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# FOCUS

## President's Letter

**Jessica Rivera**

### Thank you ACC South Florida!

As I pen my last remarks as your Chapter President, I am filled with an overwhelming sense of gratitude for the resilience this community has shown throughout two 'once-in-a-lifetime' years of change and uncertainty. We have been through a lot together.

And because it took a village, there are many individuals to thank for making our chapter stronger than ever. First, to our sponsors: each of you embodied the definition of true partnership, standing in solidarity with our organization as we navigated through the complexities of delivering member programming timely, flexibly, and safely. You allowed us to keep our finger on the pulse of pressing issues impacting our businesses, including return-to-work protocol, remote work legal implications, DEI best practices, data security and retention, and more. Thank you for your steadfast commitment to our in-house community.

Next, a large thank you to our members. From online GC roundtables and CLE webinars, to virtual family zoo visits and Disney trivia, the chapter remained very connected despite being farther apart these past two years. Because there were more web-based offerings, we got the opportunity to 'e-meet' many new members, and even reach across the state to other chapters through our recent **ACC Data Steward** seminar, sponsored in part by **Shook Hardy & Bacon**. And a big thank you to our members who

attended our in-person events held once it was safe to do so. Those meetings – some of the first face-to-face interactions I had outside my family in over a year – brought a sense of excitement and energy that simply can't be duplicated digitally. A special thanks to **Fisher Phillips** for hosting our first in-person Coffee Talk CLE of the year, **Foley & Larder** for hosting our beautiful (and fashionable!) Member Appreciation Event at Sistrunk Marketplace, and **Little** for a delectable virtual chocolate tasting.

Thanks next to our wonderful Board of Directors. Team, this was certainly not the way I expected our time together to unfold. We were challenged by tough decisions arising from the need to balance the priorities of our sponsors, members, and organization. It has been refreshing to work alongside you as we carry the privilege, voice, and duty to discuss, debate, and decide on policy impacting our diverse organization. From the bottom of my heart, I thank each of you for your extraordinary professionalism and dedication as a board volunteer. And to our Executive Director Christina Kim: your complete commitment to ACC South Florida never goes unnoticed. The continued success of our chapter these last two years is directly as a result of your world-class work ethic and dedication to this team. Thank you for all that you do.

I am delighted to turn over the Board and its work to our chapter's new President, Aline Drucker. Her leadership, pres-



ence, enthusiasm and genuine care and concern for others will undoubtedly serve our chapter well. I am proud to call her my colleague, and my friend.

The theme I unveiled in 2019 when I began my presidency was 'Clarity of Purpose'. If there's one thing that's been made 'clear' to me over these last two years, it's that my power – and my purpose – lies in my ability to *be* more, not do more. Specifically, to be more supportive, tolerant, patient, brave, honest, and gentle with myself and with others as we navigate life's celebrations and challenges together. Because there will always be more ladders to climb, more money to earn, more tasks to complete, and more goals to achieve... but none of these fleeting acts bring the lasting abundance that showing up for ourselves and for this world do. My final challenge as your President, then, is to find *your* purpose, whatever it may be, and align your words, actions, and mindset to it.

ACC community, thank you for allowing me to lead.

Jessica

# Supreme Court Deals Major Blow to Consumer Class Actions Based on Potential Future Harms

By Scott N. Wagner and Brian M. Trujillo



*\*\*This is the second part of a two-part series exploring the Supreme Court's consideration of *TransUnion LLC v. Ramirez*.*

The Supreme Court's 2016 decision in *Spokeo v. Robins* established the principle that statutory violations alone do not confer Article III standing on plaintiffs.<sup>1</sup> *Spokeo* required that a plaintiff demonstrate a "concrete harm" before accessing federal courts. The Supreme Court, however, left it to the lower courts to sort out what constitutes a concrete harm. Not surprisingly, *Spokeo* spurred an onslaught of litigation concerning the level of harm a plaintiff must show to establish standing—resulting in lower courts applying a variety of different, and often inconsistent, standards.

A notable area of confusion surrounded the issue of whether the *risk* of suffering a *future* harm is enough to confer Article III standing on potential plaintiffs.

