Ex-Winston Lawyer Can't Be Forced to Arbitrate Job Claims

Bloomberg Law is **reporting** that a former Winston & Strawn LLP intellectual property attorney can litigate—and can't be forced to arbitrate—her pay, bias, and retaliation claims.

The California Supreme Court declined to review an appellate ruling that the arbitration agreement Constance Ramos signed as an income partner contained unfair provisions that couldn't be separated from the rest of the agreement, according to Bloomberg's Joyce Cutler.

Under those provisions, Ramos would have been required to pay half the costs, and she would be subject to secrecy clauses that would have prevented her from interviewing potential witnesses.

Read the Bloomberg Law article.

'Breaking Contracts has Consequences' – Third Circuit

Backs Employer with Restrictive Covenant Agreements

A recent decision from the Third Circuit addresses a grant of preliminary injunction against an employee who signed multiple agreements with restrictive covenants, and violated them immediately upon beginning employment with a direct competitor, **reports** Genova Burns.

Authors **Dina M. Mastellone** and **James W. Sukharev** discuss the case of *Heartland Payment Sys., LLC v. Volrath*.

In that case, a former employee of Heartland breached a manager agreement by sending confidential information to his former employer's competitors.

Read the article.

Top Five Issues in Leveraging Automation Software in an Outsourcing Transaction

Contract

When leveraging automation software as part of an outsourcing relationship, it is important to document what specific benefits will be realized and the impact on the overall transaction, and to consider the appropriate mechanisms to ensure that implementation, intellectual property, and exit rights are mitigated, advises Morgan, Lewis & Bockius in a **web post**.

Authors **Barbara Murphy Melby** and **Sarah Bryan** cover the license, implementation, intellectual property rights, total cost of ownership, and liability.

Read the article.

Indemnifying for Negligence Makes a Mess

David Tollen of Tech Contracts Academy has **some advice** on using fault-triggered indemnities: Avoid them where possible and recognize that a fault-triggered indemnity might not do its job, which is to provide rules for dispute-free cooperation between the parties.

These fault-triggered indemnities create two problems – both related to the indemnitor's obligation to *defend* the case, he explains. Those two problems are refusal to defend, and conflict of interest.

"[I]n a fault-triggered indemnity, the parties have opposing interests. The indemnitor wants to show that it did nothing wrong so it can escape responsibility. The indemnified party wants to establish the indemnitor's fault, to keep it in the case. That makes cooperation difficult," according to Tollen.

Read the article.

Service Contracts and the Magnuson-Moss Warranty Act

Although it is tempting to focus only on state laws when evaluating how a service contract is regulated, the federal Magnuson-Moss Warranty Act (MMWA) provides an important reminder that federal law may be equally as significant, point out Brian T. Casey and Jon L. Gillum of Locke Lord in an **article** for Warranty Week.

"Although service contracts mirror many of the features of traditional insurance products, most states expressly exclude them from the statutory definition of insurance, and the majority of states go one step further by establishing formal licensing and financial security requirements that govern the sale of service contracts to consumers by service contract provider or obligors," they explain.

But such contracts also are potentially subject to the MMWA.

Read the article.

Limiting Exposure With a Limitation of Liability Clause

Gregory J. Reigel **asks and answers** the question: Can you really limit your liability simply by including certain language in your agreements?

He finds the answer in a recent Texas Supreme Court ruling in *Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*. In that case, plaintiff aircraft purchasers sued Bombardier, alleging that the engines installed on the plane they bought were not new equipment. A jury found in favor of the plaintiffs and awarded $2.7 million in actual damages and $5.4 million in punitives.

On appeal, Bombardier relied on a limitation of liability clause in the purchase agreement. The state Supreme Court ruling shows that "where sophisticated parties have bargained for a limitation of liability clause in an arms-length transaction, courts are likely going to enforce that clause to limit the damages that may be recovered," Reigel writes.

Read the article.

Outsourcing Contracts in the USA

Kilpatrick Townsend & Stockton has compiled a structured guide to outsourcing contracts in the United States. **The guide** is available on Lexology.com.

The guide covers the various types of contract forms for outsourcing arrangements, due diligence, customer base, business requirements, HR issues, third-party contracts, duration and renewal, supplier selection, service specifications, charging methods, warranties and indemnities, and ending the agreement.

