continuing) concern about the other side's performance or even impending insolvency. You may not perceive such party's bankruptcy to be on the immediate horizon, but rather, given this ongoing inevitable economic distress, you are concerned that your company may suffer.

The inclination might be to wait for the other shoe to drop, for the first evidence of a material default, or a notice to creditors of a Chapter 11 filing. After

that, a turnaround of the relationship or contract will likely be painful, and the loss will be yours. The purpose of this article is to encourage you to avoid waiting for catastrophe, and to consider these simple, often overlooked tasks that you should be conduct now and again in another few months. They can be done internally; through general counsel and with the help your business folks; or with a focused review by outside counsel. However conducted, you are bound to learn things and be in a position to help your company better weather this ongoing storm. Why not examine the following:



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Material contracts. Yes, you likely know all of the material terms, but take another, closer look. Re-review contracts for termination rights,

the now popular force majeure clauses, indemnification, and insurance coverage provisions – all of those clauses that you hope will never need to be analyzed, much less enforced. Also consider, can you, should you, exercise (or reject) outstanding rights of first refusal, stock interests, or other equity interest options?

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Early Termination of Contracts. If you've been contemplating ending a contract and waiting to do so under the express terms, strongly consider doing it now, before your counterparty is formally insolvent. The cost of early termination, if there even is one, may be well worth not having to perform under court review of a bankrupt party.

Inventory suppliers. If you're a supplier to a distressed distributor, consider turning off that faucet, particularly if your receivables are becoming outsized. Again, the cost of this exercise, even when considering hard dollars, reputation, and goodwill, may serve you better than being upside down when your distributor goes under.

Ipso facto clauses. Are you relying on a contractual provision (such as default triggered solely by the filing of a bankruptcy, or a waiver of rights in bankruptcy, or a waiver of the bankruptcy automatic stay)? If so, be sure that the provisions are truly unenforceable because that's often not the case. It may be worth enhancing the enforceability of such provisions by advancing new consideration, for example, in the form of a workout, forbearance, or tolling agreement.

Your Collateral. Confirm that your (recorded) security interests are current, accurately described, and perfected, and that all credit support is in place. Are your UCC's filed in the right jurisdiction, has there been an assignment of interest, have they expired, has the debtor's name changed? All the makings of tedious litigation. If possible, take possession of your collateral. Are lock boxes being routinely swept? Are you holding any expired letters of credit that should be replaced? And if you're not holding any collateral, should you? Consider whether you can demand collateral or performance assurances, or the assertion of a contractual lien.

Counterparty insolvency by your co-guarantor/partner/shareholder/member. How does this insolvency affect your company's own contract obligations? Consider the impact under your operating agreement. It's important for you, as the surviving party, to be fully aware

of your triggered rights, such as how to implement stock buy backs. Will the bankruptcy constitute an event of dissociation for the partnership? What will this mean for the venture going forward?

Actual default or breach. If both sides to the contract have breached, should you file a lawsuit first? Can you pursue contract amendments, tolling agreements, or forbearance arrangements? How about opportunities for repricing, and rescheduling payments? Is injunctive relief needed for bad behavior? Are there any contract payment netting provisions or offset rights available to you? Have any disclosure obligations been triggered? And please pay close attention to your counterparty's intercompany loans, dividends and asset transfers - these could be preferential or fraudulent transfers.

Your company's own default. It's a good idea to periodically audit your contracts for your potential technical contract defaults under, for example, liquidity ratios or other breached covenants. Make sure you address those defaults, even if the counterparty is quiet about them. Better now than in your counterparty's bankruptcy.

The foregoing may reward you with some surprising (and hopefully encouraging) sources of protection and coverage, and you can adjust your risk analysis and liability reserves accordingly. In our troubling times, these are exercises worthy of consideration on a quarterly basis.

Authors:

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Michael practices in state and federal court and has experience in an array of civil litigation matters including brokerage commission disputes, commercial landlord/tenant disputes, creditor representation in bankruptcy proceedings (including adversary proceedings and

bankruptcy appeals), homeowners' and condominium association disputes, non-compete and restrictive covenant disputes, and property rights litigation.

Jonathan K.

Osborne is a trial lawyer and former federal prosecutor who concentrates his practice in the areas of litigation, investigations and compliance.

Jonathan dedicates

his practice to advocating for clients before state and federal courts, as well as defending and advising companies, business leaders, nonprofit organizations, and healthcare professionals in connection with government and regulatory investigations. Jonathan's practice includes leading internal and external investigations and providing counsel on compliance with state and federal criminal law.



Traci Rollins

focuses her practice on representing public and private companies, financial institutions and other nontraditional lenders in

creditors' rights, bankruptcy and commercial litigation and government investigations. She offers decades of experience in Florida and other courts across the country in insolvency, workout, forbearance and complex commercial disputes, class actions, and cross-border dispute resolution, anti-foreign suit injunctions, government investigations, and consumer and commercial regulatory compliance programs.