The Supreme Court answered that question unequivocally at the end of the 2020 October term in *TransUnion LLC v. Ramirez*, finding that the mere risk of future harm is not enough to open courts' doors.<sup>2</sup>

The *TransUnion* litigation arose out of an add-on product offered by TransUnion. In addition to traditional credit-reporting services, the company checked consumers' names against a list maintained by the United States Department of the Treasury's Office of Foreign Assets Control ("OFAC") of terrorists, drug traffickers and other serious criminals. If a consumer's name matched a name on the OFAC list, the consumer's credit report would include an alert that his or her name was a "potential match" to a name on the OFAC list.

Under a theory that TransUnion failed to "follow reasonable procedures to assure maximum possible accuracy,"

as required by the Fair Credit Reporting Act ("FCRA")<sup>3</sup>, a class of individuals whose credit reports contained erroneous OFAC alerts sued TransUnion seeking both statutory damages of up to \$1,000 per consumer and punitive damages. Of the 8,185 total class members, only 1,853 actually had their credit reports sent to a third party. The rest of the class was left to argue only that their reports with the OFAC alert *could have* been sent to third parties.

At trial, the jury awarded each class member \$984.22 in statutory damages and \$6,353.08 in punitive damages, amounting to a judgment of over \$60 million against TransUnion. TransUnion then appealed to the Ninth Circuit, which ultimately affirmed the district court but effectively reduced the punitive damages awards to \$3,936.88 per class members (reducing the total damages award to roughly \$40 million).

TransUnion then appealed to the Supreme Court where the primary issue before the court was whether the 6,332 class members whose reports were never disseminated to a third party suffered a concrete harm capable of sustaining standing.

The doctrine of standing is central to American jurisprudence. It ensures that courts faithfully operate within the confines of their source of authority. Article III of the Constitution limits courts' authority to only cases and controversies in which the plaintiff has a 'personal stake' in the litigation.<sup>4</sup> Sufficiently establishing standing requires that a plaintiff show "(i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the

defendant; and (iii) that the injury would likely be redressed by judicial relief."<sup>5</sup>

In *Spokeo*, Justice Alito, writing for the court, found that plaintiffs still needed to show that they suffered a "concrete injury" in order to establish standing under Article III irrespective of whether or not they were suing for violations of consumer protection and privacy statutes. The Court emphasized that, while Congress has the authority to create a right to sue for a statutory violation, Congress "cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."<sup>6</sup> The Court also confirmed that concrete injuries could be tangible or intangible<sup>7</sup> and that under *Clapper v. Amnesty Int'l USA*<sup>8</sup>, a "risk of real harm" *could* constitute a concrete harm.<sup>9</sup> However, neither *Spokeo* nor *Clapper* clarified the threshold of risk sufficient to rise to the level of a concrete harm.

In the present case, TransUnion argued "that in a suit for damages [as opposed to injunctive relief like *Clapper*], the mere risk of future harm, standing alone, cannot qualify as concrete harm—at least unless the exposure to the risk of future harm itself causes a *separate* concrete harm."<sup>10</sup> In other words, standing alone, it was not enough that the class members' reports *could have* been shown to a third party. In order to succeed, the class members had to show that either the report was disseminated to a third party such that the publication of that false information led to harms historically recognized in American law (e.g., the harm that flows from defamation) or that being exposed to the risk that the report would be published is itself an injury capable of establishing concrete harm.

5 *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992)).

6 *Spokeo*, 136 S. Ct. at 1548.

7 *See Id.* at 1549.

8 133 S. Ct. 1138 (2013).

9 *Spokeo*, 136 S. Ct. at 1549.

10 *TransUnion*, 141 S. Ct. at 2210–11 (citing Brief for Petitioner 39, n.4; Tr. of Oral Arg. 36).

1 136 S. Ct. 1540 (2016).

2 141 S. Ct. 2190 (2021).

3 *See* 15 U.S.C. § 1681e(b).

4 *See Id.* at 2203.

*continued on page 3*

Finding this persuasive, the Court held that those 6,332 class members whose reports were never shared did not present evidence that they “were independently harmed by their exposure to the risk itself—that is, that they suffered some other injury (such as emotional injury) from the mere risk that their credit reports would be provided to third-party businesses.”<sup>11</sup> The Court drew heavily from the principle that the best way to ascertain “harm” was to look at parallels in American legal history. So, for instance, the harms produced from a disseminated erroneous OFAC alert were akin to the harms produced through defamation. But there was no parallel in American history to suggest that any harm flowed from a risk that the report *could* have been disseminated. Therefore, the Court found that those 6,332 class members failed to establish a material risk of harm under *Spokeo* and *Clapper* sufficient to supply a concrete harm.