Authors of the article are James Steinberg, Joshua M. Benson, Farah F. Cook, Joshua S. Ganz, Julie C. Grundman, Maha Khalaj, Lance McCord, Michelle Tyde, Amanda M. Witt and Vita Zeltser.

Read the article.

Overbroad Geographic Restriction Dooms Covenant Not to Compete

A recent Texas court decision highlights the requirement that any covenants not to compete, including geographic restrictions, must be reasonable to be enforceable, according to **a report** on the Ogletree Deakins website.

Lawrence D. Smith writes about *Fomine v. Barrett*, which involved a non-compete agreement for a case manager in a chiropractic clinic. The agreement prohibited the employee from being involved in any competitive business within a 500-mile radius of the employer's clinic.

The Houston appellate court found the 500-mile radius to be "significantly broader than the geographic scope" of the former employee's actual employment activities on behalf of the clinic. It is therefore "broader than is reasonably necessary" to protect the employer's business interests.

Read the article.

Notice of Terms via Buried

Link within a Post-Sale Email Unenforceable

The Second Circuit affirmed a ruling that denied a web service's motion to compel arbitration, finding that the user did not have reasonable notice of the arbitration provision contained in the terms and conditions that were communicated via a hyperlink in a post-sale email, reports Proskauer Rose in its **New Media and Technology Law Blog**.

Jeffrey Neuburger, a partner in the firm, wrote the article.

"While the court recognized that a party has a duty to read a contract, it stressed that this does not morph into a duty to 'ferret out contract provisions when they are contained in inconspicuous hyperlinks,' particularly where, as in this case, the user was presented with multiple documents, each containing different sets of terms," Neuburger writes.

Read the article.

Fifth Circuit Suggests Claims for Make-Whole Amounts Should

Be Disallowed

Image by NY Photographic

In a recent ruling, the Fifth Circuit strongly suggested that claims for make-whole damages be characterized as "unmatured interest" and that claims for postpetition interest on unsecured debt be limited in bankruptcy proceedings, reports Jones Day in **a post** on its website.

The Fifth Circuit reversed the Bankruptcy Court's order holding that the debtors' plan impaired the unsecured noteholders' claims and vacated and remanded for reconsideration determinations by the bankruptcy court that noteholders were entitled to recover such contractual amounts.

The decision makes the Fifth Circuit unattractive to unsecured or undersecured lenders asserting claims for make-whole payments and default rate postpetition interest, the authors conclude.

Read the article.

Texas Court Addresses Bad Acts in an Oil-Patch Lease Play

Writing in Gray Reed's **Energy & the Law** blog, **Charles Sartain** points out that parties to a transaction need to be mindful that if a business deal is a partnership, there will be rights and duties not present in arms-length commercial transactions.

He discusses a recent appellate court opinion and considers the main question: Was a partnership formed by a letter agreement, a participation agreement and the actions of the parties?

Stephens et al v. Three Finger Black Shale Partnership et al. is a complicated petroleum development deal that included all those elements. The jury trial ended with a multimillion dollar judgment for actual and exemplary damages in favor of two separate groups of plaintiffs and intervenors against several groups of defendants.

The appellate court determined that there was no evidence of a partnership, which meant that no fiduciary duty was owed by the defendants.

Read the article.

Trade Secrets Take Center Stage, and Contracts Play a Lead Role

With increasing attention on trade secrets and a developing body of case law around Defend Trade Secrets Act claims, an emphasis on contracts also is growing, point out **Douglas R. Nemec** and **P. Anthony Sammi** in **a post** for Skadden, Arps, Slate, Meagher & Flom.

"Breach-of-contract claims frequently have appeared alongside trade secret claims in lawsuits over the years and often materially impacted the results," they write. "But a contract should not be viewed as a mere alternative to trade secret protection. Properly crafted, and if necessary properly litigated, a contract can both strengthen and expand the reach of a trade secret claim."

Their article covers defining confidential information, term limitations and their risks, and maintaining confidentiality.

Read the article.

Knowledge Qualifiers in IP

Representations and Warranties

In most transactions involving the sale or license of intellectual property, a buyer or licensee will request that a seller or licensor represent and warrant that such intellectual property does not infringe or misappropriate the intellectual property rights of a third party.