Enter At Your Own Risk: The Use of Liability Waivers To Protect Businesses Against Liability for the Transmission of COVID-19

By Jennifer C. Glasser and Eric D. Coleman, Akerman LLP

As businesses in Florida re-open amidst the uncharted coronavirus (COVID-19) pandemic, they will likely confront lawsuits brought by patrons claiming they contracted COVID-19 while on the business's premises. Indeed, the fear of widespread liability related to COVID-19 has led Congress to consider blanket liability protection for all businesses as part of future stimulus packages. It is too soon to tell whether such blanket liability protection will pass. In the meantime, some businesses are requiring their patrons to sign liability waivers in an effort to shield the business from COVID-19 claims. Under Florida law, these waivers may provide businesses some measure of protection from negligence where the businesses are also in compliance with the applicable COVID-19 regulations.

As a threshold matter, the most prudent action a business can take in order to mitigate liability is to remain in compliance with all local, state, and federal regulations, orders, and guidelines related to COVID-19. But, what happens if a business complies with the applicable COVID-19 regulations, but a patron contracts COVID-19 on its premises anyway? A business owner has a duty to determine that its premises are reasonably safe for invitees and is required to use reasonable care to learn of any dangerous conditions on its premises. *See Johnson v. Morgan*, 2013 WL 11272115 (Fla. Cir. Ct. April 30, 2013) ("In the context of premises liability, which is the essence of Plaintiff's claim in this case where it is the condition of the Jail that Plaintiff asserts caused the decedent to contract the bacteria that led to the conditions that caused her death, a business owner has a duty to determine that its premises are reasonably safe for invitees, and is required to use reasonable care to learn of any dangerous conditions on its premises.") (citing *Cain v. Brown*, 569 So. 2d 771, 772 (Fla. 4th DCA 1990)). Compliance with applicable regulations will help to ensure that the business is considered to have acted reasonably. Moreover, even if the business faces

claims by an infected patron, the patron will find it hard to establish causation due to the highly contagious nature of COVID-19 and the fact that transmission of COVID-19 is hard to trace.

Enforcement of Liability Waivers

Florida courts have not addressed the enforceability of a liability waiver in the specific context of a patron contracting a communicable disease, including COVID-19, on a business's premises. However, based on Florida courts' acceptance of liability waivers in other contexts, it is reasonable to expect that a well drafted liability waiver in the context of COVID-19 may be enforced in certain circumstances.

Florida courts generally disfavor exculpatory clauses. However, liability waivers shielding a party against liability for its own negligence have been found enforceable. *Brooks v. Paul*, 219 So. 3d 886 (Fla. 4th DCA 2017). In order for a liability waiver to be enforceable, the waiver must be clear, unequivocal, conspicuous, and not against public policy. The waiver must be easily identifiable and understandable to the party against whom enforcement is sought and must not offend any public policy of the state in question. *See e.g., Sanislo v. Give Kids World, Inc.*, 157 So. 2d 256 (Fla. 2015) ("Exculpatory clauses are unambiguous and enforceable where the intention to be relieved from liability was made clear and unequivocal and the wording was so clear and understandable that an ordinary and knowledgeable person will know what he or she is contracting away."). The factual circumstances surrounding the waiver will be key in determining whether the waiver offends public policy. A liability waiver from business with a recreational purpose (i.e., movie theatre, bowling alley, gym, etc.) are more likely to be considered

The logo for Akerman LLP, featuring the word "akerman" in a lowercase, serif font. A red horizontal line is positioned below the letter "a".

enforceable compared to a liability waiver from an essential business (i.e., doctor, den-

tist, public services, etc.).

Where providing a written waiver to each patron is not realistic (i.e., grocery stores, shopping malls, restaurants, etc.), businesses should consider posting disclaimers containing similar language to a written waiver. Such disclaimers should be posted in conspicuous places such as the entrance to the premises. Although an unsigned disclaimer may not be as effective as a signed written waiver, it may still prove useful in limiting a business's liability and support a defense of contributory negligence.

Drafting a Proper COVID-19 Liability Waiver

The need to draft liability waivers properly cannot be overstated. Again, such clauses are disfavored by the law and generally construed against the party claiming to be relieved of liability. Businesses seeking to draft a liability waiver for COVID-19 should consider including the following:

1. A conspicuous title in all CAPITALS, BOLDED and UNDERLINED;
2. An acknowledgment that COVID-19 is a highly contagious disease most often transmitted from person to person;
3. A clear statement of the risks associated with exposure to COVID-19;
4. A clear statement that the business has taken preventative measures to limit the patron's exposure to COVID-19, but that such preventative measures cannot guarantee the patron will not be exposed to or contract COVID-19 while on the business's premises;

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5. A clear statement that the patron acknowledges the risks associated with exposure to COVID-19 and that the business cannot guarantee that the patron will not be exposed to COVID-19;
6. A clear statement that the patron expressly intends to assume all risks associated with potential exposure to COVID-19 while on the business's premises and releases the business from liability based on negligence;
7. Specific inclusion of the word "negligence";
8. A signature of the patron.