The class as a whole brought two other claims against TransUnion under the FCRA. Both claims are rooted in how TransUnion actually mailed consumers their reports. First, they would send a package containing the credit report and a summary of rights highlighting additional information such as how to correct for errors in the report. Then, if the consumer had an OFAC alert on file, they would send a second package containing just the alert with no summary of rights included.

The class argued that both instances of sending a package violated the FCRA. In the first instance, TransUnion allegedly violated the FCRA’s requirement that it disclose all information in the consumer’s file at the time of request.<sup>12</sup> In the second instance, TransUnion allegedly violated the FCRA’s requirement that it provide a summary of rights to consumers any time it sent a report to a consumer.<sup>13</sup>

The Court resolved the second and third claims together, ultimately holding that only the class representative established a concrete harm under these claims because the rest of the class did not introduce any evidence to suggest that anyone other than

the class representative even opened the two mailings, experienced confusion or distress, or tried to correct for the error in the report. And, therefore, “[w]ithout any evidence of harm caused by the format of the mailings, these are ‘bare procedural violation[s], divorced from any concrete harm.’”<sup>14</sup> With respect to the risk of future harm that the class members *could* have opened the envelope and suffered those harms, again the Court said that this alone was not enough to support Article III standing for their damages claim.

Therefore, the Court rejected that class members, besides the class representative, had standing to bring the second and third claims against TransUnion for failing to follow the procedural requirements regarding the formatting of how TransUnion sends out its reports.

Thus, upon remand, the class members will no longer be able to substantiate their \$40 million judgment against TransUnion because for the first claim the size of the class has been reduced to 1,853 from 8,185, and to just 1 for the second and third claims; a devastating blow for the class but a remarkable victory for TransUnion and future defendants defending claims premised merely on statutory violations under a theory that some harm *might* have realized. At bottom, the Court’s ruling also serves as a signal to future plaintiffs suggesting how the Court might deal with claims premised on unrealized prospective harms.

Justice Thomas, joined by Justice Breyer, Justice Sotomayor, and Justice Kagan, dissented. Justice Thomas would give more deference to Congress’s decision to provide statutory rights and remedies for these kinds of violations under the FCRA and other privacy statutes than the majority did. Drawing on history, Justice Thomas points to the fact that “courts for centuries held that injury in law to a private right was enough to create a case or controversy.”<sup>15</sup> And seeing that each class member established a violation of his or her private rights under the FCRA, Justice Thomas would have held that each class member suffered a concrete harm

sufficient to establish standing to sue in federal court.

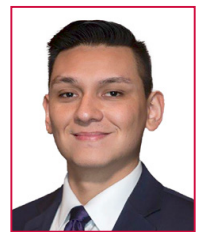
In *TransUnion*, the Supreme Court set guideposts for what constitutes a concrete harm. The Court’s explicit finding rules out standing based on possible future harms, but it also signals the Court’s increasing skepticism towards standing based on other intangible and unrealized harms, such as the risks associated with printing too many credit card numbers on a receipt.<sup>16</sup> The decision is, therefore, no doubt a blow to the class plaintiffs’ bar in that it forecloses a relatively smooth ride to class certification for lawsuits involving alleged violations of consumer protection and privacy statutes.

### Authors:

**Scott Wagner**, a Partner in Bilzin Sumberg’s Litigation Group, represents companies and individuals in antitrust, class action, and other complex litigation. He conducts internal investigations and guides corporate clients through regulatory investigations conducted by the Department of Justice, Federal Trade Commission, Securities and Exchange Commission, and state attorneys general. Scott is a past Chair of the Federal Bar Association’s Section of Antitrust and Trade Regulation. Scott is consistently recognized by legal publications such as Chambers USA, Benchmark Litigation, and Florida Super Lawyers.



**Brian Trujillo** is an Associate in Bilzin Sumberg’s Litigation Practice Group. During his time at Northwestern Law, he served as an Executive Editor of the Northwestern Journal of Technology and Intellectual Property. Brian is the recipient of the Irene V. McCormick Law Scholar award, was Vice President of Outreach of the Latino Law Students Association and Co-President of the Christian Legal Society. Brian was a judicial extern with the United States District Court for the Northern District of Illinois. Brian obtained his J.D. from Northwestern Pritzker School of Law and his B.A., summa cum laude, from Florida International University.



11 *Id.* at 2211.

