



TOP 3 HOT TOPICS IN CONTRACT LAW:

Privacy/Security Protections,
Class-Action Waivers, and
Crafting Arbitration Clauses

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OVERVIEW

- DATA BREACHES/CYBER ATTACKS
 - Key Statistics
 - Applicable Laws and Regulations
 - Strategic Prevention and Response
- CLASS-ACTION WAIVERS
 - Recent developments at the federal and state levels
- ARBITRATION CLAUSES THAT MEET YOUR NEEDS
 - Questions of Arbitrability
 - Questions of Enforceability

DATA BREACHES ARE AN ONGOING PROBLEM

- Increased frequency, scope, and **cost**
 - Average total cost of a data breach = \$7.91 million (U.S.)
 - Ponemon Institute, *2018 Cost of a Data Breach Study: Global Overview* (July 2018)
 - “Mega Breaches”
 - Norsk Hydro – March 2019
 - Cyberattack paralyzed Norwegian aluminum manufacturer’s operations, costing company between \$35 million and \$40 million in the first week
 - Facebook – 2018
 - Fines alone could exceed \$1 billion
 - Yahoo – 3 data breaches between 2013-2016
 - Proposed settlement of \$117.5 million

GOVERNMENT SCRUTINY

- General Data Protection Regulation (European Union)
- HIPAA; HITECH; GLBA; FTC; FINRA (U.S. Federal Regulatory Schemes)
- Pennsylvania
 - Breach of Personal Information Notification Act (71 P.S. § 2301, *et seq.*)
- New Jersey
 - Data Security Breach Notification Law (N.J.S.A. § 56:8-161, *et seq.*)
 - Identity Theft Prevention Act (N.J.S.A. § 56:11-44, *et seq.*)

DUTIES TO EMPLOYEES

- *Dittman v. UPMC d/b/a The University of Pittsburgh Medical Center*, 196 A.3d 1036 (Pa. 2018)
 - If an employer requires an employee to provide sensitive personal info (SSN, bank account info, etc.) → common law legal duty to exercise reasonable care to safeguard the info
 - Breach may result in liability to employees
 - *Requiring* the info = affirmative conduct giving rise to duty to protect
 - Employees may recover damages based on a breach
 - Reversed Superior Court's holding that economic loss doctrine bars claims for purely economic damages
- Interesting side note: *Dittman* merged the economic loss doctrine with the gist of the action doctrine

AN OUNCE OF PREVENTION

- A proactive approach to data breach prevention and response is crucial
 - Internal security measures
 - Incident response plan
 - External security measures (third-party vendors)

VENDOR ASSESSMENT

- Vendor intake forms
- Vendor review checklists
- Post-contract tracking of vendors

VENDOR INTAKE FORMS

Purchase Details – Part I		
1	Who will use this purchase (both within the Company and externally, if applicable)?	
2	Have you reviewed the agreement and/or SOW to ensure they contain your negotiated terms and adequate business terms that meet our organization's needs?	<input type="checkbox"/> Yes <input type="checkbox"/> No
3	Do you have any additional comments or concerns for Procurement, Legal, Privacy or Information Security to address with the vendor (e.g., support & maintenance, anything they specifically promised during discussions, price point, contract length)?	
4	Is the purchase considered critical to the Company's customer facing or internal operations (e.g., <i>significant business interruption if the software fails</i>) OR will it be integrating with a critical system?	<input type="checkbox"/> Yes <input type="checkbox"/> No
5	Will the vendor and/or the purchase have access to our internal infrastructure and/or systems (note – access can be remote or onsite)?	<input type="checkbox"/> Yes <input type="checkbox"/> No
6	Will vendor personnel and/or the purchase (whether internal or external) collect or have access to any Sensitive Information (e.g., the Company's financials or Personal Data) and/or Confidential Information (each, as defined in the Personal Information Management (PIM) Policy)? For clarity, this may be through providing support to the Company, hosting the data, etc.	<input type="checkbox"/> Yes <input type="checkbox"/> No
7	If you have answered "yes" to question 4, 5 and/or 6, then has this purchase already been reviewed by Information Security?	<input type="checkbox"/> Yes - Attach Security Review <input type="checkbox"/> No

VENDOR REVIEW CHECKLISTS

- Security standards (ISO/SOC) and security obligations
- Right to audit
- Incident response
- Insurance/risk management

POST-CONTRACT TRACKING

- Maintaining records for security certifications
- Insulating yourself against legal changes

CLASS-ACTION WAIVERS

- Vendor/Service Contracts
- Customer Contracts
- Employment Contracts

CLASS-ACTION WAIVERS

- *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018)
 - Federal Arbitration Act vs. National Labor Relations Act
 - Employers may require employees to arbitrate any disputes individually, rather than on a class-wide basis
- *But see* New Jersey's Diane B. Allen Equal Pay Act (eff. July 1, 2018)
 - Required waiver of any NJLAD protections – including trial by jury – is an unlawful employment practice
- *And* Amendment to NJLAD (eff. March 18, 2019)
 - Same, and extends to waiver of rights or remedies under NJLAD or “any other statute or case law”
- “Waive the waiver”

PROS & CONS

- Pros

- Limits exposure to large-dollar, bet-the-company suits
- Discourages low-value individual suits

- Cons

- Risk of facing numerous related suits

CRAFTING EFFECTIVE, ENFORCEABLE AGREEMENTS

- Importance of clarity in arbitration clauses
 - *Flanzman v. Jenny Craig, Inc.*, 456 N.J. Super. 613 (App. Div. 2018)
 - No forum designation in arbitration agreement = **UNENFORCEABLE**
- Consider related parties and multiple contracts
 - *Franklin Towne Charter High School v. Arsenal Associates, L.P.*, 2019 Pa. Super. Unpub. LEXIS 847 (Pa. Super. Mar. 11, 2019)

CRAFTING EFFECTIVE, ENFORCEABLE AGREEMENTS

- Additional Considerations:
 - Forum and Venue
 - Procedural and Evidentiary Rules
 - Arbitrator Selection Process

NAVIGATING THE “ARBITRABILITY” QUESTION

- Who decides whether a particular claim is subject to arbitration?
 - A court, absent **clear and unmistakable evidence** that the parties wanted it to go to an arbitrator
 - *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995)
 - What is “clear and unmistakable evidence?”
 - Generally, incorporating AAA Rules is sufficient
 - The “wholly groundless” exception doesn’t exist
 - *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019)

NAVIGATING THE “ARBITRABILITY” QUESTION

- “Waive the waiver,” revisited – Keeping the arbitration in the arbitrators’ hands
- Circuit split
 - Higher burden may apply to show delegation to arbitrator of class arbitrability question
 - Third, Sixth, and Eighth Circuits
 - *Contra* Second, Tenth, and Eleventh Circuits
 - Lack of “express contractual language” delegating class arbitrability question may be fatal
 - Third, Fourth, Sixth, and Eighth Circuits
 - *Contra* Second, Fifth, Tenth, and Eleventh Circuits
 - incorporation of AAA Rules is enough
- Both are open questions

PROS & CONS

- Pros

- Often cheaper and faster than litigating in court
- Private
- Decision is final, binding, and effectively unreviewable

- Cons

- Complex arbitrations can become very costly
- Lack of formal rules = less predictability
- Decision is final, binding, and effectively unreviewable

QUESTIONS??



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