While Florida courts may enforce a properly drafted liability waiver, such waiver will only protect a business from its own negligence. Courts have consistently held that liability waivers seeking to shield a party from its gross negligence, reck-

less conduct, willful/wanton conduct, or intentional acts are unenforceable. Opening a business to the public but failing to comply with local, state, and federal regulations, orders and guidelines may be considered grossly negligent given the known risks associated with COVID-19. A waiver, no matter how well drafted, may not protect the business absent its reasonable compliance with these measures.

Authors:

A multifaceted litigator, **Jennifer Glasser** focuses her practice on complex commercial disputes, business torts and private equity litigation. She represents local, national, and international companies in the hospitality industry,



providing strategic advice on day-to-day operations, preventative counseling, and risk mitigation. A seasoned trial lawyer, Jennifer has represented corporate entities and individuals in state and federal courts at both the trial and appellate levels, as well as before administrative boards. She is also experienced in local government representation, including First Amendment challenges, tort defense, contract disputes, wrongful death cases, and defending municipalities in challenges to the constitutionality of their ordinances.

Eric Coleman

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The Pill and the Pandemic

By **Joshua M. Samek, Sanjay M. Shirodkar and Sidney Burke, DLA Piper**

I. Background

The general purpose of a shareholder rights plan or "poison pill" is to deter and mitigate the time pressures of hostile takeover attempts

made at unfair or inadequate prices, or by coercive or unfair tactics. Rights plans have been around for quite some time. Rights plans generally give the adopting corporation's stockholders (excluding the potential acquiror) the right to purchase stock at a nominal price, triggered by the acquirer's acquisition of beneficial ownership of a specified percentage of the corporation's stock. This right is typically applicable to stock in the corporation prior to the proposed business combination, or in the final corporation after a successful takeover.



There is, however, no one-size-fits-all rights plan and it is incumbent upon a board that is considering adoption of a rights plan (including a plan that was previously "on the shelf") to obtain input from its

advisors concerning the current state of the market with respect to key features of the plan. There are several design features that allow a board to customize its rights plan to take into account prevailing market conditions and particular facts and circumstances applicable to the corporation. We provide a brief discussion of some of the key levers available that are currently being discussed in virtual boardrooms, as well as details of rights plans adopted in the past seven months.¹

II. Key rights plan levers for board consideration

Trigger

Rights plans achieve their objective by conferring certain rights on the corporation's stockholders that have the effect of imposing substantial, disproportionate financial and voting dilution on a potential activist. Determining the thresholds at which certain provisions of a rights plan are activated is a key decision that a board needs to make.

Two-tier trigger

The purpose of this measure is to restrict further accumulations by activists while leaving the door open for passive investors. In Delaware, the validity of a two-tiered pill was upheld by the Delaware Court of Chancery in *Third Point LLC v. Ruprecht*, which imposed a 10% trigger threshold on

¹The data and chart used in this alert are derived from Deal Point Data as of August 10, 2020.

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Schedule 13D filers and a 20% trigger threshold on Schedule 13G filers. Adopting such a provisions in other states requires additional analysis.

Derivative trigger

The purpose of this measure is to prevent activists from accumulating stock positions under the radar in excess of the trigger threshold. In order to combat this threat, certain synthetic interests in securities created by derivative positions – whether or not such interests are considered ownership of underlying shares or are reportable for purposes of Regulation 13D of the Securities Exchange Act of 1934, as amended – are treated as beneficial ownership of the number of shares equivalent to the economic exposure created by the derivative positions.

Acting in concert

The purpose of this measure is to prevent stockholders (particularly hedge funds) from cooperating, or acting in coordination, with each other in ways that fall short of an “agreement, arrangement or understanding,” and forming a “group,” but still effectively allowing the stockholders to act in a coordinated manner with other large block holders (an informal “wolf pack”). Boards considering this avenue typically include language that expands the definition of “stockholders acting in concert” under the rights plan.

Flip-in/flip-over provision

Flip-in trigger

The purpose of this measure is to entitle the eligible right-holders (i.e., all stockholders other than the potential acquiror) to purchase the corporation’s equity securities at a substantial discount.