12 See 15 U.S.C. § 1681g(a)(1).

13 See 15 U.S.C. § 1681g(c)(2).

14 *TransUnion*, 141 S. Ct. at 2213 (quoting *Spokeo*, 578 U.S. at 341).

15 *Id.* at 2218 (Thomas, J., dissenting).

16 See, e.g., *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917 (11th Cir. 2020).



# The Role of Lawyers in the Face of Increasingly Capable Technology

By David Field, Canon Australia, Chief Legal Counsel and Director, People & Finance

It is something of a tired cliché these days to talk of the threat of artificial intelligence (AI) replacing lawyers. There are already substantial places where increasingly intelligent technology is performing tasks that lawyers used to perform, and we should expect technology to make increasingly aggressive inroads into the practice of law in upcoming decades.

No sensible lawyer should resist this trend, and in fact, the true challenge for lawyers lies in achieving a type of collaboration with technology. Lawyers need to use technology to rapidly and efficiently solve high-volume or routine issues, freeing themselves to apply their uniquely human skills to deliver more value for clients and the community.

So, what are these uniquely human skills, and how should we be looking to deliver more value with them? I'm being told I need to collaborate — what's my contribution to the collaboration?

In this discussion, I have been somewhat undisciplined in relation to how I use terms like “artificial intelligence.” A common definition of artificial intelligence relates to the use of technological systems to perform tasks normally associated with human intelligence. The definition is fuzzy and slightly circular, but the linkage back to “normally associated with humans” is very well suited to the present discussion. We're talking about technology that does things we (or people like us) used to do.

The impact of technology on the practice of law could be described as disruptive. Many established businesses seem to fear disruption and treat it as something to be avoided, as though disruption were something random and calamitous, like an asteroid collision striking the earth.

But the reality is that, at its heart, if your business is disrupted it means that someone else has found a better or cheaper way to add more value to your customers. If you want to avoid being disrupted,

either as a business or in your professional career, you should be focused on delivering as much value as possible and should keenly embrace any tool or technology that allows you to achieve this.

Much of the traditional role of lawyers has been intermediating complex information and processes for clients. The average layperson lacks the time and training to research the law themselves or execute complex processes such as a sale of business. Lawyers are trained where to look for the law and how to understand it when they find it; and have training and experience in navigating complex legal processes.

Without wanting to be disrespectful, much of the routine practice of law for the average consumer of legal services can boil down to the skillful, neat, and efficient execution of administrative processes. When seen in this way, technology can facilitate equal access to law.

Legal knowledge, processes, and logic-flows can be captured in technological systems that guide laypeople through the options available to them and the key decisions they need to make, making legal advice accessible without the need for an expensive professional human to dedicate their time. From a public policy perspective, and provided quality control concerns can be met, more people having greater access to the law at lower cost must be a good thing, and lawyers should be embracing it.

A perpetual dilemma for industries and enterprises faced with threatened disruption is the need for cannibalism of legacy revenues. Many would be familiar with the story that Kodak invented the digital camera in the 1970s but didn't invest in further developing it because it was incompatible with their lucrative film businesses.

The rest is history, to the point where a “Kodak moment” has become synonymous with an incumbent missing the opportunity to pivot into a new opportunity, therefore dooming themselves

to irrelevance. Any lawyer who resists opportunities to use technology to deliver more value to clients is courting their own “Kodak moment.”

So, if lawyers increasingly delegate lower-order tasks to technology in order to deliver better value for their clients, where should they be looking to offer unique human value-add? I propose the following (non-exhaustive) starting list of higher-order skills that lawyers should be looking to deploy for clients:

- Insights and opportunities
- Judgment/wisdom
- Values
- Empathy

## Insights and opportunities

If you asked clients to describe what they expect from their lawyers, I doubt many would offer the words “insight” and “opportunity.” However, it is one of the easiest ways to add profound value to a client and establish yourself as a trusted adviser. In the process of performing more traditional legal functions, lawyers often have an opportunity to see the client's business or affairs from a perspective that the client themselves rarely sees.

Where the lawyer is working on disputes, they will be able to see repeat issues or root-causes of problems that are causing unwanted expense, distraction, and customer dissatisfaction. Where the lawyer is working on customer contracts, they will be able to see repeat issues that are triggering customer objections, slowing sales, or causing mismanaged customer expectations. A good human lawyer is on the look-out for these sorts of insights to help their client improve.

