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.

Creating Defensible Employment Agreements Before an Employee's First Day

Significant tools in the arsenal of strategies are contracts signed by the employee, but waiting until the employee departs is too late to start thinking about them, points out **Spiwe L. Jefferson** in **an article** on the website of the Association of Corporate Counsel.

In her article, she discusses contract considerations at the beginning of the employment relationship.

She covers confidentiality agreements and nonsolicitation agreements,. Under the "noncompete agreements" heading, she discusses limiting temporal scope, protecting legitimate interests, exempted professions, timing requirements, consideration, and geographic limits.

Read 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.

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

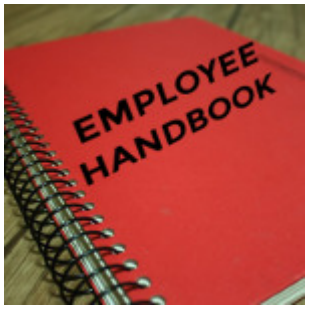
A post on the **What's Fair?** blog on the Ellis & Winters LLP website discusses a recent federal appellate decision that shows how data-breach lawsuits premised on overpayment theories – which often assert claims sounding in contract – still face an uphill battle.

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.

Tips For Drafting Employee Handbooks: Avoiding Breach of Contract Claims



A new post on Bryan Cave's At Work blog explains how including certain language in an employee handbook may help an employer to defend breach of contract claims.

"To avoid breach of contract claims premised on employee handbook policies, employers should include an express contract disclaimer in their employee handbooks," write Bill Wortel and Christy Phanthavong.

The article explains the "at will" clause, the use of a reservation of right by the employer to modify policies, and the need for the disclaimer to be conspicuous.

Read the article.

Enforcing Nursing Home Arbitration Agreements Post-*Kindred*

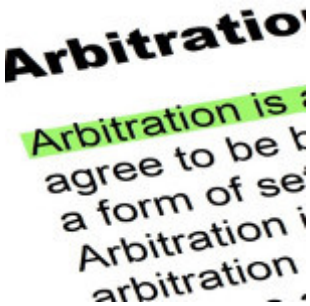


Image by NY Photographic

Liz Kramer, writing for Stinson Leonard Street's **Arbitration Nation**, writes that a recent ruling for a state supreme court may be indicative of what litigation over nursing home arbitration agreements will look like after the U.S. Supreme Court's ruling in *Kindred Nursing Centers v. Clark*.

Kramer, a partner in the firm, discusses the Wyoming Supreme Court's reversal of a lower court's ruling in an arbitration case. The lower court denied a nursing home's motion to compel arbitration.

But the state's high court reversed, following the U.S. Supreme Court's *Kindred* ruling that another state's rationale for not enforcing an arbitration agreement was preempted by the Federal Arbitration Act.

Read the article.

General Counsel – Contract Process or Risk Management?

Contract management is a distinct profession with a well understood body of knowledge, writes Mark Little of **Berkman Solutions**.

“Contract management is not the practice of law. That said, contracts have a life of their own which requires monitoring and nurturing. In many organizations the legal department simply throws an executed contract over the wall into the contract management department. The legal department may hear about it again when it is time to renew, amend, or terminate the contract. This approach to contractmanagement misses revenue opportunities and causes unexpected risk to materialize,” he explains.

“A shared contract management system that focuses on the contracts which are fully executed promotes collaboration between the general counsel and the management team. Effectively managing the contract portfolio together allows both general counsel and contract managers to make a measurable impact on revenue and contract risk management. No one will remember that you drafted the force majeure clause just so, but everyone will remember that you identified an opportunity to decrease prices during the term of the purchasing contract.”

Read the article.

Recent ITAR Case Sends Important Message For Small/Midsized Government Contractors

A recent State Department ITAR enforcement case involving a supplier of military spare parts sends a valuable message to small and mid-sized government contractors of every type, writes **Thomas B. McVey** of Williams Mullen.

In **an article** on the firm's website, he explains the case involves Bright Lights USA, Inc., a small New Jersey defense manufacturer. According to the Directorate of Defense Trade Controls Charging Letter, the company's business primarily consists of "manufacturing minor spare parts (including rubber stoppers, seals assemblies, and grommets) for both private- and public-sector customers." Many of these parts transitioned off of the U.S. Munitions list (USML) beginning October 2013 as a result of Export Control Reform.

When supplying military parts, the company periodically sought to obtain components from foreign suppliers. According to the DDTC Charging Letter, when ordering foreign-made parts the company sent drawings of export-controlled components to foreign suppliers to obtain quotations without obtaining the requisite export licenses. Similarly DDTC claimed the company posted drawings of controlled items online to solicit quotations, including posting on a manufacturing sourcing website where the drawings could be accessed by foreign persons. DDTC also stated that the Company misclassified certain components as being subject to EAR instead of ITAR.

