Keys to Negotiating Indemnity Agreements

The effective management of indemnification and related insurance obligations is an active agenda item for top-level business leaders, including any CFO, CEO and general counsel, points out James Buldas in **an article** on the website of Business Insurance.

“It is, therefore, imperative, whether you are a Fortune 500 company or a small business, that your company’s risk management and legal departments strategically manage indemnification and insurance obligations to minimize the always increasing cost-of-business demands,” writes Buldas, a partner at Pietragallo Gordon Alfano Bosick & Raspanti L.L.P. in Pittsburgh.

His article covers the language of the indemnity agreeement, selecting the governing law, specificity in insurance obligations, requesting the appropriate additional insured endorsement, and communication between legal and risk management departments and brokers.

Read the article.

How to Build a Solid

Contractual Risk-Transfer Program

The use of subcontractors helps to ensure construction projects are completed in a timely and efficient manner, but it also creates a wide range of contractual risks, cautions Tommy Williams, USI Uniondale vice president, in an article for Property Casualty 360°.

"Without a properly structured risk-transfer program, a general contractor (GC), owner or property manager would assume financial responsibility unnecessarily for losses caused by a third party, who is contractually obligated to control or prevent those losses. The financial impact could be significant – more so in certain jurisdictions," he explains.

His article discusses the basics of contractual risk transfer, common subcontractor policy exclusions, and the need for expert advice.

Read the article.

How Boards Must Think Differently in Today's Digital Landscape

The evolving digital landscape continues to challenge many sitting directors with the various transformation and security issues it presents, according to **Boardroom Resources**. Boardroom discussions can no longer ignore the rise of the digital consumer, which has begun to affect industries far beyond just retail or business-to-consumer. These challenges are accompanied by many opportunities for directors to improve board and company performance.

In **a video**, Alex Schmelkin, board member with Essendant and founder & CEO of Cake & Arrow, is given an interesting task: If you could design a digital training program for today's board members, what would it look like? Host TK Kerstetter asks Schmelkin how he would both define 'digital' and communicate its current and future impact for today's directors.

In the video discussion, Schmelkin outlines several approaches that boards can take to better understand the "end user" no matter the organization or industry.

Watch the video.

A Primer on Deal Structure and Its Implications on the Sale of a Business

The success of the sale of a business often hinges on the chosen form and exit strategy, writes **Jeremy S. Piccini** of Bertone Piccini LLP in **an article** on the website of NJBiz.

The benefits of pursuing one strategy over another vary depending on the goals of the business owner, but some of the most important factors of each include tax consequences, third-party costs, and the degree of autonomy that the seller has over the future of their business, Piccini explains.

He discusses a few examples of the ideal target purchasers for a sale, including strategic competitors, private equity buyers, and employee stock ownership plans.

Read the article.

Assessing the Ability to Change Culture –

Complimentary Article from NACD

The National Association of Corporate Directors has published a complimentary article titled "**Assessing the Ability to Change Culture**," providing a quick overview of best practices set forth in the *Report of the NACD Blue Ribbon Commission on Culture as a Corporate Asset*.

Most boards recognize that management's actions create an organization's culture, and that leaders should "walk the talk." But few know what's involved in assessing and changing culture in a rigorous, comprehensive, and data-driven way, NACD says on its website.

The article describes how boards should:

- Assess the company's commitment to change along four key dimensions
- Oversee management in identifying and implementing needed interventions
- Seek to modify specific behaviors, not just instill values or tone from the top

Download the article.

Key Provisions for Supply Chain Contracts

In an article in the **Manufacturing Industry Advisor** published by Foley & Lardner, **Nicholas J. Ellis** discusses six areas that generally are the most critical points to consider when it comes to drafting a supply chain agreement.

“By paying careful attention to the terms of its supply chain contracts, a company can help to mitigate its risks while at the same time maximizing the value of its supply chain,” he writes.

The areas he discusses are critical commercial terms, quantity, duration, early termination, warranties and disclaimers, and limitation of remedies and damages.

Read the article.

Three Legal Pitfalls to Avoid in Blockchain Smart Contracts

While the use of smart contracts is tempting, this silver bullet of efficiency and lower costs doesn’t come without potential problems, warns Gregg M. Jacobson of Chamberlain Hrdlicka in an article in ***Bitcoin Magazine***.