Similarly, through being a repeat-player on some of the most challenging parts of clients' lives, lawyers are often in the box-seat to identify opportunities to generate value for clients. A key example that

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comes to mind is the role that the Disney legal team played in recent decades in their IP protection strategy.

Disney is faced with the progressive expiry of copyright in large swathes of its catalogue, starting with the iconic Steamboat Willie, which brought Mickey Mouse to the world, and becomes public domain from 2024. The Disney legal team has been able to pivot the focus of IP protection from copyright into trademarks, extending the useful life of the catalogue.

### Judgment/wisdom

Perhaps not surprisingly for a higher-order human skill, I struggle to precisely define judgment and wisdom. I think the relevant sense in which I am using it here is the ability to go beyond data to a synthesis of complex environmental factors that shape or constrain the courses of action that are genuinely available.

By way of example, in a large corporation dealing with consumers, it is essential that any proposed course of action is judged against a social media or talk-back radio test. The company's contractual rights may be perfectly clear, but if enforcement of those rights would be judged harshly by a substantial community when reported or discussed on Facebook, Twitter, or talk-back radio, then any quality legal advice on the subject should reflect this.

### Values

In a similar vein, recent regulatory developments such as the Hayne Royal Commission and the Bergin Inquiry into Crown Casinos here in Australia, have shown that poor corporate values can result in serious adverse commercial outcomes, and highlighted that anyone responsible for brand, reputation, and risk in a company should be keenly interested in the corporation's values, and the mechanisms for ensuring actions are aligned with those values.

Among many other excellent reasons for having strong values, alignment between a company's actions and its stated values will be a critical factor in determining the degree of trust placed in the company by customers, partners, regulators, and the broader community. As with the social media or talk-back radio test, there will be courses of action that are legally available that simply do not align with the company's values. Legal advice that does not flag important values issues is inadequate legal advice.

### Empathy

Intertwined with the last two skills is empathy — the ability to understand the thoughts and feelings of another human. I am aware of research on areas such as robotic interpretation of body language, and that humans are often nowhere near

as good at reading another human's emotions as they would like to think. However, I would assert that it's impossible to provide quality legal advice in complex situations without empathy.

Ideally, to provide quality legal advice in complex situations you need to be able to understand as much as you can of the circumstances, aspirations, values, risk appetite, and concerns of your client in order to provide the legal advice that they need. Obviously not all issues justify that — the answer to some simple questions may be black and white, and some problems simply don't justify the additional legal effort. But in complex situations involving competing considerations and a degree of risk, the legal solution must be responsive to the needs of the individual client sitting in front of you.

Ultimately, law is a human system. Yes, the practice of law involves data and logic-flows in ways that may not have been apparent to our legal forebears, but ultimately legal systems add the most value when they serve humans. Across the economy there is strong market demand for people with the skills, awareness, and passion to make systems work better for humans, and I personally believe the legal profession will not be an exception. I know what I'm going to be trying to contribute to this collaboration.

## ACC News

### Good Lawyers to Great Lawyers Professional Development Retreat: September 20–22

Miami, FL and Virtual

Don't miss your chance to sharpen your soft skills, develop your leadership style, and network with leading executives in the legal profession. Attend either in-person or virtually. [Register today!](#)

### 2021 ACC Virtual Annual Meeting: October 19-21

It's here! The 2021 ACC Annual Meeting program is ready and it's jam-packed with valuable substantive and career-focused content you don't want to miss. [Check it out!](#)

### ACC In-house Counsel Certification Program: November 1-11

The [In-house Counsel Certification Program](#) covers the core competencies identified as critical to an in-house career. This virtual training is a combination of self-paced online modules and live virtual workshops. The workshops will be conducted over a two-week period, four days a week for three hours each day.

### 2021 ACC Securities Law Disclosure: November 3-5

New York, NY

Join the conversation in the room where it happens! Amp up your [securities law skills](#) at this one of a kind executive level seminar where we will teach you everything you need to know to participate in those C-suite discussions.