Flip-over trigger

The purpose of this measure is to obligate an acquiror to honor the redemption or conversion provisions of the rights plan in the event of a merger or other consolidation. The term usually refers to a conversion provision that allows the right-holder to acquire voting equity securities of the acquiror at a substantial discount.

Exchange feature

The purpose of this measure is to afford flexibility by providing a corporation with additional time to distribute rights certificates without reducing the rights plan’s immediate dilutive effect. A common way to do this is to include features that extend the timeline for distributing right certificates or allow independently managed trusts to exercise the rights of stockholders until the right certificates are distributed.

III. Current market conditions and plan features

The market dislocation caused by the COVID-19 pandemic led to significant declines in equity values of US companies across industries. Therefore, it should come as no surprise that we have seen an increase in interest in rights plans, whether formally adopted or available on the shelf.

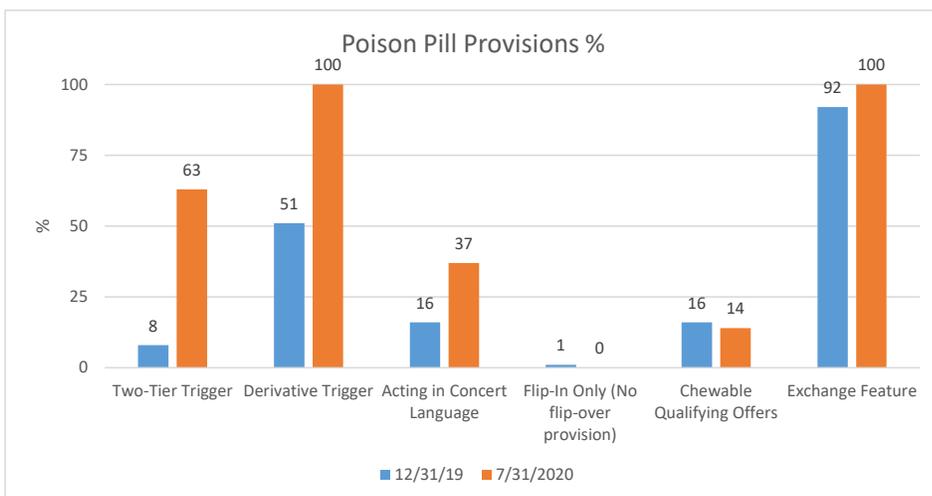
Historical snapshot

For the past few years, rights plans have increasingly come under attack by prominent shareholder advisory services, and the number of companies with active rights plans has declined. As of December 31, 2019, there were only 160 US companies with an active rights plan.

Volume of adoptions through July 2020

For the seven month period through July 31, 2020, there were 77 adoptions (57 traditional and 20 NOL) by US companies. To put this in context, there were 16, 18 and 19 traditional rights plans adopted by US companies during the full 2019, 2018 and 2017 years, respectively.

Characteristics of these newly adopted rights plans are reflected below and compared to the 83 rights plans of US companies that were active as of December 31, 2019:



The terms of rights plans vary over time, and the terms of the rights plans currently being discussed in boardrooms and that have been formally adopted and announced are more aggressive in some regards. Almost all formally adopted plans have terms that expire within one year, so their adoption did not require stockholder approval. For ease of discussion, the remainder of this article excludes active NOL plans (which represented 77 out of 160 active rights plans as of December 31, 2019).

The rights plans adopted during this seven month period contain on the whole more aggressive measures than active rights plans in place as of December 31, 2019:

- 63% (36 of 57) of 2020 plans utilize a two-tier trigger, up from 9% (8 of 83) of December plans;
- All of the 2020 plans include a derivative trigger, up from 51% (42 of 83) of December plans;

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- 37% (21 of 57) of the 2020 plans include “Acting in Concert” language, up from 16% (13 of 83) of December plans; and
- 12% (7 of 57) of the 2020 plans include a 5% ownership trigger, which is uniquely low.

Summary

As public companies review their available defensive measures, we encourage them to remain mindful of the availability of a rights plan and current market trends on their adoption and terms. Our experience with shareholder rights plans over the past seven months leads us to conclude that the terms of such plans have deviated in a significant manner over what was “market” for the past few years. We also believe that the information noted above – which is based on publicly available information – does not adequately reflect the number of companies

that had a rights plan on the “shelf.” The current facts have led to a significant market correction in the valuation of many public companies. Shareholder activism as a whole has been depressed for the first seven months of 2020. In our discussions with our colleagues and market participants, we believe that there is a lot of “dry” powder waiting to be deployed. It is quite likely that the remainder of 2020 and 2021 will be fertile ground for activists seeking a “good” deal.