Among the concerns he points out are: “First, will a court even consider a computer program to be a binding contract? Second, if disputes arise, where can the parties sue? Last, do the parties have to go to court, or is the less-expensive option of arbitration available?”

In his article, he discusses each of those points.

Read the article.

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6 Essential ‘TENANT’ Tips for Negotiating a Commercial Lease

Image by Nick Youngson

Real estate lawyer Laura A. Drossman uses a handy acronym to illustrate some of the issues and some tips for tenants approaching lease negotiations in a commercial setting.

In her **Linkedin article**, she discusses six points, keyed to the acronym TENANT.

Those are term length, exit strategy, notice and cure periods, assignment and subleasing, net or gross: rental structures, and tenant improvements.

She writes that keeping those points in mind will help commercial tenants understand how to negotiate favorable lease terms to position themselves for success before signing.

Read the article.

AT&T Would Win a Fight With DOJ Over Time Warner Deal, Analyst Says

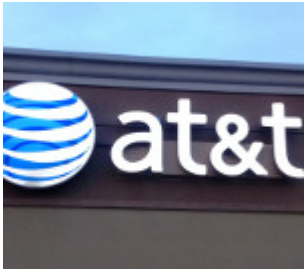

Image by Mike Mozart

AT&T and the Justice Department could be on their way to a major court battle, which one analyst believes the company

stands a strong chance of winning, **CNBC reports**.

AT&T's wants to acquire Time Warner, but the government wants the company first to sell Turner Broadcasting, which includes CNN, or sell DirecTV. The company has made it clear that it has no intention of selling any of those assets.

"If this does go to court, we think AT&T holds a strong position and would likely prevail," Paul Gallant, a Washington analyst at Cowen Research, said Thursday in a note to clients.

CNBC reporter **Jeff Cox** writes that Cowen believes the company has three advantages that would give it an edge in its fight with the DOJ.

Read the CNBC article.

Insurance Giant Receives New York Subpoena on Sales Practices

The New York Times **is reporting** that New York's attorney general has subpoenaed TIAA, the giant insurance company and investment firm, seeking documents and information relating to its sales practices, according to people briefed on the inquiry.

Last month, the newspaper raised questions about the firm's sales methods. TIAA oversees almost $1 trillion in client

assets, for more than four million workers at thousands of nonprofits, according to reporter **Gretchen Morgenson**.

A related SEC complaint was filed by former TIAA employees who contend they were pressured to sell products that generated more revenue for the firm but were more costly to clients while adding little value.

Read the *NYT* article.

Defending Breach-of-Contract Claims in Data-Breach Litigation

A post on the **What's Fair?** blog on the Ellis & Winters LLP website discusses a recent federal appellate decision that shows how data-breach lawsuits premised on overpayment theories – which often assert claims sounding in contract – still face an uphill battle.

Alex Pearce explains that the overpayment theory rests on the premise that the price of a product or service includes a payment for data security measures. He outlines the recent ruling in *Kuhns v. Scottrade*.

"In that decision—a boon for data-breach defendants—the Eighth Circuit employed a demanding test for the pleading of facts that give rise to an overpayment claim," Pearce writes.

Read the article.

Billionaire CEO Shuts Down Publications After Vote to Unionize

The CEO of a group of digital local news sites shut down the publications a week after reporters and editors in the combined newsroom of DNAinfo and Gothamist voted to join a union, reports ***The New York Times***.

Joe Ricketts, the billionaire founder of TD Ameritrade, owned the sites.

“For DNAinfo and Gothamist, the staff’s vote to join the Writers Guild of America East was just part of the decision to close the company, write **Andy Newman** and **John Leland**.

“The decision by the editorial team to unionize is simply another competitive obstacle making it harder for the business to be financially successful,” said a spokeswoman for DNAinfo.

Read the *NYT* article.

Dealmakers Increasingly Optimistic About M&A Market and U.S. Economy in Dykema Survey

Respondents to Dykema's **13th Annual M&A Outlook Survey** expressed an overall bullish viewpoint of the economy and U.S. merger and acquisition market, bringing a new level of optimism, not seen in several years.

