

[How to Guarantee Bad Performance From Your Vendors](#)

A well-crafted master services agreement for outsourced services can create a powerful alliance between you as the customer and the service provider or vendor, writes [Matt Hafter](#) for [Thompson Coburn LLP](#). Then there's the other kind of agreement.

Writing with what he calls "hearty dose of well-meaning sarcasm," he highlights a few of the pitfalls that will likely or almost guarantee an unsuccessful relationship with your vendors.

As an example, his first point is, "Make sure the business unit using the services stops their involvement in the procurement process after the RFP."

Another is, "Use the word 'penalty' to describe fee credits for service level failures."

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[Defining Personal Information](#)

[in Contracts](#)

The terms “personal information,” “personal data,” “personally identifiable information,” and “PII” are often left undefined in contracts and treated as if they were terms of art for which there was a single definition, points out David A. Zetony of [Bryan Cave](#).

“Because different statutes, regulations, and guidance documents define the terms differently, you could either say that they are not terms of art, or that they are terms of art that are highly dependent upon context,” he explains.

He offers an example of one of the most expansive and one of the most narrow definitions of near identical phrases, and illustrates the degree to which the meaning of such terms can differ depending upon context.

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[The 5 Most Overlooked Elements Of NDAs](#)

[Tom Kulik](#) of Dallas-based [Scheef & Stone](#) writes about a trend toward companies and counsel using rote reliance on forms for non-disclosure agreements without thinking through the application of the provisions and whether the document

actually reflects what is contemplated (let alone *needed*) for the intended transaction.

Writing for [Above the Law](#), he discusses the top five most overlooked elements in NDAs that should *always* be addressed before signing on the dotted line.

Those include the importance of definitions, exclusions, “what the government seeks, it can inadvertently take away,” “use needs a purpose,” and “the term is only the beginning.”

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[Liquidated Damage Provisions – A Good Idea or an Unenforceable Penalty?](#)

A post by [Joshua M. Pellant](#) of [Faegre Baker Daniels](#) discusses the use of a provision for a stipulated or “liquidated” damage amount in the event of specified contract breaches in construction contracts.

“These provisions can be an effective tool to recover losses that otherwise may go uncompensated because they cannot be proven or because the damages are not recoverable under an ordinary contract,” he explains. “However, courts generally

will not enforce a liquidated damage provision that is seen as a 'penalty' unrelated to any anticipated or actual loss. The question, then, is whether a particular contract provision will be interpreted as an enforceable liquidated damages provision or an unenforceable contractual penalty."

He discusses general enforceability standards and how much is too much (or not enough).

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[ADA Website Wars Coming to a Retailer Near You](#)

The Winn-Dixie grocery chain is the latest and perhaps highest-profile business to face penalties for websites that are not compliant with the Americans with Disabilities Act (ADA), but it's not likely to be the last, according to a post on the website of [Androvett Legal Media & Marketing](#).

A federal judge in Florida found that the grocery chain's website was inaccessible to visually impaired individuals and thus violated the ADA because features such as the website's online coupons and pharmacy could not be accessed using a screen reader. The court ruled in favor of the plaintiff on all issues and awarded injunctive relief and attorneys' fees.

The Americans with Disabilities Act prohibits discrimination

on the basis of disability in public places, like stores and movie theaters. Increasingly, a battle has been brewing over whether or not websites for such “places of accommodation” must also be accessible.

“In Winn-Dixie’s case, the court agreed that because its website was closely integrated with its stores, the web content must be accessible to the hearing and visually impaired,” said employment attorney [Audrey Mross](#) of Dallas-based [Munck Wilson Mandala](#). “If consumer-facing businesses were not aware of ADA website compliance, this case should be an eye-opener.

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[2017 Litigation Finance Survey Shows Continued Growth](#)



Burford’s [2017 Litigation Finance Survey](#) shows that litigation finance continues to achieve dramatic growth, finding that the use of litigation finance in the United States grew by 28% from last year, to 36%. And it has grown 414% since 2013.

Among respondents in the US, UK and Australia, a majority of users (59%) say their use of litigation finance has increased in the last two years.

A strong majority (72%) of all respondents agree that

litigation finance is a growing and increasingly important area of the business of law—and, notably, 40% of US companies report having foregone claims due to the cost of litigation.