Authors:

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Mini MBA Program

NEW DATE

Saturday October 17, 2020

Virtual + In-Person Options

ACC South Florida is pleased to announce its first ever Mini MBA for in house counsels. The program will be presented by St. Thomas University and include topics such as corporate finance, accounting and brand strategies. [Click here to register.](#)





MEMBER SPOTLIGHT

Simonne Lawrence
Deputy General Counsel & VP,
Compliance, Elixir

- 1. How long have you been an ACC South Florida member?** 7 years
- 2. Why did you join the ACC?** ACC South Florida came highly recommended by the company's then General Counsel.
- 3. What's a typical day like for you at Elixir?** I typically start the day around 8am by responding to emails and reading the latest healthcare news. I tend to have meetings with the operational and clinical teams in the morning and with the legal and compliance leads in the afternoon. Sprinkled throughout the day are high priority client issues, products that need to be reviewed and investigations/audits to approve. After 5pm is when I can truly sit down and focus on my work.
- 4. What do you enjoy most about being in-house?** What's not to love about being in-house? I find producing strategic and solution-oriented advice based on the company's risk appetite immensely satisfying.
- 5. When you're not working, where would we find you?** Right now, my options are rather limited due to COVID-19, but I still make it a point to get out and get some fresh air every day.
- 6. What's your favorite song right now?** Already by Beyoncé
- 7. Tell us something that might surprise us about you.** I wanted to be a gymnast when I was younger.

ACC Association of Corporate Counsel SOUTH FLORIDA

Presented by: Bilzin Sumberg

11th Annual CLE Conference

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Shook, Hardy and Bacon, LLP

SILVER

Akerman
Boies, Schiller & Flexner LLP
Cozen O'Connor
Jackson Lewis P.C.
Squire Patton Boggs

BRONZE

Alvarez & Diaz-Silveira LLP
Buchanan Ingersoll & Rooney PC
CSC
DLA Piper
Nelson Mullins
Robert Half Legal
Shutts & Bowen LLP

Miami-Dade Progressive Dinner

Shook, Hardy and Bacon, LLP
(Premier Sponsor)
Buchanan Ingersoll & Rooney PC
(Dinner Sponsor)
DLA Piper (Dessert Sponsor)

Palm Beach Progressive Dinner

Shutts & Bowen LLP (Premier Sponsor)

Member Appreciation Event

Foley & Lardner

Holiday Party

Cozen O'Connor (Miami)
DLA Piper (Palm Beach)

Coffee Talk CLE Series

Baker McKenzie
Fisher & Phillips LLP
Rumberger, Kirk & Caldwell
White & Case LLP

Chief Legal Officer Roundtable

Nelson Mullins

Sports Outing & CLE Program

Buchanan Ingersoll & Rooney PC

We are monitoring the impact of COVID-19 (Coronavirus) in the South Florida area. The health and safety of our members, guests and sponsors is our top priority. ACC South Florida has made the decision to postpone all in-person ACC-related events and activities until further notice. We will continue to review the guidelines provided by the state, counties and cities and re-evaluate our calendar schedule as more information becomes available.

COVID-19 Resources for ACC South Florida Members

To better help you navigate information around COVID-19, we have aggregated all the various resources from ACC, our sponsors and the state/counties on our [website](#). Also included are links to recordings of past webinars.

Chapters & Networks | Chapters | South Florida

COVID-19 Resources for ACC South Florida Members

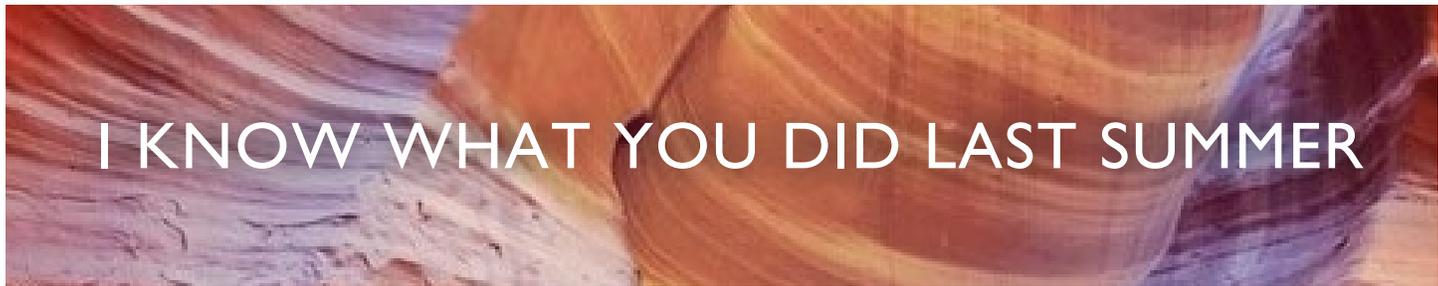
RECORDINGS OF RECENT WEBINARS

- Bilzin Sumberg (password: COVID-19)
- Navigating the Coronavirus Aid, Relief and Economic Security Act (CARES Act)