According to the firm, 39 percent of respondents in this year's survey expect the M&A market to strengthen over the next 12 months, up from 33 percent last year and 37 percent in 2015. With a record-breaking robust stock market and uncertainty surrounding the presidential election fading, this revelation mirrors the 60 percent of respondents who predict a strong U.S. economy in the next 12 months, doubling last years' results.

"With the uncertainty around the presidential election in the rearview, our survey respondents are abandoning the 'wait and see' mantra, with an increasing number predicting that deal activity is back on the rise," said Thomas Vaughn, co-leader of Dykema's M&A practice. "In this year's survey, we are, however, still hearing that uncertainty around the Trump administration's priorities and regulations will have the greatest impact on M&A from a global perspective."

More than half (50 percent) of respondents expect Donald Trump

to be a positive force in U.S. markets as a whole this year. Likely factors playing a role in this optimistic sentiment include expected reduction in corporate tax rates, more favorable business regulations, and the Trump administration's perceived business-friendly positive economic policies.

The survey yielded a number of other interesting conclusions, including:

- Half of respondents said President Trump will have a positive impact on the U.S. economy and M&A market in 2018.
- Seventy-percent of respondents predict the volume of small deals (under $50 million) will increase over the next 12 months, with 53-percent predicting an uptick in deals valued between $50 million and $100 million.
- Sixty-eight-percent of respondents said they would be involved in an acquisition in the next 12 months, which is fairly consistent with 2016's 70 percent.
- For the fourth consecutive year, respondents expect technology and healthcare to see the most M&A activity in the next year. Fifty-nine-percent of respondents also predict an increase in M&A activity between fintech startups and established financial services organizations in 2018.
- Almost 80-percent of respondents expect an increase in M&A activity involving privately owned businesses in the next 12 months, increasing by 10-percent from last year's results.
- Mirroring prior years, dealmakers say the leading driver of cross-border deals will be companies seeking growth via entrance into foreign markets. More companies in Asia are expected to pursue deals in the U.S., and outbound M&A activity from the U.S. to Mexico and Canada is expected to increase in the next year, despite ongoing public statements by the Trump administration around the renegotiation of the North American Fair

Trade Act (NAFTA).

"The middle market is quickly becoming the focus of M&A," said Jeff Gifford, co-leader of Dykema's M&A practice. "Technology and healthcare are two of the more active spaces, with fintech becoming an increasingly popular area of interest. Megadeals have lost some of their steam and we are seeing more and more companies pursuing small to middle market strategic transactions."

Survey results are being released this week at Dykema's exclusive annual M&A Outlook events in Detroit and Chicago. The full report is available **here**.

GCs Taking the Heat in Congressional Grilling of Social Media Giants

The top Democrat on the Senate Intelligence Committee berated lawyers for social media giants Facebook Inc., Twitter Inc. and Google for a lethargic response to Russian interference in U.S. politics, as the companies' lawyers faced a second day of grilling in Congress, **reports Bloomberg**.

Updating its coverageWednesday morning, Bloomberg reports:

> "Your first presentations were less than sufficient," [Sen.] Mark Warner said at the panel's hearing Wednesday, saying lawmakers were at first "blown off" by companies that in

effect said, “Nothing like this happened. Nothing to see here.”

Warner chided Facebook General Counsel Colin Stretch for his “I will have to come back to you on that, sir” reply to a question on cross-checking fake accounts.

“We’ve had this hearing scheduled for months,” Warner of Virginia replied. “I find your answer very, very disappointing.”

The Associated Press reported on Tuesday’s grilling of the companies’ top lawyers: “**Senators blast Facebook, Twitter, Google in Russia probe**.”

Read the Bloomberg article.

U.S. States Allege Broad Generic Drug Price-Fixing Collusion

Image by Images Money

A large group of U.S. states accused key players in the generic drug industry of a broad price-fixing conspiracy, **reports Reuters**.

Reporter Karen Freifeld writes: "The states said the drugmakers and executives divided customers for their drugs among themselves, agreeing that each company would have a certain percentage of the market. The companies sometimes agreed on price increases in advance, the states added."

