Enforceable Contract for Sale of Family-Owned Business or Just Agreement to Agree?

In the sale of family-owned business interests, parties can be bound by term sheets or similar documents, even when such documents expressly contemplate the preparation of further documents to finalize the transaction, explains **Michael Connolly**, a partner in Murtha Cullina's litigation department.

Writing in the firm's **Family Business Perspectives** blog, Connolly discusses a case in which a court "recently ruled upon a claim by one family member against another to enforce a 'Settlement Memorandum' which provided for the purchase and sale of stock in the family business, even though the Memorandum contemplated the drafting of later documents to finalize the transaction."

"Parties to negotiations involving the sale of family-owned business stock or assets should therefore be cautious in their drafting and conduct in order to ensure that it is clear to all parties what documents are – and are not – intended to create enforceable rights and obligations," warns Connolly.

Read the article.

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Using Arbitration Agreements to Reduce the Costs of Litigation and the Risk of Class Action Claims

A properly drafted arbitration clause with a class action waiver should be enforceable and can be a good and useful line of defense against expensive and costly litigation, especially class action lawsuits, write **Jay N. Varon** and **Jennifer M. Keas** in Foley & Lardner's **Consumer Class Defense Counsel** blog.

Their article explains how arbitration works, what type of arbitration agreements are generally enforceable, what features that have or can cause problems, and how such provisions can reduce the risk of class actions.

They also discuss the possible effect or non-effect that could come from the Consumer Financial Protection Bureau's proposed arbitration rule.

Read the article.

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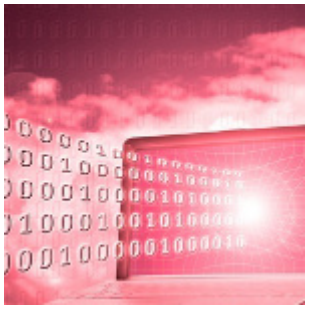
Federal Court: An Open-Source

License Is an Enforceable Contract



A federal court has set the precedent that licenses like the GNU General Public License (GPL) can be treated like legal contracts, and developers can legitimately sue when those contracts are breached, reports **Keith Collins** for the digital news outlet **Quartz**.

The GNU GPL requires that anyone using GPL-licensed software to produce some other software, must provide the resulting software as open-sourced with the same license if it's released to the public. Or the second developer could pay a licensing fee to the original developer.

South Korean developer Hancom Office incorporated an open-source PDF interpreter called Ghostscript into its word-processing software, but it declined to open-source its software or to pay Ghostware's developer.

Read the article.

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Are Restrictive Covenants

Enforceable When Employee Converts to 'At-Will' Employment?

On their firm's website, Gaetan J. Alfano and Joseph L. Gordon of Pietragallo Gordon Alfano Bosick & Raspanti discuss a recent case that dealt with the question of what happens to the restrictive covenants in an employment contract when an employee converts to at-will status.

In *Metalico Pittsburgh Inc. v. Douglas Newman, et al.,* an employer had three-year contracts with two high-level executives. After the three-year period ended, they continued to work as at-will employees. A year later, the employees joined a competitor and solicited Metalico's customers and solicited Metalico employees to join the new employer.Metalico sought a preliminary injunction to enforce the restrictive covenants.

"According to the Superior Court, because the employment agreements contained express language indicating that the employees agreed to be bound to the covenants for the duration of their employment, their status as at-will employees was irrelevant.," the authors write.

Read the article.

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‘We Have a Deal’ Email From Lawyer Creates a Binding Settlement

A U.S. magistrate judge in the Southern District of New York has ruled that the terms of a settlement negotiated via email can be enforced as a binding contract.

In a post on Steptoe & Johnson’s **SDNY Blog**, **Charles Michael** explains that the plaintiff managed social media presence for former Mets star Lenny Dykstra. The agreement included including “dealing with the fallout from Dykstra’s boorish behavior.” The plaintiff claims to have not been paid.

Dykstra’s lawyer had written “we have a deal” in an email chain with settlement terms but later argued that the terms also needed to include a “standard” mutual release, writes Michael.

Read the article.

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11th Circuit: 'Completed Work' Exclusion Does Not Bar Claims for Work Under Maintenance Contract

Image by Pictures of Money

The 11th Circuit ruled in *Liberty Surplus Ins. Corp. v. Norfolk Southern Railway Co.* that the unambiguous language of Liberty's "Completed Work" exclusion did not bar coverage for injuries sustained by a motorist injured at a railroad crossing who later sued Norfolk Southern, reports Hunton Williams.

