

# Index

## **ABANDONMENT**

Restrictive covenants, **38:39**

## **ACCOUNTANTS**

Due diligence personnel, **1:28**

## **ACCOUNTING**

General discussion, **1:30 to 1:37**

Accounts receivable, **1:32**

Employee benefit plans, **28:27**

Intangibles, **1:34**

Inventory, **1:33**

Material adverse changes, carve-outs, **13:20**

Method of accounting, **1:37**

Pension liabilities and other employee benefits, **1:35**

Solvency opinions, **1:36**

Valuation

general discussion, **1:31**

accounts receivable, **1:32**

intangibles, **1:34**

inventory, **1:33**

pension liabilities and other employee benefits, **1:35**

## **ACCOUNTS RECEIVABLE**

Valuation, **1:32**

## **ADVERSE CHANGES**

Material Adverse Changes (this index)

## **ADVERTISING**

Restrictive covenants, **38:20**

## **AGE DISCRIMINATION IN EMPLOYMENT ACT**

Subsidiary, violation by, parent's liability, **18:15**

## **AGENCY**

Disappointed bidder litigation, law of agency, **34:4**

## **AGENCY PROTECTIONS**

Environmental liabilities, **19:6**

## **AGENTS**

Escrow Agreements (this index)

## **AGREEMENTS**

Allocation agreements.

Environmental Liabilities (this index)

Asset purchase agreement, **37:1, 37:2, App 44A, App A1, App A2, App A8 to App A10, App A9**

Collective bargaining agreements. Labor and Employment (this index)

Confidentiality Agreements (this index)

Consulting agreement, **App 10B**

Escrow Agreements (this index)

Finders' agreements, **2:1, 2:2**

Investment bankers, agreements with, **1:48**

License agreements, intellectual property, **15:10, 15:15 to 15:18**

Management and financial advisory services, letter agreement, **App 10A**

Merger. Agreements and Plans of Merger (this index)

Noncompetition agreements, employees, **24:35**

Security agreements. Intellectual Property (this index)

Stock and asset purchase agreement HanesBrands Inc., **App A6**

## **AGREEMENTS AND PLANS OF MERGER**

Altair Engineering Inc. (2024), **App A7**

Bottomline Technologies, Inc. and Project RB Parent, LLC, **App A3**

**AGREEMENTS AND PLANS OF MERGER—Cont'd**

- Horizontal merger guidelines, **App 11A**
- Rockwell Automation, Inc. and Plex Systems Holdings, Inc., **App A5**
- X Holdings I, Inc., X Holdings II, Inc., and Twitter, Inc., **App A4**

**ALLOCATION AGREEMENTS**

- Environmental Liabilities (this index)

**ALLOCATION FORMULAS**

- Withdrawal Liability in Corporate Transactions (this index)

**ALTER EGO**

- Employer status, alter ego doctrine, **24:9**
- Subsidiaries. Parent's Liabilities for Subsidiaries (this index)

**AMENDMENTS TO BYLAWS**

- Poison pills, securities considerations, **48:26**

**ANNOUNCEMENT OF MERGER**

- Material adverse changes, carve-outs, **13:14**

**ANNUITY CONTRACTS**

- Health and welfare plans, **29:311**

**ANTI-ASSIGNMENT**

- Government contracts, **47:4**

**ANTITRUST**

- General discussion, **11:1 to 11:79**
- Acquired company, notice to, **11:10**
- Bankruptcy, waiting period, **11:15**
- Business activities affecting workers, antitrust guidelines for, **App 11B, App 24A**
- Business risks, merger analysis, **11:69**
- Checklist, FTC and DOJ, **11:79**
- Checklist for acquisition analysis
  - general discussion, **11:74**
  - horizontal mergers, questions relating to, **11:76**
  - potential entrant mergers, **11:77**
  - relevant market, questions relating to, **11:75**

**ANTITRUST—Cont'd**

- Checklist for acquisition analysis
  - Cont'd
  - vertical mergers, **11:78**
- Coordinated interaction, horizontal mergers, **11:47**
- Covenants, restrictive, antitrust considerations, **38:38**
- Defense industry mergers, **11:62**
- Defining relevant product market.
  - Horizontal mergers, below
- Degree of difference, horizontal merger analysis, **11:51**
- Disappointed bidder litigation, **34:27**
- Disclosure of submitted documents, premerger notification, **11:12**
- Disruptive influence, elimination of, vertical merger analysis, **11:58**
- Early termination of waiting period, request for, **11:19**
- Ease of entry, horizontal merger analysis, **11:53**
- Efficiencies, horizontal merger analysis, **11:54**
- Enforcement actions
  - general discussion, **11:20**
  - Failure to file, below
  - gun-jumping, **11:26**
- Exchange of information, premerger, **11:82**
- Exemptions, premerger notification, **11:5**
- Failing-firm defense, horizontal merger analysis, **11:55**
- Failure to file
  - general discussion, **11:21**
  - constructive avoidance of filing requirements, **11:24**
  - erroneous application of exceptions to filing, **11:25**
  - inadvertent violations, **11:23**
  - willful failure, **11:22**
- Filing requirements. Failure to file, above
- Foreign competition, horizontal merger analysis, **11:52**
- Foreign transactions, premerger notification, special rules, **11:32**