The suit names 18 companies and subsidiaries and named 15 medicines. Mylan NV, Teva Pharmaceuticals USA, Ascend Laboratories and Encure Pharmaceuticals are among the 18 companies named.

The Los Angeles Times also covered Mylan's challenges: "**A price-fixing noose tightens around Mylan, the company that profiteered from the Epipen.**"

Read the Reuters article.

Allocation of Data Breach Risks and Costs in Vendor Contracts: Negotiate, Negotiate, Negotiate

Most companies are rethinking data breach risk and cost allocations in new and existing vendor agreements, points out **Anne S. Peterson** in McGuireWoods' **Password Protected** blog.

"Limitation of liability and indemnification clauses form the framework for reducing unforeseeable, and potentially devastating, data breach costs," she writes. "To defend against unpredictable damages, these clauses are fast becoming the most fiercely negotiated language in service provider agreements."

"Under most state statutes, a service provider's obligations, and liability for costs, end with notification to the customer. Simply put, if the organization's sensitive data is breached while under the control of a vendor, the vendor's *only* obligation is to notify the organization. It is then the customer's obligation to handle the fallout, *unless* the customer's contract with the vendor provides otherwise."

Read the article.

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Timing is Vital in a Release

Clause in Any Settlement Agreement

Lawyers – particularly those representing plaintiffs – should give thoughtful attention to the timing of a release clause in any settlement agreement, advises **Lisa B. Markofsky** in a post for **Proskauer Rose LLP**.

Failure to do so, she writes, could result in the plaintiff finding that its "compromise" was nothing more than a unilateral agreement to reduce the value of its claim.

The case could turn on "whether the settlement agreement is construed to be (i) a "substituted contract" wherein Plaintiff accepted the ***promise to perform*** the compromise as satisfaction of its underlying claim or, alternatively, (ii) an 'executory accord' wherein Plaintiff accepted actual performance of the compromise as satisfaction of its underlying claim."

Read the article.

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Leaving the Contractual Term 'Voting Power' Undefined

Could Be Risky Business

Any attorney who regularly drafts stock purchase agreements, voting agreements, or other contracts that use the term "voting power" would do well to take note of a recent ruling, suggest **Benjamin F. Jackson** and **Stephen P. Younger** of **Patterson Belknap Webb & Tyler LLP**.

They write that the New York case *Special Situations Fund III QP, LP. v. Overland Storage, Inc.* raises several questions: What does the contractual term "voting power" mean? Does it refer only to the power to elect corporate directors, or does it refer to the power to vote on any fundamental matter of corporate governance? Is voting power an attribute of stock, or is it something that shareholders possess?

Leaving this term undefined in a contract could be risky business, they warn.

Read the article.

A Lesson from the 3rd Circuit on Arbitration Clauses: Say

What You Mean

A recent decision by the United States Court of Appeals for the Third Circuit is a reminder that – for an arbitration clause to apply in certain situations or to certain parties – that intention must be built into the plain terms of the contract.

In a post on the Blank Rome website, partners Stephen M. Orlofsky and Deborah Greenspan discuss *White v. Sunoco, Inc.* The case involved the "Sunoco Awards Program," under which customers who used a Citibank-issued "Sunoco Rewards Card" credit card were supposed to receive a 5-cent per gallon discount on gasoline purchased at Sunoco gas stations.

A dispute over the discount led to arbitration.

In its ruling the appellate court found: "[n]owhere does the agreement provide for a third party, like Sunoco, the ability to elect arbitration or to move to compel arbitration."

Read the article.

Silicon Valley Software Startup, Ex-CEO Fined Nearly

$1M

Silicon Valley software startup Zenefits and its co-founder Parker Conrad have been fined nearly $1 million by the U.S. Securities and Exchange Commission as part of a settlement over charges that they had misled investors, **reports Reuters**.

Zenefits will pay a $430,000 penalty and Conrad, who resigned as chief executive from the company in early 2016, has been fined more than $533,000, according to Reuters reporter **Heather Somerville**.

“The SEC found that Zenefits made ‘false and misleading statements and omissions’ to company investors by failing to disclose that it was not compliant with state insurance regulations,” Somerville reports. “Zenefits employees had sold health insurance without proper licensing, the company said, a violation that led to fines from several states.”

Read the Reuters article.

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