"Before the Court is, once again, the classic case of the insurer requesting relief from the consequences of the inartfully drafted, yet plain, terms of its insurance policy," the opinion reads.

Andrew A. Stulce writes in the firm's **Insurance Recovery Blog** that the decision makes some important points:

> First, courts continue to construe exclusionary provisions

narrowly and against the insurer, even where the provision utilizes plain and unambiguous wording. Second, in the context of contracts and agreements to supply services, work or operations over time, exclusions designed to bar coverage for completed work or operations must be explicit as to when the services, work or operations are deemed to be "complete."

Read the article.

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Insight on Waiving Contractual Right to Arbitration

Bass, Berry & Sims attorney Chris Lazarini provided insight on factors a court should consider when determining whether a party has waived a contractual right to arbitration, the firm reports on its website.

"The factors, which are tied to potential prejudice to the non-moving party, include: (1) the time elapsed between commencement of litigation and the request for arbitration, and (2) the extent to which the moving party has participated in the litigation process," according to **Lazarini's article**.

His article examines the issue as presented in the case *Chehebar vs. Oak Financial Group, Inc.*, No. 14-2982 (E.D.

N.Y., 3/7/17)

Read the article.

AIA Releases 2017 Construction and Design Agreements

The American Institute of Architects has released several revised documents including the primary agreements between the owner and contractor and the owner and architect, reports Dickinson Wright PLLC.

The article on the firm's website explains that any of the revisions are attempts to clarify existing provisions. A number of changes, however, are more significant.

The update covers general conditions of the contract for construction, such as building information modeling and digital data, evidence of owners' financial arrangements and minor changes in the work.

It also discusses agreements between the owner and the contract, including assumptions, contractor progress payments and owner termination.

Topics also include the agreement between the owner and

arthitect.

Read the article.

Arbitration Clauses Extending to Non-Signatory Affiliates: Are They Enforceable?

Image by NY Photographic

A recent decision of the New Jersey Appellate Division considered the enforceability of arbitration agreements by non-signatories, writes **Marissa Tillem** in Proskauer Rose's **Minding Your Business** blog.

She discusses a case in which the plaintiff filed a putative class action complaint against defendant alleging violations

of New Jersey's Truth-In-Consumer Contract, Warranty and Notice Act, as well as the state's Lemon Law.

The panel determined, among other things, that by signing a lease agreement, plaintiff agreed to arbitrate her dispute not only with the underlying signatories of the lease, but with any of its affiliates. Now the plaintiff will need to decide whether to pursue her claims in arbitration, Tillem explains.

Read the article.

M&A Indemnification Provisions: Are You Drafting Unenforceable Time Limits?

In a merger-and-acquisition transaction, the convention is for the seller to make representations and warranties to the buyer regarding the target business, according to **an article** posted by Womble Carlyle Sandridge & Rice.

"When the target business is a private company, the acquisition agreement typically provides the buyer with a post-closing right to indemnification if any of the seller's representations and warranties prove to be untrue," writes partner **Melinda Davis Lux**. "The purchase agreement also typically provides that the buyer's right to indemnification is the buyer's exclusive remedy for breaches of the seller's representations and warranties."

In her article, she discussindemnification time limits, shortening the statute of limitations and its consequences, time extensions, and lengthening the statute of limitations.

Read the article.

The Beneficiaries of 'Pay-if-Paid' Clauses in Construction Contracts

In construction law, general contractors have largely negotiated a shift in the distribution of risk away from the general contractor and to the subcontractor with the inclusion of "pay-if-paid" contractual clauses," writes **Dana Chaaban** in Shutts & Bowen's **Construction Law Blog**.

Writing for the Florida firm, Chaaban explains that such clauses make the general contractor's receipt of payment from the owner a condition precedent to the general contractor's ultimate payment to the subcontractors. Absent such a provision, general contractors bear the risk of an owner's potential insolvency.

Subcontractors have sought to circumvent contractual "pay-if-paid" provisions by bringing claims against both the general contractors and their sureties who may guarantee payment.

Chaaban discusses some cases on the subject.

Read the article.

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Company Lawyers Automate Contracts to Ease Pain of Quote-to-Cash

A recent presentation at Apttus Accelerate conference in San Francisco discussed how to take control of a company's quote-to-cash process.

Diginomica reports that some company lawyers explained how they automate contracts to remove manual, paper-based logjams from the process.

Michelle Swan talked with two companies that have recently invested in Contract Lifecycle Management (CLM) – software that automates the process of managing a contract from initiation through execution, compliance and renewal. People from their legal teams told her about the benefits they are seeing from taking control of these defining moments.