## INDEX

### ANTITRUST—Cont'd

- FTC and DOJ acquisition checklist, **11:79**
- Geographic market, defining, **11:44**
- Guidelines
  - general discussion, **11:71**
  - business activities affecting workers, **App 11B, App 24A**
  - cutting a deal, **11:73**
  - horizontal mergers, **App 11A**
  - international enforcement and cooperation, **App 11D**
  - licensing of intellectual property, **App 11C, App 15A**
  - tactical considerations, **11:72**
- Gun-jumping, enforcement actions, **11:26**
- Hart-Scott-Rodino considerations, **1:62**
- High technology cases, relevant “product” market, **11:39**
- Horizontal mergers
  - general discussion, **11:37 to 11:55**
  - adverse effects, potential, **11:46**
  - analysis, **11:37 to 11:55**
  - checklists, **11:75, 11:76**
  - coordinated interaction, **11:47**
  - degree of difference, **11:51**
  - ease of entry, **11:53**
  - efficiencies, **11:54**
  - failing-firm defense, **11:55**
  - foreign competition, **11:52**
  - guidelines, **App 11A**
  - high technology cases, relevant “product” market, **11:39**
  - injunctive relief, **11:38**
  - other factors in horizontal merger analysis, **11:49 to 11:55**
  - quantitative point at which horizontal merger should be illegal, **11:45**
  - recent or ongoing changes, **11:50**
  - relevant geographic market, defining, **11:44**
  - relevant product market, defining
    - general discussion, **11:39**
    - Brown Shoe* test, **11:31**
    - checklist, **11:75**

### ANTITRUST—Cont'd

- Horizontal mergers—Cont'd
  - relevant product market, defining—Cont'd
    - DuPont* test, **11:48**
    - high technology cases, **11:43**
    - Kodak* analysis, **11:46**
    - unilateral effects, **11:48**
- Hospitals, merger analysis, **11:61**
- Information exchanges, premerger, **11:82**
- Information gathering, practical aspects of merger analysis, **11:66**
- Injunctive relief, horizontal mergers, **11:38**
- Intellectual property, **15:4, App 11C, App 15A**
- International considerations, premerger notification, **11:33**
- International enforcement and cooperation, **App 11D**
- Investigation “clearance,” waiting period, **11:18**
- Joint ventures, premerger notification, special rules, **11:30**
- Labor and Employment (this index)
- Legal risks, merger analysis, **11:68**
- Licensing of intellectual property, **App 11C, App 15A**
- LLCs, premerger notification, special rules, **11:28**
- Merger analysis
  - general discussion, **11:35**
  - business risks, **11:69**
  - Checklist for acquisition analysis, above
  - defense industry mergers, **11:62**
  - due diligence, **App 11E**
  - Horizontal mergers, above
  - hospital mergers, **11:61**
  - information gathering, **11:66**
  - legal risks, **11:68**
  - opinion letter, **11:70**
  - overview of merger law, **11:36**
    - Brown Shoe* test, **11:41**
    - DuPont* test, **11:40**
    - Kodak* Analysis, **11:42**

**ANTITRUST—Cont'd**

## Merger analysis—Cont'd

pitfalls during pre-merger negotiations, avoiding, **App 11E**  
 post-merger challenges, **11:63, 11:64**

practical aspects, **11:65 to 11:73**  
 risk analysis, **11:67 to 11:69**  
 special industry rules, **11:60 to 11:62**

state and private litigants, **11:80**  
 statute of limitations, post-merger challenges, **11:64**