### ACC Data Steward Program

Law firms are holding some of your company's most sensitive data but are you certain that it is secure? The Data Steward Program – Single Client Option – allows you to gain assurance that your law firms are secure, while the DSP Program does all the work. [Learn more.](#)

## ACC South Florida Upcoming Events

### SEPTEMBER

**Coffee Talk CLE - 9/30**  
presented by White & Case

### OCTOBER

**GC/CLO Roundtable**  
presented by Nelson Mullins

### NOVEMBER

**Coffee Talk CLE**  
presented by Rumberger Kirk and Caldwell

### DECEMBER

**Miami Dade Holiday Party**  
presented by Cozen O'Connor

**Palm Beach Holiday Party**  
presented by DLA Piper

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### Miami-Dade Progressive Dinner

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(Dinner Sponsor)  
DLA Piper (Dessert Sponsor)

### Palm Beach Progressive Dinner

Shutts & Bowen LLP (Premier Sponsor)  
FordHarrison LLP (Dessert Sponsor)

### GC/CLO Dinner

FTI Consulting

### 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

### Newsletter Article

SustainaBase

## Welcome New Members!

### Diana Abril

Chief Legal Officer  
AgileThought, Inc.

### Melia Arnett-Archie

Senior Privacy Counsel  
Stryker Corporation

### Oral Beason

General Counsel  
Litai Assets LLC

### Carol Celestine

General Counsel  
quantilope, Inc.

### Matthew Fox

Counsel  
JM Family Enterprises, Inc.

### Jessica Garrett

Senior Corporate Counsel  
Kronos Incorporated, a UKG Company

### Chris Green

COO & In-House Counsel  
United States Polo Association

### Jacob Jackson

General Counsel  
MerchantWorthy, Inc./Summit  
Merchant Processing, Inc.

### Eduardo Ludmer

Legal Counsel  
Citrix Systems, Inc.

### Ricardo Marenco

In-House Counsel  
Gara Group, Inc.

### Maria Mayer

Associate General Counsel  
JM Family Enterprises, Inc.

### Michel Morgan

Senior Associate General Counsel  
Universal Property & Casualty  
Insurance Company

### Kevin Norman

Senior Venture Capital Counsel  
NextEra Energy, Inc.

### John-Paul Ovadia

Counsel, Franchising & Real Estate  
Restaurant Brands International

### Valentina Shenderovich

Associate General Counsel  
Compass, Inc.

### Alex Troise

Senior Counsel & Director, Supply  
Management  
Carrier

### Benjamin Wiles

Director, Intellectual Property  
Carrier

### Michael Zuk

Director, Security  
Carrier

# Cybercrime: A Leading Threat to Business & National Security

By Traci Rollins, Michael Green and Jonathan Osborne

The August 11, 2021 cyber-attack on Accenture, a global consulting firm offering cybersecurity services, reminded businesses and policymakers that we remain in the midst of a global crisis in which hackers and ransomware actors have taken center stage, threatening national and economic security, as well as the cybersecurity of the private sector. In June, a bipartisan group of U.S. Senators [announced](#) a proposed bill, the Better Cybercrime Metrics Act, to improve data collection on cybercrimes. This legislation follows the June announcement of [the reintroduction of the International Cybercrime Prevention Act](#). According to lawmakers, this Act would permit law enforcement to confiscate communication devices and other property used to commit cybercrime, and would create a new criminal violation for cybercriminals who knowingly target critical infrastructure, including dams, power plants, and hospitals. In an effort to further bolster the tools available to federal prosecutors, the bill would also criminalize selling the “means of access” to a compromised computer if the seller knows or has reason to know the buyer intends to cause damage to the computer, to use the means of access to commit fraud, or to violate the criminal spam statute.

Indeed, in recent years, ransomware incidents have become increasingly prevalent among private businesses, critical infrastructure organizations, and government entities. For example, in the widely covered Colonial Pipeline Co. incident, Colonial paid nearly \$5 million to get gasoline and jet fuel back flowing to major cities along the Eastern Seaboard. It was later reported that the FBI recovered more than \$2 million of the ransom funds paid by Colonial, marking the first recovery by a new ransomware Justice Department task force. But many ransomware victims are not so fortunate.

In September 2020, Universal Health Services (“UHS”), which operates 400 hospitals and behavioral health facilities in the U.S. and United Kingdom, [suffered a cyberattack](#) that severely impacted all

of its IT systems. Following the incident, UHS reportedly worked swiftly to rehabilitate its information technology infrastructure and to restore normal business operations. However, despite working around the clock, the recovery process took around three weeks and resulted in significantly increased labor costs, loss of operating income, reductions in patient activity, and billing delays. Ultimately, UHS reported total pre-tax losses of an estimated \$67 million due to the ransomware attack.