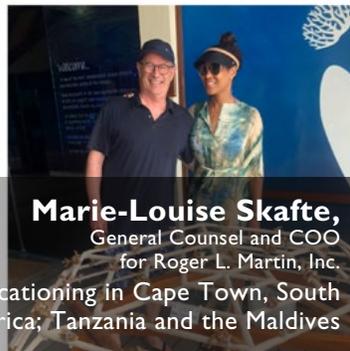
JOB OPPORTUNITIES

If you would like to be included on a distribution list for South Florida in-house employment opportunities, please e-mail Christina Kim at southflexec@accglobal.com. E-mails will be sent out on a periodic basis based on availability. Distribution list is only for ACC South Florida members.

Member Photos



I KNOW WHAT YOU DID LAST SUMMER



Marie-Louise Skafta,
General Counsel and COO
for Roger L. Martin, Inc.
Vacationing in Cape Town, South
Africa; Tanzania and the Maldives



Janet Buchanan,
General Counsel
Automotive Management Services, Inc.
Vacationing in Dubai & Greece



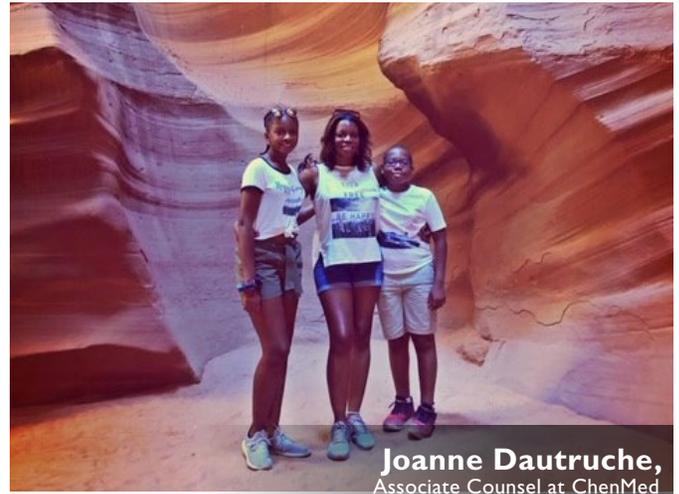
Aline Drucker,
General Counsel
at Invicta Watch Group
Vacationing in Zurich



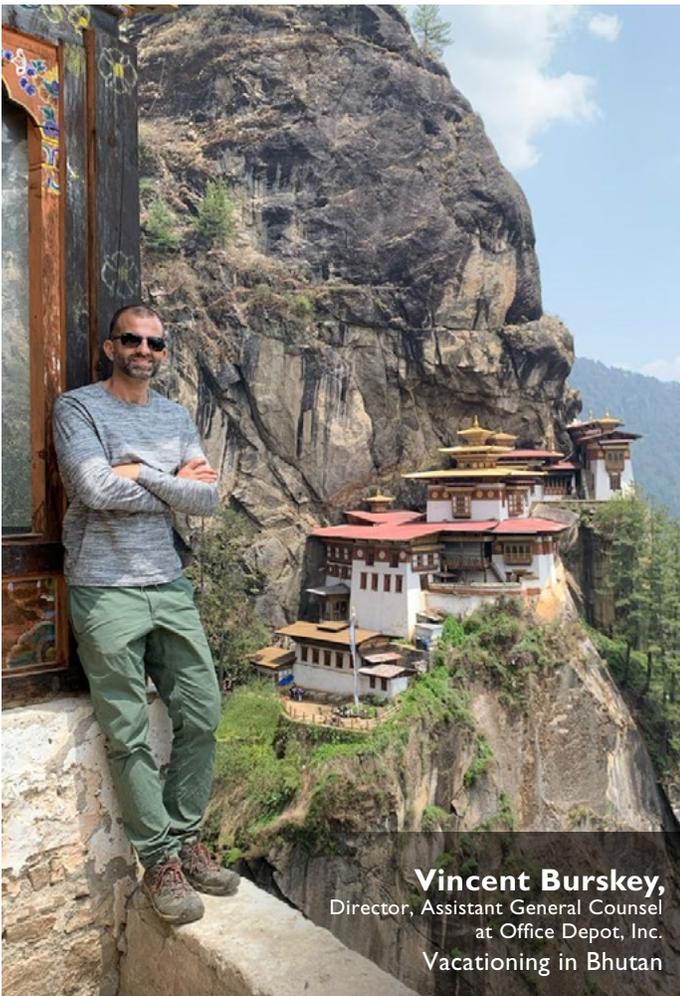
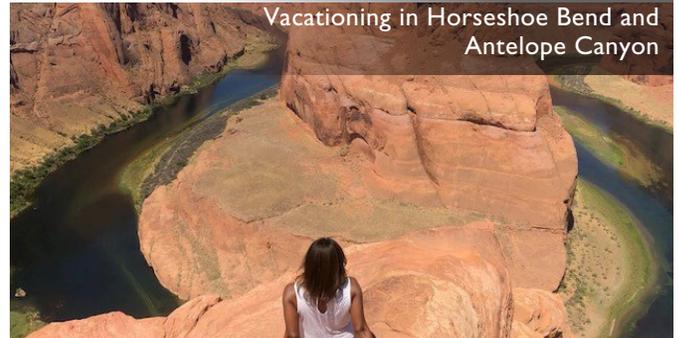
Justin Carlson,
CLO / General Counsel at Velocity Solutions, LLC
Vacationing in Benin, Ouidah Benin, Sao
Tome and Gamarth Beach in Tunis