In **a post** on the Morgan Lewis website, **Rahul Kapoor** and **Shokoh H. Yaghoubi** explain that this representation and warranty is often heavily negotiated in a license or purchase agreement. That's because the seller or licensor wants to limit its obligations for breach of this representation to limit its liability under the agreement, whereas the buyer or licensee wants to keep this provision as broad as possible to ensure that it receives appropriate protection from third-party claims for the intellectual property it licenses or buys.

Their article offers some advice on structuring this type of contract clause.

Read the article.

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5 Security Best Practices for

Contract Management

A new post from **Contract Logix** offers some advice on how to avoid landing in a nightmare business situation: Imagine if a disgruntled employee or ambitious hacker accessed the details of your most important and sensitive contractual agreements and did something malicious with the information. Just think about the potential legal, financial, and brand liability.

Security breaches like this can result in the most severe and highest profile consequences for your business, especially in today's hyper-connected world of social media. Unfortunately, the contracts at many organizations are scattered throughout the company in file cabinets, on individuals' hard drives, or in shared folders – exposing the business to significant risk.

Below are 5 security-focused best practices you can implement to better protect your contracts:

1. Centralize all your contracts in a secure electronic repository.

It's not uncommon for organizations to store contracts in shared folders across multiple locations and formats. However, centralizing your agreements in a password protected and cloud-based repository is the most important step towards secure contract management. Not only will it keep your agreements organized, it greatly reduces the risk of them being accessed by the wrong individuals and stores them in a safe place. It also allows you to securely access any document at anytime from anywhere on any device.

2. Implement role-based security to your contracts and related information.

Another challenge with storing contracts in multiple places is

that it’s impossible to govern tiers of access to them. Once you’ve centralized your contracts online, you’ll be able to set role-based permissions for enhanced security. This allows someone to read or write certain document or contract types but denies them access to others that would be inappropriate to edit. It also prevents unauthorized users from seeing or editing contract details.

3. Ensure all your contract data is encrypted in transit and at rest.

An important best practice to protect your contracts from unauthorized users is to encrypt all your document data. You’ll want to encrypt information both at rest and in transit using the latest AES 256-bit encryption and TLS 1.2 standards. Data at rest refers to any data that is stored within your contract management system. Data in transit refers to any data that is being sent externally to or from your contract management system to a user or another application.

4. Leverage E-signature capabilities.

The most time-consuming part of any contract process is getting approvals, especially for those chasing down paper-based signatures. E-signatures are a best practice to get documents signed faster. More importantly, however, is that e-signatures are more secure than paper ones. They have been legally binding for over 15 years thanks to the ESIGN Act of 2002. E-signatures carry a digital record about who, when, and where a document was signed to ensure authentication and help with audit trails. Be sure to fully capitalize on the benefits E-signatures offer your organization.

5. Intake your contract data through secure forms.

Many organizations still rely on email to request contracts and capture required data to create them. This often leads to incomplete or incorrect information which adds time and creates risk. Email attachments are also the most common way

hackers infiltrate corporate networks with malicious software. With pre-defined and encrypted intake forms, team members can quickly and accurately submit an existing contract, request the creation of a contract, or if they have the authority, instantly create a contract. This ensures the integrity and security of data captured for your contracts, eliminates the need for double data entry or chasing down missing data, and minimizes mistakes.

Takeaway

The number of security breaches and malicious hacks continues to skyrocket. Given that contracts are the backbone of your business, you can increase the security of them by implementing these five best practices. Not only will you have greater piece of mind, you'll also avoid potential financial, legal, and brand risks.

Seventh Circuit: Class Arbitration is for Courts to Decide, Not Arbitrators

A **post** on the Carlton Fields website updates the latest ruling in a class action alleging violation of the Fair Labor Standards Act and breach of contract.

A U.S. district court had compelled arbitration pursuant to an agreement between the plaintiff and defendant, but it struck as unlawful a waiver clause that appeared to forbid class or

collective arbitration of her claims, reasoning that the plaintiff could not waive her right to bring a class action under the National Labor Relations Act.

On appeal, the Seventh Circuit was faced with reconciling the district court's decision with a subsequently-decided U.S. Supreme Court case, writes **Gail E. Jankowski**.

Read the article.

Evaluating Current Contracts for Use In the New Year

Snell & Wilmer offers some advice for businesses that may need to take a look at their existing contract templates to evaluate a refresh or, in certain circumstances, a major overhaul.

The **article**, posted on JDSupra.com, discusses updating contracts for changes in the law, creating a family of templates with consistent legal terms, creating a state addendum for use on contracts across multiple states, new delivery models, and new technologies and techniques.