Pointing to continued growth on the horizon, among all respondents whose organizations have not yet used litigation finance, a majority of law firm respondents (57%) and nearly half of in-house respondents (49%) are likely to consider its use in the next two years.

Some early concerns about litigation finance have evaporated. For example, in the US, the number of in-house respondents with concerns about litigation finance leading to unnecessary litigation fell to 10% from 81% five years ago. Among all respondents, ethical concerns rank dead last among obstacles to use, at 9%.

Only 7% of all respondents are unfamiliar with litigation finance, and only 4% of law firm respondents.

Christopher Bogart, Burford's CEO, commented: "Burford's latest research affirms our own experience: More and more often, clients and law firms are turning to litigation finance as a solution to some of the intractable challenges and pressures of managing legal cost and risk, and that strong demand is driving dramatic growth."

Burford's 2017 Litigation Finance Survey was conducted by ALM Intelligence, the research arm of ALM Media, publisher of The American Lawyer, from May 17 to June 16, 2017. The full report is [available online](#).

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Announcing LawGeex 4.0 – Contract Review Automation



LawGeex, developer of an AI contract review platform for businesses, has launched [product enhancements](#) that provide more control, speed and consistency than ever before.

LawGeex combines machine learning algorithms and text analytics to quickly review and approve everyday contracts, helping businesses answer the question “Can I sign this?”

The new features and significant design upgrade empower customers to have deeper and wider control of their AI-powered reviews, contract editing and approval process, the company said in a release.

One of the main features of the latest release is more granular control when creating legal policies in the LawGeex Policy Center. The introduction of specific variations of legal concepts allows businesses more granular control in clause concepts they want to see – and do not want to see – in contracts before signing them. Based on these pre-set policies, the LawGeex’s AI can automatically accept, red flag or reject clauses in incoming contracts., and a revamp of LawGeex’s Action Center.

Another feature of the new release is a revamp of LawGeex’s action center – where the contract can be edited after the AI’s first line of defense. When reviewing a contract within LawGeex, customers can now clearly see which of their policies were applied to each clause and can red-line the

contract within the platform, instantly inserting their company's standard clause language with one click (LawGeex also provides default language). Users also have full visibility on their company's clause definitions, fallback positions, tips, and more, during the editing process, bringing an unparalleled transparency and cohesiveness between a company's policies and the actual contract review. The enhancements also include improved layout for LawGeex AI-reviewed contracts. Clauses are grouped simply by their status as "Missing" or "Present", and reviewers are simply able to manually override the acceptance or rejection of clauses.

[Read more about the release.](#)

[Equifax Execs Sold Shares Before the Hack Was Announced – But Was It Insider Trading?](#)



Los Angeles Times reporter James Rufus Koren [examines](#) the question: Did three Equifax executives, including the chief financial officer, engage in insider trading when they sold thousands of shares in the days after the company discovered a massive security breach?

“The credit bureau has publicly stated the executives were unaware of the hack at the time of the sales, but the size of breach and timing of the trades has nonetheless stirred

suspicion,” writes [Koren](#).

SEC filings show that three days after the company discovered a massive hack had stolen information of up to 143 million consumers in Equifax’s files, the CFO and the president of a business unit sold more than 10,000 shares. The next day, the president of another business sold some shares. All shares sold for about \$146 each.

When Equifax announced the hack weeks later, the stock closed down about 16% from the time the executives sold stock, Koren writes. The company has said the executives did not know about the hack at the time of the sales.

[Read the *LA Times* article.](#)

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[**Landmark Second Circuit
Ruling Clarifies the
Standards for Mobile
Contracts**](#)



The U.S. Second Circuit Court of Appeals has issued a landmark ruling in *Meyer v. Kalanick* that clarifies the standards for contract formation in the age of smartphones and mobile contracting, providing important guidance to companies about how to design enforceable mobile contracts, reports [Coblentz](#)

[Patch Duffy & Bass](#).

The court applied California law to determine the enforceability of the arbitration clause in Uber's Terms of Service, holding that a "reasonably prudent smartphone user" unambiguously assents to a conspicuously hyperlinked contract when he downloads a smartphone application to his mobile phone and signs up for an account.

"Now is a good time for businesses to review their online and mobile contracting practices," according to the article by [Timothy Crudo](#), [Rees Morgan](#), [Skye Langs](#), and [Mark Hejinian](#). Make sure that your terms and conditions are highly visible on an uncluttered page or screen."