Carlos Cardelle,
Managing Senior Counsel at ADPTotalSource
Vacationing in Marco Island



Joanne Dautruche,
Associate Counsel at ChenMed
Vacationing in Horseshoe Bend and
Antelope Canyon



Vincent Burskey,
Director, Assistant General Counsel
at Office Depot, Inc.
Vacationing in Bhutan

We're Getting SOCIAL!

For the latest photos and details from our events, please be sure to follow ACC South Florida Chapter on Instagram and Facebook. On LinkedIn, join our group page exclusively for members. In addition, we are excited to now have a public ACC South Florida Chapter page for interaction with our sponsors, respective companies and everyone. On all of our social media platforms, feel free to tag ACC South Florida Chapter on your posts and hashtag #accsouthfl.

You can find updates, event information and more at:



[accsouthflorida](#)



[@accsouthflorida](#)



[ACC South Florida Chapter](#)

ACC News

2020 ACC Annual Meeting: Now Low Rate for the New Dynamic Experience

ACC will host the 2020 Annual Meeting entirely virtually and we want to see you there. You won't want to miss this year's program — including live interactive workshops, networking without limits, daily marquee speakers, access to the entire meeting's substantive content, and more! Reserve your spot today at acc.com/annualmeeting.

In-house Counsel Certified (ICC) Designation

The [ACC In-house Counsel Certification Program](#), helps in-house counsel become proficient in the essential skills

identified as critical to an in-house legal career. The program includes live instruction, hands-on experience, and a final assessment. Those who successfully complete the program will earn the elite ICC credential. Your law department and your employer will benefit from having a lawyer that returns with global best practices in providing effective and efficient legal counsel. Attend one of these upcoming programs:

- Alexandria, VA, November 16-19

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:

- Virtual course starts September 12

Learn more and register at acc.com/BU.

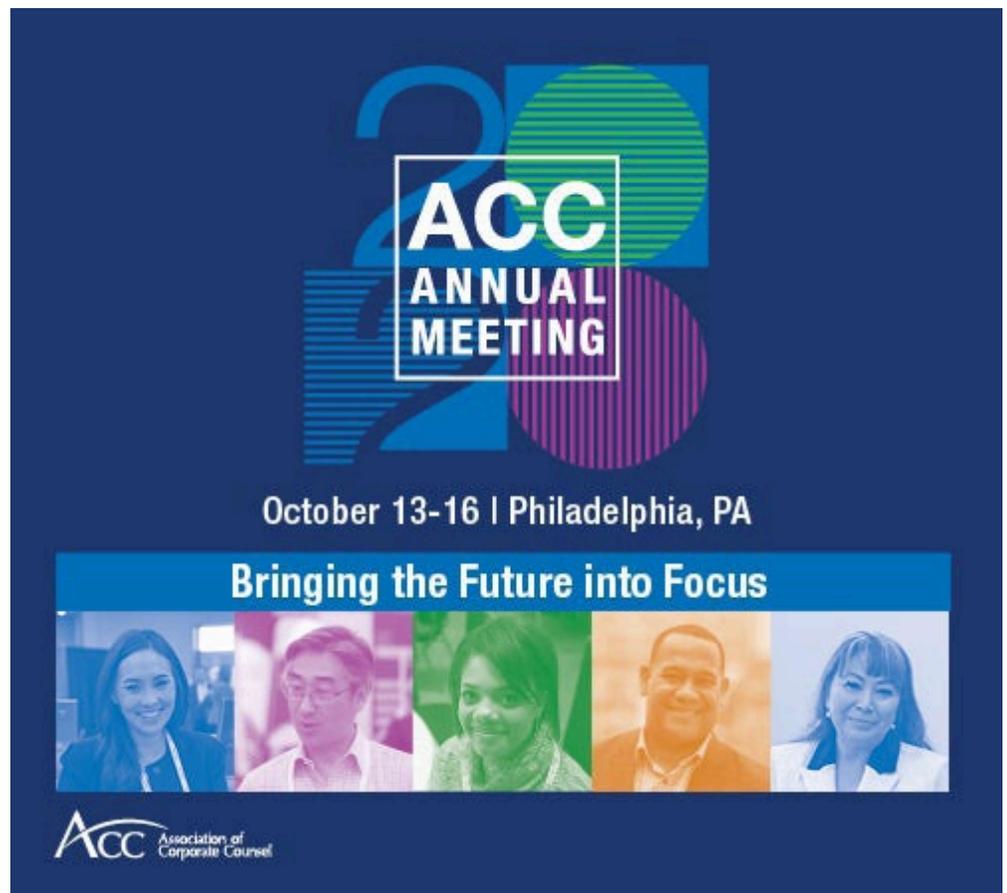
Are you prepared to comply with new state privacy laws?