Vertical mergers, below

Notification. Premerger notification, below

Opinion letter, merger analysis, **11:70**

Partnerships, premerger notification, special rules, **11:28**

Planning documents and attorney-client privilege, **11:11**

Post-merger challenges, **11:63**

Potential entrant mergers, checklist for acquisition analysis, **11:77**

Practical advice, **1:63**

Practical aspects of merger analysis, **11:65 to 11:73**

Preconsummation activities

general discussion, **11:81**

other activities, **11:83**

premerger information and exchanges, **11:82**

Premerger information exchanges, **11:82**

Premerger notification

general discussion, **11:2 to 11:31**

acquired company, notice to, **11:10**

avoiding notification by manipulating form of transaction, **11:6**

disclosure of submitted documents, **11:12**

Enforcement actions, above

exemptions, **11:5**

Failure to file, above

foreign transactions, special rules, **11:32**

formal interpretations, **11:7**

information required by form, **11:8, 11:9**

**ANTITRUST—Cont'd**

## Premerger notification—Cont'd

international considerations, **11:33**

joint ventures, special rules, **11:30**

LLCs, special rules, **11:29**

model voluntary request form, **11:9**

overview, **11:3**

partnerships, special rules, **11:28**

planning documents and attorney-client privilege, **11:11**

states and private litigants, **11:34**

transfer of exclusive patent rights, special rules, **11:31**

unincorporated entities, special rules, **11:27 to 11:29**

Waiting period, below

when must merger be notified, **11:4 to 11:11**

Product market. Horizontal mergers, above

Rate regulation theory, evasion of, vertical merger analysis, **11:59**

Recent or ongoing changes, horizontal merger analysis, **11:50**

Relevant product market, defining. Horizontal mergers, above

Restrictive covenants, antitrust considerations, **38:38**

Risk analysis, **11:67 to 11:69**

Second requests, waiting period, **11:16**

Special industry rules, merger analysis, **11:60 to 11:62**

States and private litigants

merger analysis, **11:80**

premerger notification, **11:34**

Statute of limitations, post-merger challenges, merger analysis, **11:64**

Transfer of exclusive patent rights, premerger notification, special rules, **11:31**

Unilateral effects, horizontal mergers, **11:48**

Unincorporated entities, premerger notification, special rules, **11:27 to 11:29**

Vertical mergers

general discussion, **11:56**

## INDEX

### **ANTITRUST—Cont'd**

- Vertical mergers—Cont'd
  - checklist, **11:78**
  - disruptive influence, elimination of, **11:58**
  - guidelines, **App 11F**
  - potential competition, **11:57**
  - rate regulation theory, evasion of, **11:59**
- Waiting period
  - general discussion, **11:13**
  - bankruptcy, **11:15**
  - early termination, request for, **11:19**
  - investigation “clearance,” **11:18**
  - model timing agreements, **11:14**
  - noncompliance, statement of reason, **11:17**
  - second requests, **11:16**

### **ARBITRATION**

- Escrow disputes, **7:31**
- Material adverse change clauses, **13:34**
- WARN Act, **25:47**
- Withdrawal liability in corporate transactions, **26:30**

### **ARMS EXPORT CONTROLS ACT**

- Export Controls (this index)

### **ARTICLE 6**

- Bulk Sales (this index)

### **ASSET PURCHASE AGREEMENTS**

- Ascent Industries Co., **App A10**
- Bed Bath Beyond Inc. and Overstock.com, Inc., **App 44A**
- MiX Telematics North America, Inc. and Trimble Inc., **App A8**
- Model agreement, **37:1, 37:2**
- Stock
  - HanesBrands Inc., **App A6**
- The Home Depot, Inc. and HD Supply Holdings, Inc., **App A2**
- Verb Technology Company, Inc. and SW Direct Sales, LLC, **App A9**

### **ASSET PURCHASE TAXABLE TRANSACTIONS**

- Tax Aspects (this index)

### **ASSET PURCHASES THROUGH BANKRUPTCY**

- Bankruptcy (this index)

### **ASSET TRANSFERS**

- Spin-Offs (this index)

### **ASSIGNMENTS**

- Copyrights, etc. Intellectual Property (this index)
- Export licenses, **46:72**
- Government contracts, anti-assignment statutes, **47:4**

### **ATTORNEY-CLIENT PRIVILEGE**

- Antitrust issues, planning documents and attorney-client privilege, **11:11**

### **ATTORNEYS**

- Due diligence, lead attorney, **1:27**
- Legal opinions, disclosure of special relationship between attorney and client, **42:30**

### **AUDITS**

- Due diligence, **5:31**

### **AUTOMATIC STAY**

- Bankruptcy, **44:18**

### **BALANCE SHEET**

- Adjustment, **1:43**

### **BANKRUPTCY**

- General discussion, **1:94, 43:1 to 43:30**
- Acquisition of Chapter 11 debtor
  - general discussion, **43:2**
  - Asset sales, below
  - Plan of reorganization, acquisition pursuant to, below
- Administrative expenses, asset purchases through bankruptcy, **44:14**
- Administrative status, **44:17**
- Advantages, **1:96**
- Appointment of trustee, examiner, or mediator, **43:28**