Those companies were: Cadence, a company that sells software and hardware that other companies use to design everything from robotics and mobile phones to jets and medical devices,

and Silicon Labs, a semiconductor company that makes the silicon, sensors and other software used in various devices.

Read the article.

Mitigation of Construction Defect Litigation – Top 10 Construction Contract Issues

When negotiating a construction contract with a general contractor, the owner/developer should be aware of, and address, a number of issues to attempt to mitigate or limit the risk of construction defect litigation for a residential project, including multi-family and for-rent residential apartment and senior housing projects, advises **Rebecca W. Dow** in Holland & Hart's **Construction Law Blog**.

She explains that tandard forms of construction contract – such as the American Institute of Architects (AIA) or ConsensusDocs – are more beneficial to the contractor than the owner in many respects.

A construction contract will need to be reviewed thoroughly and revised to better protect the owner, and in the case of residential construction, should in particular, address 10 key

issues.

She discusses those issues, which include: scope of work, change orders, indemnification, warranties, subcontracts, insurance, dispute resolution, compliance with laws/environmental matters, construction lender, damages/attorneys' fees.

Read the article.

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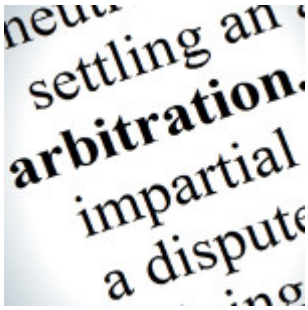
Is 'Class Arbitration' an Oxymoron?



"Class arbitration" – the utilization of a class action mechanism in an arbitration proceeding – is considered by some to be the unicorn of ADR; desirable but elusive, writes **Gilbert Samberg** on Mintz Levin's blog, **ADR: Advice from the Trenches**.

"Another view is that it is the Frankenstein's monster of ADR – an anomalous hybrid of disparate parts that comprise a disconcerting and ultimately nonviable creation," he writes. "And so let us ask, is 'class arbitration' an oxymoron? Should it be viable given the essential nature of arbitration? And whither the emperor's jurisprudential clothes?"

The Mintz Levin post is one in a series of posts concerning

the concept, its theoretical roots, the current state of the law, implementation of the mechanism, the significance and effects of a class arbitration award, etc.

Read the article.

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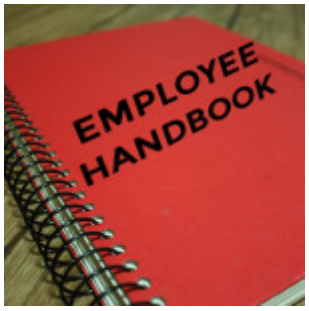
How Policies Can Defeat a Breach of Contract Claim



Employees often seek to use an employer's handbook, code of conduct, or policies as the basis for a breach of contract claim, writes **John J. Buckley** in a blog on the site of **Norris McLaughlin & Marcus**.

He describes a recent case in which a company was sued after an employee discovered he had been the victim of identify theft. It was suspected that the compromise came after another employee gave away some of the de-commissioned company computers.

The plaintiff claimed that the company breached its contract to secure the personal information that he submitted in his job application. But the federal district court. The court found that no contractual promise was made in the company's policies because those policies "existed for the purpose of protecting the company from harm," not to benefit employees.

[Read the article](#).

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Negotiating Technology Contracts – Insurance Requirements

By [Stephen F. Pinson](#)
[Scott & Scott LLP](#)

Image by [Pictures of Money](#)

One of the most overlooked sections in a technology-related contract is the insurance section. Whether that contract involves IT services, development, Software as a Service or Cloud Services, the insurance section is just as important as the other risk-allocating provisions contained in the contract. Yet, in most of the contracts in the industry, the original contract is silent on insurance and there is no

insurance provision drafted. This leaves a business customer vulnerable to risks that are not covered by insurance. This discussion will help identify what provisions are actually needed in a contract to properly allocate the risks.

The following is a brief list of insurance provisions that parties should include in technology contracts for the different types of claims scenarios between contracting parties. This list describes how each provision works within the contract and what should be negotiated (this is not an exhaustive list). Parties should negotiate individual and aggregate limits for the types of risks involved.

1. Commercial General Liability – This type of insurance, commonly known as GL, is the most basic form of business liability insurance. This type of insurance protects a business against claims due to injuries, accidents, and negligence. It can protect a business from costs related to bodily injury, property damage, medical expenses, legal costs, judgments, and personal injury claims such as libel and slander. GL is a staple requirement for both the service provider and the business customer, but it will not protect against all risks or threats. To protect a service provider or business customer from more specific types of emerging threats, each party may need to purchase additional liability policies.