Rapidly growing data privacy regulations from California to New York make you accountable for all third-party service providers that access, process, or store your company's personal data. Visit www.acc.com/VRS for more information.

The world's largest gathering of in-house counsel is still happening.

We are committed to providing you the education, networking, and legal department solutions you need this fall. Originally, our plan was to host the 2020 ACC Annual Meeting (#ACCAM20) as a hybrid live/virtual meeting, with speakers and breakout sessions available to all attendees, whether joining us in Philadelphia or from their homes. However, due to recent spikes in COVID-19 cases and in the interest of attendee safety, ACC made the necessary decision to change course: #ACCAM20 will be 100 percent virtual.

To learn more about what the virtual experience means for attendees, speakers, and sponsors, see our [FAQ page](#).



October 13-16 | Philadelphia, PA

Bringing the Future into Focus



ACC Association of Corporate Counsel

[Let's Do This - Virtually](#)

Chapter Leadership

President

Jessica Rivera

EVP, Global Sales & Corporate Affairs, MotionPoint Corporation

Immediate Past President/CLE Conference Chair

Carlos Cardelle

Managing Senior Counsel, ADP TotalSource, Inc.

Secretary

Amy Charley

Chief Administration & Legal Officer, Alteon Health

Treasurer

Warren Stamm

General Counsel, Niido

Sponsorship Co-Chair

Aline Drucker

General Counsel, Invicta Watch Group

Sponsorship Co-Chair

Eric Masson

Chief Legal Officer, Dental Whale

Communications Co-Chair

Simonne Lawrence

Deputy General Counsel and VP, Compliance, Envision Pharmaceutical Holdings

Communications Co-Chair

Joanne Dautruche

Associate Counsel, ChenMed

Community Outreach Chair

Sharaine Sibblies

Deputy General Counsel - Corporate Services, JM Family Enterprises, Inc.

Membership Co-Chair

Alan Kramer

Associate General Counsel, Deutsche Post DHL

Membership Co-Chair

Daniela Rost

General Counsel, Felman Trading Americas

Membership Engagement Chair

Matthew Cowan

Director, Assistant General Counsel, Office Depot

Board of Directors

Joshua Forman

General Counsel & Chief Compliance Officer, GlobeNet

Peter Levine

Associate General Counsel, WoundTech

Robert D'Amore

Senior Counsel, Attorneys Title Insurance Fund, Inc.

Executive Director

Christina Kim

Christina Kim
Executive Director

Executive Director Note

Dear Members,

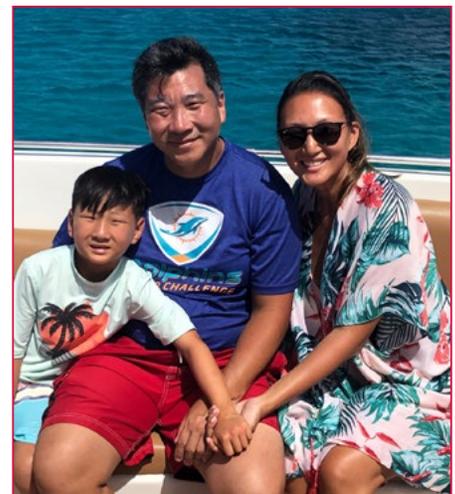
We continue to hope and pray all of you are healthy and doing well. In times like this, community is so important, and it has been great to see our members and sponsors come together to support and engage with ACC South Florida.

Our priority continues to be the safety and well being of everyone involved in our chapter so with that in mind, we have postponed our Mini MBA to October 17, 2020 and our Annual Conference to April 30, 2021. In the meantime, we will be bringing you virtual events hosted by our sponsors – stay tuned!

If you have any questions, suggestions, thoughts – please do not hesitate to let us know. We are here for you

Christina Y. Kim

Executive Director, ACC South Florida



Christina & Family vacationing in Anguilla last summer