DDCT concluded that Bright Lights had “significant training and compliance program deficiencies” and charged the company with a number of violations.

Read the article.

Webinar: Implement Contract Triage in 5 Steps

A **new webinar** from LawGeex will cover how to create an internal contract triage process in five steps, all the way from planning through to execution.

The complimentary 45-minute webinar will be Wednesday, Nov. 29, 2017, at 2 p.m. Eastern time.

The event is intended to provide a practical look at building on-the-ground solutions for contract triage.

The webinar will cover:

- What is contract triage, and how leading legal teams are implementing these solutions today.
- How to dramatically reduce the time and cost of contract review and approval.
- Practical steps to improve your existing triage process and streamline contract review.

Register for the webinar.

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.

Senate Kills Rule On Class-Action Suits Against Financial Companies

The Senate has voted 51-50 to get rid of a banking rule that allows consumers to bring class-action lawsuits against banks and credit card companies to resolve financial disputes, NPR reports.

Vice President Pence cast the tie-breaking vote to rollback the Consumer Financial Protection Bureau rule banning restrictive mandatory arbitration clauses found in the fine print of credit card and checking account agreements, writes NPR reporter Scott Neuman.

President Trump is expected to sign the measure, which has already been approved by the U.S. house.

Neuman writes: “CFPB said it was redressing a situation in which consumers were forced ‘to give up or go it alone — usually over small amounts,’ while companies were able to ‘sidestep the court system, avoid big refunds, and continue harmful practices.'”

Read the NPR article.

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Webinar on Improving Legal and Contract Collaboration, Featuring Forrester

Optimus BT will present a **free webinar** providing a comprehensive overview of Legal Contract Collaboration by Optimus and Forrester for the Microsoft Cloud.

The webinar will be Thursday, Nov. 2, 2017, beginning at 11 a.m. ET / 8 a.m. PT.

Forrester, a leading analyst firm, along with Optimus, a leading Microsoft Cloud Contracts Platform, will be conducting this webinar to provide an overview of the key issues facing business and legal collaboration with a presentation along with scenario based demos of Contracts and Legal solutions for both SharePoint & Office 365.

The presentation will also highlight integrations with Outlook and Word to improve legal work productivity.

“We will review various aspects of the Contract Lifecycle including document and outlook based collaboration, contract metadata management, review and approval workflows, electronic signature integration, contracts search, repository and document generation processes, reporting and metrics, alerts setup and management, among others,” the company says on its website.

Register for the webinar.

Microsoft SPLA Self-Assessment – What It Is, and How to Respond

By Christopher Barnett
Scott & Scott LLP

Many of our clients have been contacting us in recent weeks (mid-late 2017) regarding notices they received from Microsoft requesting an internal self-assessment of their license positions under their Services Provider License Agreements (SPLAs). Naturally, many of those clients have questions about that process and the ramifications of cooperating with Microsoft.

For those who may be unaware, SPLA is the principal licensing framework that Microsoft uses in order to enable online service providers to incorporate Microsoft's software products in the solutions that those providers host for their customers over the Internet. Unlike traditional license agreements, which typically entail capital expenditures in order to acquire perpetual software licenses that can last longer than the term of the purchasing agreement, SPLA entails a monthly reporting model. Each month, service providers measure their usage of Microsoft products in their hosted environments, and they report that usage to authorized SPLA resellers. The resellers then generate invoices based on those reports, which

the service providers typically pay as an operating expense.

Like all commercial Microsoft licensing agreements, SPLA gives Microsoft the right to conduct audits to verify that its products are being used (and reported) consistent with applicable licensing terms. In many cases, Microsoft designates third-party firms, such as KPMG, Deloitte or Pricewaterhouse, to gather the necessary inventory data and to prepare a report comparing the usage previously reported under SPLA against the deployments measured based on the audit data. Microsoft then reviews the auditors' reports, and the audited companies then usually place supplemental license orders under their SPLAs in order to resolve any under-reporting identified through the audit process. For service providers with high volumes of monthly usage, the dollar amounts of those supplemental orders can be well into the millions of dollars.

Under most SPLAs, Microsoft has the express right to require its SPLA licensees to complete the self-assessment process in lieu of submitting to a "traditional" SPLA audit conducted according to the process described above. However, even if that right were not stated in the SPLA, we would recommend that our clients comply with the self-assessment process in an effort to avoid any more burdensome audit activity to be undertaken by a third-party auditor. The self-assessment process represents a much more favorable framework for verifying compliance with SPLA, for at least the following reasons:

- **No deployment or usage information needs to be submitted to Microsoft.** In most cases, the self-assessment process typically is completed when a licensee provides a signed, written certification confirming that it has completed an internal review and either (1) that all SPLA usage has been properly reported, or (2) that a supplemental report has been submitted in order to resolve any identified, past under-reporting. It usually is not necessary to provide Microsoft with any

deployment counts or any further details regarding the results of the internal review.