2. Professional Liability Insurance, Errors and Omissions – This is also known as E&O insurance and will cover a service provider if it fails to perform according to the requirements in the contract. This coverage will help offset the costs associated with customer claims when the provider's mistake causes a customer loss. Customers may want to insist on E&O coverage to help bridge the gap between coverage offered by GL or other policies.

3. Automobile Liability – If a service provider will use an automobile in any phase of the work performed for the

business, the business should require evidence of automobile insurance. In some cases, the service provider will own no automobiles and therefore may not purchase automobile liability coverage; however, the business customer should require evidence of coverage for exposure related to non-owned and hired automobiles. This coverage protects the service provider and business customer in claims arising from the use of personal or rented vehicles by the service provider's employees or principals. If dealing with a sole proprietor, proof of personal auto coverage should be required.

4. Workers' Compensation – If an employee experiences a job-related illness or injury, this policy can help pay for medical expenses and lost income. If a service provider plans to do work onsite at the business customer's location, the business customer should require evidence of worker's compensation insurance. In some states, worker's compensations can be waived by following certain statutory protocols. The agreement should contain a provision that ensures the business customer will have no liability for the service provider's employees or independent contractors, even if the service provider opted out of workers' compensation. Additionally, if a service provider has no employees, then Workers' Compensation is not generally required by the State.

5. Employer's Liability Insurance – Employer's liability coverage, known as EPLI, is designed to cover claims like harassment, wrongful termination, and other claims that that are not covered by workers compensation or by a GL insurance policy. The primary goal for requiring this type of insurance is that a business customer will want likely claims the services provider may incur to be covered by insurance. Having uncovered risks may make the service provider less able to continuously provide services in the event of a claim by an employee.

6. Cyber Liability – Cyber liability includes numerous subsets of insurance coverage, and customers should carefully examine

the particular coverage because it varies greatly among providers. Cyber Liability coverage should include both first-party liability coverage and third-party liability coverage.

• First-party liability coverage applies to direct costs for responding to a claim incident, such as: (1) notifying clients that their information was compromised or exposed, (2) purchasing credit monitoring services for customers affected by the breach or hacking incident, (3) launching a public relations campaign to restore the reputation of the company affected by the breach, (4) compensating the business for income that it isn't able to earn while it deals with the fallout of the data breach, and (5) paying a cyber-extortionist who holds data hostage or threatens an attack.
• Third-party liability insurance covers the people and service provider responsible for the systems that allowed a data breach to occur. It offers protection for the service provider and independent contractors who were responsible for the safe storage of the data. The following is a list of coverage types that should be included in some form or another as coverage for a service provider or business customer when they are seeking coverage for the different types of claims scenarios.

Regardless of whether the coverage is first-party or third-party, the contracting parties should examine whether they require the following categories of coverage:

- Network Security and Privacy Liability – This coverage protects the service provider against losses for the failure to protect a customer's personally identifiable information (SSN, credit card numbers, medical information, passwords, etc.) via theft, unauthorized access, viruses, or denial of service attack.
- Media Communications Liability / Reputation or Brand Protection – This coverage protects against allegations of defamation/libel/slander, invasion or violation of

privacy, plagiarism/piracy, copyright/trademark infringement, and other wrongful media communication acts that can hurt a service provider or business customer that is associated with media communications in electronic, print, digital, or broadcast form.

- Data Breach – Data breaches come in many shapes and sizes, but many kinds of cyber incidents, including: malware attacks, malfunctions, insider data breaches, data theft by employees, ransomware, or employee mistakes. Data Breach Insurance may cover these breaches as well as when a hacker targets your service provider or a business customer.
- Data Loss / Interruption of Computer Operations – This type of insurance covers incidents where there is data loss or interruption of computer operations from an inadequate backup or an insured loss, e.g., a disaster that destroys the computer system or virus. This type of coverage can also reimburse losses related to lost income that a service provider or business customer incurs ancillary to a data loss.
- Regulatory Response – Regulatory response insurance protects against fines and defense costs arising from proceedings brought by any regulatory body against either the service provider or those individuals performing regulatory functions within the business customer's firm when an incident occurs.
- Regulator Defense/Penalties – This insurance covers defense expenses and regulatory fines and penalties imposed by a regulatory agency in connection with a data breach.
- Systems Damage – This insurance covers computer systems that are damaged in retrieving, restoring or replacing any computer programs or other data media.
- Threats or Extortion – This insurance covers incidents where threats or extortion from a hacking attack or virus on a computer system.

