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# Common Contractual Dilemmas

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# We Signed What? (KYC - Know Your Contracts)

- Who tracks, reviews?
- Policies and procedures versus ad hoc
- Software solutions?
- Strategy – Consistency versus one size fits all
- Strategy – Proactive versus reactive



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# How Did This Happen? (The Importance of Process)

- Who drafts? Who reviews?
- When is outside counsel used?
- Policies and procedures versus ad hoc
- The checklist philosophy
- Crafted or boilerplate?
- First draft – use natural language



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# Who Are We Involved With? (Know Your Contracting Partners)

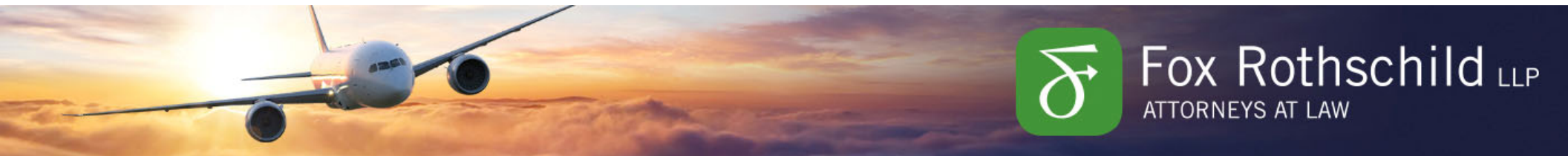
- High risk tolerance?
- Bad quality control, risk management?
- Poor finances/coverages/assets?
- Appetite for litigation
- Court record searches/property searches
- Intel from insurers, brokers



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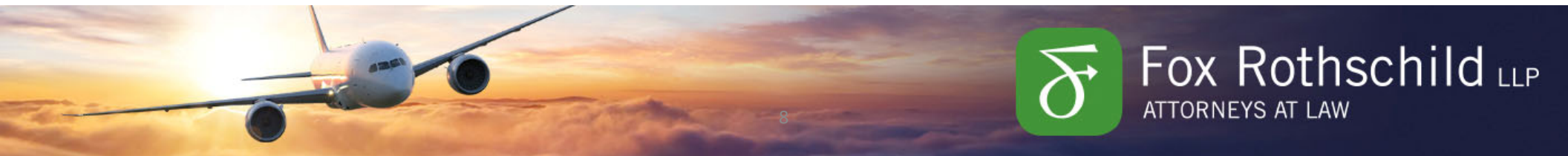
# CLE Code #1

- Contracts



# How Do We Stay Out of Trouble? (Building an ARK)

- Awareness (and)
- Review (of)
- Key Clauses



# Key Clauses Unlock the Right Contract

- Indemnity
- Dispute Resolution
- Law
- Forum
- The most important clauses are often those you don't understand, are foisted upon you, or are changed by circumstance



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# So You Think You're Protected? (Common Indemnity Problems)

- Lack of integration with defense and hold harmless provisions
- Not noticing the notice requirement (condition precedent/covenant)
- Is the scope broad enough? (representations/warranties)
- Is the scope deep enough? (thresholds, caps and insurance)
- Does it cover your own fault?
- Who is covered? (employees, affiliates, assigns, etc.)
- Waiver of subrogation



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# Is the Defense Clause Defensible?

- Lack of choice of counsel
- Lack of control over settlement (non-monetary terms, admission of fault)
- Pre-tender fees and expenses
- Unclear cooperation clauses
- Suits for injunctive/equitable relief



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## We Are Paying for What?

- Gross negligence/recklessness/willful conduct/punitive damages
- Failure to comply with law or your instructions
- Bad faith breaches
- Amounts already covered by insurance or other payments
- Losses caused by delayed notice
- Losses you cannot defend; settlements you didn't make



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# Is The “Hold Harmless” Harmless?

- Might require, even absent a defense clause, that you indemnify for costs and expenses that have not yet been paid by the other party
- Result in the release of the indemnified party from liability to the indemnifying party



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# Indemnity for “Yada yada yada” (Different words mean different things!)

- Causes of Action
- Claims
- Liabilities
- Losses



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# Pitfalls of Choice of Law & Jurisdiction (The Legal ...)

- Choice of Law clauses that subvert the choice of law
- Lack of substantial relationship/reasonable basis
- Violation of public policy
- Transfer/removal
- Qualified to do business in selected state?



## CLE Code #2

- Choice of Law



# Pitfalls of Choice of Law & Jurisdiction (... and the practical)

- Bias/Home turf (reciprocity/plaintiff is the “away” team solution)
- How serve?
- Expense/Inconvenience/Delay
- Enforceability
- Limits of Subject Matter Jurisdiction
- Changed circumstances (floating jurisdiction clause?)



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# Pitfalls of Dispute Resolution Clauses (“Well that escalated quickly”)

- Negotiation
- Executive Tribunals
- Expert determinations
- Neutral evaluations
- Mediation
- Downsides – delay, cost, game playing, “agreement to agree,” lack of actionable harm



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**Questions?**



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# Thank You

If you have any questions, please contact us:

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