[Read the article](#).

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[**Construction Contracts and**](#)

Arbitration Provisions: Is the Word “May” Mandatory? Maybe!

According to some courts, the traditional line of reasoning in defining “may” versus “shall” is no longer the trend in the context of arbitration provision in construction contracts, writes Matthew DeVries in [Best Practices Construction Law](#).

Traditionally, the use of “may” could be interpreted as making performance permissive or optional, while “shall” makes performance mandatory.

DeVries cites a case in which the Supreme Court of Virginia held that the parties’ use of the word “may” in the dispute resolution provisions of their construction contract required mandatory participation in arbitration at the election of one of the parties.

[Read the article.](#)

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Mother Nature Is Tough – How About Your Contracts?



What happens to supply contracts when a natural disaster floods entire cities, shuts down factories, cuts off warehouses, washes trucks off the road, and essentially brings an entire supply chain to a screeching halt?

[Joe Jones](#), writing for Squire Patton Boggs' Global Supply Chain Law Blog discusses that question in a [new post](#):

"In most US states, UCC Section 2-615 allows sellers to delay or cancel delivery if 'performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made.'"

But in practice, he warns, this "impracticability" defense can be difficult to exercise. For instance, hurricanes are a regular occurrence on the Gulf and Atlantic coasts of the United States, so a customer might argue that a supplier in Houston or Miami should have considered hurricane risk when agreeing to supply products from that location.

[Read the article.](#)

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[**Widening Your Moat: Using**](#)

Continuation Applications to Protect Commercially Successful Products



Fitch, Even, Tabin & Flannery LLP will present a free webinar, “Widening Your Moat: Using Continuation Applications to Protect Commercially Successful Products,” featuring Fitch Even partners Jonathan H. Urbanek and Mark A. Borsos.

The event will be Thursday, Sept. 28, 2017, at 9 am PDT / 10 am MDT / 11 am CDT / 12 noon EDT.

CLE credit has been approved for California, Illinois, and Nebraska. Other states may also award CLE credit upon attendee request. There is no fee to attend, but registration is required. Register at http://bit.ly/FitchEven_SeptWebinar

Protecting a commercially successful product is critical for any business. Although patents can help to prevent others from utilizing covered technology, recent trends in case law and post-issuance validity challenges introduced by the American Invents Act have made it more difficult for businesses to effectively enforce patents against competitors. Continuation applications can be an important tool for bolstering patent protection for key products, providing the patent owner leverage in negotiations and enforcement.

This webinar will provide tips and strategies on how to use continuation applications to

- Limit design-arounds that use similar technology
- Target commercial products
- Expand the scope of patent protection
- Mitigate invalidity challenges
- Avoid antitrust pitfalls

Following the live event, a recording of the webinar will be available to view for one year at www.fitcheven.com.

[Register for the webinar.](#)

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[Equifax Faces Multibillion-Dollar Lawsuit Over Hack](#)



Bloomberg [reports](#) that a proposed class-action lawsuit was filed against Equifax Inc. late Thursday evening, shortly after the company reported that an unprecedented hack had compromised the private information of about 143 million people.

The law firms filing the suit are Olsen Daines PC and Geragos & Geragos, a celebrity law firm known for blockbuster class actions. Reporter [Polly Mosendz](#) writes that Ben Meiselas, an attorney for Geragos, said the class will seek as much as \$70 billion in damages nationally.

In the security breach, hackers are believed to have accessed Social Security numbers, addresses, driver's license data, and birth dates. Some credit card information was also put at risk.

[Read the Bloomberg article.](#)

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[Trump Lawyers Urge Supreme Court to Rule for Colorado Cake Maker Who Turned Away Gay Couple](#)

Trump administration lawyers joined sides with a Colorado baker Thursday and urged the Supreme Court to rule that he has the right to refuse to provide a wedding cake to celebrate the marriage of two men, reports [The Los Angeles Times](#).

In a friend-of-the-court brief, Acting Solicitor Gen. Jeffrey B. Wall argued that the cake maker's rights to free speech and the free exercise of religion should prevail over a Colorado civil rights law that forbids discrimination based on sexual orientation, according to the report by [David G. Savage](#).

Savage writes: "The brief filed Thursday is likely to bolster the cake maker's case, and is in line President Trump's repeated promises to protect 'religious liberty.'"