In response to these and a plethora of similar stories of private sector cyberattacks, federal and state regulators have issued measures and proposals geared toward curbing cybercrime and pressuring private sector businesses to invest in cybersecurity to protect against ransomware attacks. Examples include the Biden Administration’s [Executive Order on Improving the Nation’s Cybersecurity](#). Private sector businesses, particularly those in [Critical Infrastructure Sectors](#) such as healthcare, communications, commercial facilities, and food and agriculture, should do the same. In addition to investing in appropriate cybersecurity technology and infrastructure that secures networks, systems, and applications, private sector businesses should assemble an Incident Response Team (“IRT”) that is prepared to act in the event of an attack.

Tasked with supporting the organization’s upper management or corporate board in assessing and responding to a breach, this team should include professionals with authority and expertise in IT, operations, human resources, and internal and external communications. The response team should also include legal counsel to assist with streamlining the process of crafting internal and external communications about the suspected incident, managing law enforcement and governmental reporting where necessary, and conducting an internal investigation of the occurrence with an eye toward preserving the organization’s attorney-

client privilege and work-product protections where appropriate.

The following are some specific steps that should be considered by the IRT in the event of a suspected cyber incident:

## 1. Identify the Method and Scope of Attack

Given the variety of attacks, the IRT should be equipped to first determine the method of intrusion, whether through the company’s website or email system; external media or devices; or otherwise. The IRT should then work to determine the scope of the attack by assessing which systems or networks are impacted, when and how the attack began; and the nature and extent of any damages sustained. The IRT should also define next steps, including what, if any, ongoing containment measures are necessary.

Determining the causes of an attack, appropriate remedial measures, and managing potential reputational harm, may require engaging outside legal counsel with experience in responding to cyber-incidents, as well as outside consultants.

## 2. Recordkeeping and Reporting

From the outset, the IRT should consider documenting its observations, findings, and response, mitigation, and containment decisions, in accordance with the organization’s incident response policies. The IRT should also be aware of whom on the company’s organizational chart should receive briefings concerning the incident. These parties often include the C-Suite as well as the human resources, information technology, public relations, and legal departments. In some instances, reporting to the media and the government may be required.

## 3. Post-Containment Recovery

Once the incident is contained, the IRT should work with the organization’s

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leadership to shore up vulnerabilities, improve information security infrastructure and systems, and implement the appropriate changes to the company's incident response policies and approach.

*Gunster 2021 Summer Associate Harrell Watts, II, contributed to this Publication.*

#### Authors:

##### Michael Green -

Michael Green is a shareholder who joined the firm in 2011. He is a member of Gunster's Business Litigation, Creditor Rights & Bankruptcy, and Intellectual Property Litigation practice groups. Michael is also a member of the firm's Associate Mentoring Committee. 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.

##### Traci Rollins -

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.