7. Umbrella Liability Insurance – Umbrella coverage provides extra liability protection to help protect a service provider or business customer in the event that a loss exceeds the limits of the other policies. There are three basic reasons to maintain an umbrella policy: (1) professional liability insurance can be quickly exhausted by legal defense fees, (2) there are significant business assets to protect, and (3) there are risks of legal claims due to the nature of the products or services provided. This type of insurance is used in situations where "excess liability" kicks in after your commercial general liability coverage has been exhausted. Without this policy in place, a service provider or business customer would be responsible for the additional out of pocket amounts (which can reach into the millions of dollars). Unless that money has been stashed away for such an incident, a lawsuit would have major financial repercussions, without the extra protection of a business umbrella policy.

8. Self-Insured – Some service providers are so well established that they elect to provide self-insurance against many of the risks identified above and to the extent they have third-party insurance, they do not make the third-party coverage available to the customers. In a situation where a service provider will not include insurance language because it is self-insured, the business customer should include language adjusting the limitations of liability sections and indemnification provisions to adequately provide protection in the event of a loss.

Parties to a technology contract should include a provision requiring the other party to provide evidence of the insurance contained in the contract.

Given the regulatory and privacy risks, it is increasingly important to seek advice from experienced counsel when negotiating a technology contract to make sure the risks are adequately assessed and each party's interests are protected.

Using a TRO to Stop Legal Opponents in Their Tracks

Sometimes a temporary restraining order, or TRO, can provide immediate relief from the court system when a party can show irreparable harm will be caused if someone is allowed to remain in control of assets that belong to the company, according to an article posted on the website of **Mehendru P.C.**

“It may be that a competitor has interfered with a business contract, an employee has stolen your trade secrets or breached a non-compete agreement, or a business partner has stolen from your company. You have to go to court to protect the company though you’d rather not,” the post reads.

A judge can grant a TRO to stop an individual’s actions even without that person or his lawyer being in court. And a TRO provides immediate relief from the court system when a party can show irreparable harm will be caused if someone is allowed to remain in control of assets that belong to the company.

Read the article.

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Best Practices for Limiting Liability Arising from Smart Contract Vulnerabilities

Jared Butcher, writing in the Steptoe Blockchain Blog, says it is no secret that smart contracts have vulnerabilities, but he suggests a mix of best practices to limit potential liabilities that may arise when vulnerabilities interfere with smart contract performance.

"There is potential for manipulation by insiders, which is of particular concern for smart contracts that operate based on 'proof of stake' protocols, given the ongoing concerns that those protocols will not be effective in ensuring that the parties play by the rules," Butcher writes. "Even without intentional interference by hackers or insiders, smart contracts may have software bugs that disrupt performance, and there is the possibility of unintended outcomes if the smart contract's code fails to anticipate an unusual situation."

In the post, he offers six best practices to consider when implementing a smart contract.

Read the article.

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Restrictive Covenants Can Swing Both Ways: A 3-Step Plan To Avoiding Legal Risks When Onboarding New Employees

Employers have been using restrictive covenant agreements – contracts that contain non-compete, customer non-solicitation, employee non-solicitation, or non-disclosure of confidential information – with increasing frequency in recent times, writes **Michael Elkon** with **Fisher Phillips**.

"Increased media attention on the practice of forcing lower-level employees to sign non-compete covenants, combined with the widely publicized report on non-compete restrictions issued by the Obama White House in its waning days, has led to an increase in the number of reported cases. Further, several states are passing new laws or considering changes to existing laws on the subject," he explains.

He describes three basic steps a company can take to reduce the chances of a lawsuit from a competitor, or at least put the company in a favorable position if litigation is threatened.

These include "Ask questions on the front end," "Structure the job on the front end to ensure compliance," and "Emphasize the importance of purging all former employer materials."

Read the article.

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Reallocation Actions and Settlement Agreements: What Did We Settle?

The purpose of a settlement and release agreement is to fully and finally dispose of a disputed matter, explains Stacy L. La Scala, a neutral writing for JAMS.

“However, more and more often, a dispute cannot be fully resolved where nonparties to the dispute have contributed defense and indemnity amounts on behalf of one or more of the parties and have reserved the right to seek recovery of those amounts in subsequent litigation,” he cautions.

In **the article**, published on JDSupra.com, he writes:

> In particular, where insurance carriers have actually provided a defense and/or indemnity in an action, those carriers in a number of jurisdictions have potential rights against their insureds, pursuant to reservation of rights for uncovered claims; potential rights against those entities who are principally responsible for the loss; and potential rights against contractually obligated indemnitors of their insureds. The carriers are typically not part of the action and are not signatories to the settlement

agreement.

Read the article.

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