[Read the LA Times article.](#)

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[VW Engineer Sentenced to 40-Month Prison Term in Diesel Case](#)

A federal judge in Detroit sentenced former engineer James Liang to 40 months in prison for his role in Volkswagen AG's multiyear scheme to sell diesel cars that generated more pollution than U.S. clean air rules allowed, [Reuters is reporting](#).

The sentence calls for Liang to pay a \$200,000 fine, 10 times the amount sought by federal prosecutors. The sentencing judge said he hoped the prison sentence and fine would deter other auto industry engineers and executives from similar schemes to deceive regulators and consumers, write [David Shepardson](#) and [Joseph White](#).

Prosecutors said Liang was a "pivotal figure" in designing the systems used to make Volkswagen diesels appear to comply with U.S. pollution standards, when instead they could emit up to 40 times the allowed levels of smog-forming compounds in normal driving, according to the report.

[Read the Reuters article.](#)

8 Signs You Need Contract Automation



Conga offers [some tips](#) on making the decision whether to look into contract automation.

First on the list is: “You keep your contracts on paper – in a filing cabinet.” Conga points out that B2B companies manage an average of 20,000-40,000 contracts at one time while 85 percent of those companies are using manual processes to manage them.

Some of the other tips, each with discussion, include: missing contract renewals, the sales team uses semi-manual processes to send out contracts or quotes, and the legal team has hundreds of clauses and no way to effectively manage or maintain them.

[Read the article.](#)

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Smart Contracts as Pre-Commitment Devices on a Blockchain



“Smart contracts” in blockchain technology are highly useful in many cases where contracting parties lack a strong ex post enforcement mechanism (like a court system) and need to pre-commit to not defrauding or otherwise taking advantage of each other when executing a contract, writes [Max Gulker](#) for the [American Institute for Economic Research](#).

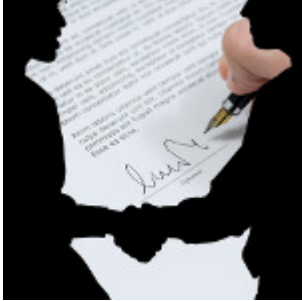
Gulker explains that pre-commitment strategies are useful in mitigating some types of fraud: “Smart contracts based on multisignature-escrow Bitcoin wallets, such as the system employed by blockchain-based retail platform OpenBazaar, can go a long way in allowing a buyer and seller to commit to fairly executing a contract.”

[Read the article.](#)

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Stays of Contract Award and

Performance (Post-Award Protest Primer #6)



[Daniel Chudd](#) and [James Tucker](#) of Morrison Foerster continue their [discussion](#) of stays of contract award and performance with an examination of the issue during the pendency of a bid protest.

They explain there are two kinds of protest stays: pre-award stays and post-award stays.

Their article covers the stay of contract award, the stay of contract performance, Court of Federal Claims protests, and stay overrides.

[Read the article.](#)

No Signature? No Problem! Enforcing Arbitration Even Without Everyone Signing

California courts are often hostile toward defendants that seek to require litigious employees to honor their arbitration agreements, warns [Michael Wahlander](#) in the Seyfarth Shaw [California Peculiarities Employment Law Blog](#).

“The defendant’s plight might seem more stark still if the defendant has not itself signed the agreement. But defendant employers still have means of enforcing such agreements, which can be especially significant in class actions claiming joint employment,” he writes.

He covers the subjects of the agency theory, equitable estoppel, and third-party beneficiary.

[Read the article.](#)

[Samsung Lader Jay Y. Lee Given Five-Year Jail Sentence for Bribery](#)



Image by [KBS](#)

A South Korean court on Friday convicted Lee Jae-yong, the heir to the Samsung business empire, of bribery and embezzlement and sentenced him to five years in prison, in a dramatic break with the country’s history of dealing light penalties to major business figures, [The New York Times](#)

reports.

Reporters Jeyup S. Kwaak and Paul Mozur write that the verdict presents new challenges for the huge Samsung organization.

“The court ruled that Mr. Lee and four other Samsung executives paid \$6.4 million in bribes and other inducements to ensure that the country’s disgraced former president, Park Geun-hye, supported a complicated corporate deal that strengthened Mr. Lee’s grip on Samsung Electronics, the conglomerate’s crown jewel,” according to the *Times*.

[Read the NYT article.](#)

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