##### Jonathan Osborne

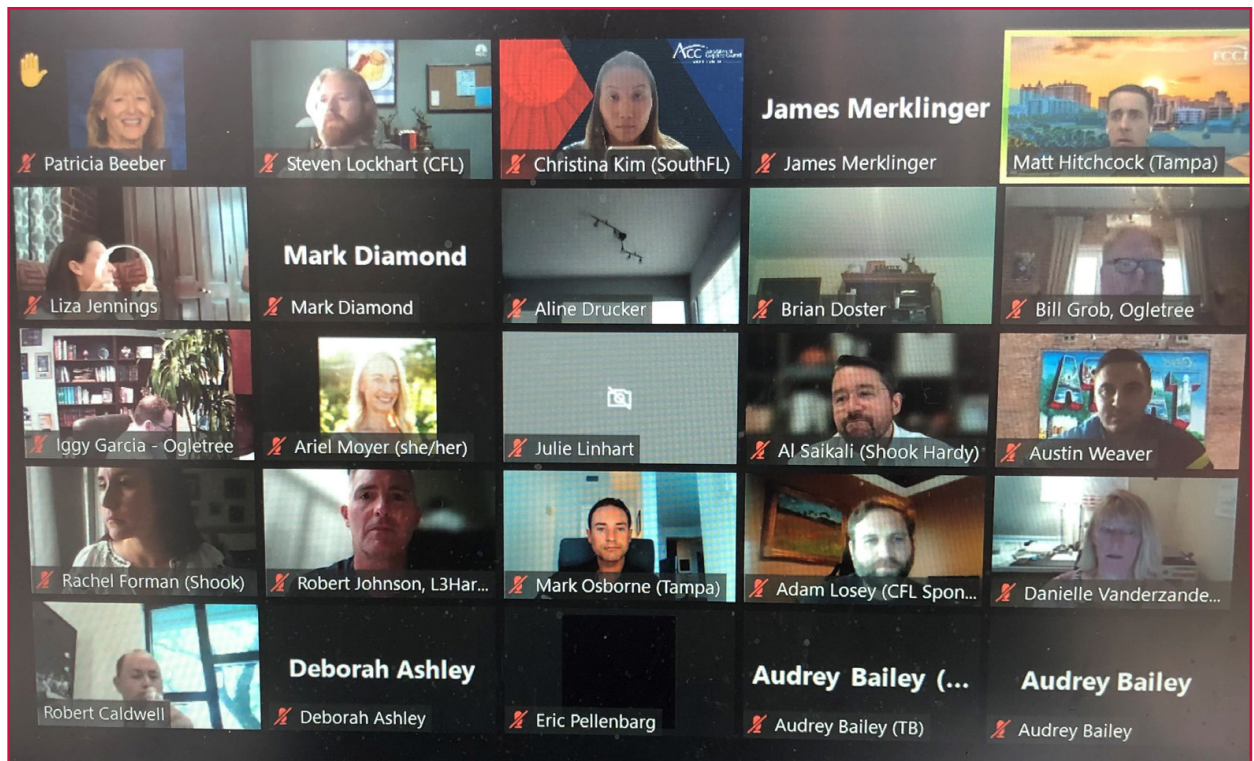
- Jonathan K. Osborne is a business litigation shareholder and co-chair of the firm's White Collar Criminal Defense & Internal Investigations practice group. He began his practice at Gunster and later returned to the firm after serving in the U.S. Department of Justice as an Assistant United States Attorney in the Southern District of Florida. An experienced first chair trial attorney, Jonathan represents individuals and organizations in civil business litigation, including the defense of legal malpractice claims as well as white collar criminal matters and internal investigations.



## EVENT PHOTOS

We've had some great events these past few months!

All Florida  
Data  
Steward  
Seminar  
presented  
by Shook,  
Hardy &  
Bacon





**Member Appreciation presented by Foley & Lardner**



**CLE Coffee Talk presented by Fisher Phillips**



**Virtual Chocolate Tasting presented by Littler**



## Chapter Leadership

### President

#### Jessica Rivera

EVP, Global Sales & Corporate Affairs, MotionPoint Corporation

### Immediate Past President/ CLE Conference Chair

#### Carlos Cardelle

Senior Deputy General Counsel, ShiftPixy

### President-Elect/Sponsorship Co-Chair

#### Aline Drucker

General Counsel, Invicta Watch Group

### Secretary

#### Justin Carlson

CLO / General Counsel, Velocity Solutions, LLC

### Treasurer

#### Warren Stamm

General Counsel, Niido

### Sponsorship Co-Chair

#### Eric Masson

Chief Legal Officer, Dental Whale

### Communications Chair

#### Joanne Dautruche

Corporate Counsel, ChenMed

### Community Outreach Co-Chair

#### Sharaine Sibbles

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

### Community Outreach Co-Chair

#### Alex Perez

Senior Legal Counsel, Assurant

### Membership Chair

#### Matthew Cowan

Director, Assistant General Counsel, Office Depot

### Board of Directors

#### Robert D'Amore

Senior Counsel, Attorneys Title Insurance Fund, Inc.

#### Alan Kramer

Associate General Counsel, Deutsche Post DHL

### Executive Director

#### Christina Kim

Christina Kim  
Executive Director

## Executive Director Note

### Dear Members,

Summer went by in a blink of an eye, and we are already in the last stretch of 2021. Fall is a time of transition for our Board of Directors and this year we are saying goodbye to Robert D'Amore who has served for the last six years and has been dedicated to the organization. In addition, a very special thank you to Jessica Rivera, our outgoing President, who I had the privilege to work alongside for the last two years and is not only an amazing leader, but a mentor and friend. We will be welcoming new Board members on October 1 and Aline Drucker will be taking the helm as our President!

We appreciate everyone who has been joining us both virtually and in person for our events – in whatever format you have been participating, it is always a joy to see our members and catch up.

We have a number of upcoming activities to close out the year and we hope you will continue to partake and meet our sponsors, network with your in-house counsel colleagues and be able to take a small break from the every day.

Sincerely,

**Christina Y. Kim**

Executive Director, ACC  
South Florida



Soaking in some family time in Anna Maria Island, FL.