Read the article.

Three Recent Cases Consider the Interpretation and Enforceability of Arbitration Agreements

A post on the website of **McGuireWoods LLP** discusses three recent cases before the Supreme Court and the Third Circuit relating to the interpretation and enforceability of arbitration agreements.

The Third Circuit found in favor of Kaplan University in a case in which a student challenged an arbitration agreement included in an e-signed enrollment.

The Supreme Court ruled in a case in which the justices rejected a judicially created exception limiting enforcement of arbitrability.

And the Supreme Court upheld statutory exemption for an independent contractor.

Read the article.

Should Contractually-Provided Severance Pay Decrease as Wealth Accumulation Increases?

Employment agreements between publicly-traded issuers and their executive officers often contain severance pay provisions that are heavily negotiated at the time of entering into the agreements, explains **a post** on the website of Hunton Andrews Kurth.

The post by **Anthony J. Eppert** considers whether the amount of contractually-provided severance pay could, over the employment term, be reduced proportionate to the increase in the executive's wealth accumulation over the same time period (*i.e.*, an inversely proportional relationship between the amount of severance pay and the amount of wealth accumulation by the executive over the employment term).

Read the article.

Have You Really Agreed to Arbitrate?

Image by [NY Photographic]

Unless an employment contract specifies the forum for arbitration and the process by which the arbitration will be conducted, a court may find that the parties have not reached an agreement to arbitrate, warns **a post** on the website of Porzio, Bromberg & Newman.

The authors discuss a New Jersey case that illustrates the need to use care in drafting.

An appellate court found that the arbitration clause in the contract did not specify what forum would substitute in place of the jury trial.

Read the article.

Taking the First Step to Digitally Transform Your

Legal Department

By Justin Perkins
Contract Logix

With more than two-thirds of CEOs expecting their business models to change in the next three years, it's no surprise that digital transformation continues to be a strategic priority for organizations of all industries and sizes.

What is surprising, however, is that a recent study by Gartner revealed an astonishing 81% of legal departments are not prepared to support their company's digitization process. That's a worrisome figure given that legal departments and the contracts they execute define our business relationships and are the backbone of any organization.

The good news for legal is that digitization, at least when it comes to contract management, has never been easier. By embracing software that's built specifically to support contract lifecycle management, legal teams can shift from laggard to leader in the execution of their organizations' digital transformation.

The question then becomes, where and how should a legal organization begin the process? Let's look at the first and most critical step to take when setting the foundation for contract – and legal – digitization.

Digitize and Centralize All Your Contracts in Secure Repository

It's not uncommon for legal departments to store contracts in shared folders across multiple locations and formats. However, centralizing your agreements into an electronic contract repository is the all-important first step towards the digital transformation of your contract management processes.

Think about how often you or your team need to reference or

find an agreement. Whether you're locating a specific detail or reviewing the entire contract before a renewal or termination, there are many reasons why an online, centralized repository is a foundational element to your legal digitization.

Not only will it keep your agreements organized, it greatly reduces the risk of contracts being lost, overlooked, and accessed by the wrong individuals. It will also allow you to access any document at anytime from anywhere on any device, and that ubiquity is a key component and driver for any organization's digital transformation.

Another reason to digitize your contracts is so you can easily make use of the valuable data contained in them. Having the ability to capture, analyze, and report on data such as expiration dates, contract amounts, types of clauses used, and contacts will allow you to make much more informed business decisions. After all, digital transformation is all about improving your business processes and developing new business models.

As you begin the process of digitizing and centralizing your contracts – whether they are paper or already in electronic form – it's' important that your contract management system employs optical character recognition (OCR) technology. OCR automatically scans the content of your documents as you add them to the system regardless of their format. This ensures that all your contract data is easily found in the results of any search you perform, reports you run, or dashboards you create.

Takeaway

Centralizing all your contracts into a secure, electronic repository is the best and most logical starting point to achieving legal digitization. It may seem like a daunting task, but with help of contract management software, it's not.

Cloud-based contract management software can be very easy and cost-effective to implement. You can start with a solution that meets the needs of your organization today. Then, as your requirements grow, you can add additional capabilities and user licenses.

Once you've built this foundation you can begin to embrace all the other wonderful features of contract management software that allow you to further execute your digital transformation strategy and put smiles on the faces of both your CIO and CEO.