- **No under-reporting penalties appear to apply.** The SPLA self-assessment notice message typically requires only that a licensee report additional license quantities to the reseller in order to resolve any past errors. In other SPLA audits, Microsoft has the right to apply a contractual penalty for any under-reporting, and that penalty typically consists of 25% markup over list SPLA prices. The self-assessment notice does not indicate that the contractual penalty would apply for any supplemental orders placed as a result of the self-assessment process.

We therefore ordinarily recommend that our clients cooperate with SPLA self-assessment requests.

In theory, the self-assessment process should mirror a SPLA licensee's monthly reporting process. If the licensee has mature software asset management (SAM) processes in place, then each month it should be gathering and archiving all the data that it should require in order to confirm its usage of any Microsoft products installed in its environment. For that reason, a confident licensee in that position could sign and return the requested self-assessment certification immediately upon receiving the self-assessment request.

However, many licensees are not in that position, and for them, the self-assessment represents an excellent opportunity to assess and review their internal monthly reporting processes. We regularly work with SPLA licensees to conduct those sorts of initiatives, identifying tools that would be capable of gathering information relevant to licensing information as well as reports that should be generated and gathered each month in order to confirm usage levels. While the kinds of reporting used will vary, depending on the kinds of Microsoft products being licensed under SPLA, the typical set of reports includes the following:

- **Hardware Inventory** – One or more reports identifying all physical and virtual servers and the operating systems running on those machines.
- **Software Inventory** – One or more reports showing all Microsoft products installed on the computers identified in the hardware inventory.
- **Virtualization Data** – Reporting that maps virtual machines to their physical hosts and provides relevant information regarding those hosts' hardware configurations.
- **Active Directory** – Reporting that identifies the computers included in the hosting domain(s) and also the user groups and accounts with access to those computers.
- **Secondary Inventories** – While not requested in every audit, Microsoft's auditors also may ask for secondary data sources to validate the completeness of the device inventories generated from the other sources identified above. The list of devices from an anti-virus solution is a common request.

We also typically advise our clients to create and maintain archives of all reports gathered each month in order to support their SPLA reports, so that historical usage may be validated during any SPLA conducted in the future by one of Microsoft's selected audit firms. Absent that kind of historical data repository, Microsoft's auditors often attempt to extrapolate historical usage levels based on data collected during the audit – those extrapolated findings often are inaccurate and can result in inflated SPLA audit resolution demands from Microsoft.

Business leaders who receive self-assessment requests from Microsoft should work with their teams to determine their level of confidence regarding the monthly SPLA-reporting practices. If there is any doubt regarding the maturity of those practices, then the team should undertake an initiative to implement any appropriate improvements and, absent any

unique concerns, to provide a timely response to the self-assessment request. If the team believes that it lacks any subject-matter expertise in order to complete that initiative, then it makes sense to engage a knowledgeable attorney to assist with the process.

Business With a Friend: Lessons from a Liftboat Contract

Charles Sartain, a partner in Gray Reed, uses a recent 5th Circuit ruling on a liftboat construction contract to illustrate his advice on how to administer and perform a contract, especially one with a friend.

Writing in the firm's **Energy & the Law** blog, he discusses *Semco, LLC v. The Grand, LTD*. The case involves a $15.9 million contract between long-time friends to construct a liftboat, a construction project that involved numerous change orders.

"At some point, the parties 'got away from the change order program' and informal requests were approved by email or orally," Sartain explains. Then allegations of fraud were raised.

Read the article.

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When Contracts and Bankruptcy Collide, a Short Term May Be Better in the Long Term

Image by NY Photographic

Before entering into a long-term contract, you should consider that the longer the contract, the greater the risk of a change in the contract counterparty's financial situation. A safe credit risk in 2017 might find itself filing for bankruptcy by 2020, warns **Jeffrey A. Krieger**, a partner in **Greenberg Glusker Fields Claman & Machtinger LLP**.

For those who respond that they're not worried because the agreement includes a bankruptcy termination clause, Krieger says: "The U.S. Bankruptcy Code has a lot to say about the rights of both the debtor and the non-debtor party once a bankruptcy is filed – often to the chagrin of the non-debtor party."

"A Right to Terminate clause is unenforceable because the non-

debtor party's termination would violate the 'automatic stay' of Bankruptcy Code section 362. Once a bankruptcy is filed, section 362 puts a halt to any action to obtain possession of, or exercise control over property of the estate," he writes.

He offers an approach that could deal with this potential problem before signing the agreement.

Read the article.