**BANKRUPTCY—Cont'd**

- Asset purchases through bankruptcy
  - general discussion, **44:1 to 44:19**
  - administrative expenses, **44:14**
  - administrative status, **44:17**
  - agreement between Bed Bath Beyond Inc. and Overstock.com, Inc., **App 44A**
  - automatic stay, **44:18**
  - bankruptcy court order approving asset purchase agreement, **App 44B**
  - breakup fees, **44:13**
  - collusive bidding, **44:12**
  - court order approving asset purchase agreement, **App 44B**
  - estate property, sale of, **44:1**
  - Executory contracts, below
  - liens and interests, **44:6**
  - order of bankruptcy court approving asset purchase agreement, **App 44B**
  - reclamation claims, **44:16, 44:17**
  - successor liability in bankruptcy, **44:19**
  - taxes, **44:15**
- Asset sales under section 363(b)
  - general discussion, **43:3**
  - auction process and breakup fees
    - general discussion, **43:5**
    - balancing of equities test, **43:8**
    - best interests of estate test, **43:7**
    - business judgment test, **43:6**
  - balancing of equities test, **43:8**
  - best interests of estate test, **43:7**
  - bidders, standing, **43:9**
  - business judgment test, **43:6**
  - collusive bidding, prohibition against, **43:10**
  - requirements for approval, **43:4**
  - Sale free and clear, below
- Assignment of executory contract, **44:11**
- Assumption of contracts. Executory contracts, below

**BANKRUPTCY—Cont'd**

- Auction process and breakup fees.
  - Asset sales under section 363(b), above
- Automatic stay, **44:18**
- Balancing of equities test, asset sales, **43:8**
- Bankruptcy court order approving asset purchase agreement, **App 44B**
- Best interests of estate test, asset sales, **43:7**
- Bidders, standing in Chapter 11 case, **43:9**
- Breakup fees, asset purchases, **44:13**
- Business judgment test, asset sales, **43:6**
- Claims. Sale free and clear of all liens, claims, and encumbrances, below
- Collective bargaining agreements, successor liability, **43:13**
- Collusive bidding, **43:10, 44:12**
- Court order approving asset purchase agreement, **App 44B**
- Creditors' committee, membership on, **43:25**
- Debt or equity securities, acquisition through purchase of, **43:22 to 43:24**
- Disadvantages, **1:95**
- Disappointed bidder litigation, **34:31**
- Encumbrances. Sale free and clear of all liens, claims, and encumbrances, below
- Environmental claims, successor liability, **43:12**
- Examiner, appointment of, **43:28**
- Examples, **43:30**
- Executory contracts
  - general discussion, **44:7**
  - assignment, **44:11**
  - assumption
    - general discussion, **44:8**
    - duty to cure, **44:9**
    - timing, **44:10**
- Free and clear sale. Sale free and clear of all liens, claims, and encumbrances, below

## INDEX

### **BANKRUPTCY—Cont'd**

- Funding Chapter 11 plan, **43:26**
- Health care provider, acquisition of, successor liability, **43:14**
- Insurance coverage, **8:16**
- LBO claim, disposition in bankruptcy, **35:19**
- Liens
  - purchase of assets through bankruptcy, **44:6**
  - Sale free and clear of all liens, claims, and encumbrances, below
- Mass tort claims, protection from successor liability, **43:20**
- Mediator, appointment of, **43:28**
- Order of bankruptcy court approving asset purchase agreement, **App 44B**
- Plan of reorganization, acquisition pursuant to
  - general discussion, **43:15**
  - confirmation, requirements for, **43:19**
  - contents of plan, **43:17**
  - creditors' committee, membership on, **43:25**
  - debt or equity securities, acquisition through purchase of, **43:22 to 43:24**
  - disclosure, adequate, **43:18**
  - mass tort claims, protection from successor liability, **43:20**
  - purchase of assets pursuant to Chapter 11 plan, **43:21**
  - who may propose plan, **43:16**
- Plan of reorganization, generally, **44:5**
- Products liability of successor corporations, **8:15**
- Reclamation claims, asset purchases, **44:16, 44:17**
- Sale free and clear of all liens, claims, and encumbrances
  - general discussion, **43:11**
  - collective bargaining agreements, successor liability, **43:13**
  - environmental claims, successor liability, **43:12**

### **BANKRUPTCY—Cont'd**

- Sale free and clear of all liens, claims, and encumbrances
  - Cont'd
    - health care provider, acquisition of, successor liability, **43:14**
- Sale of estate property
  - jurisdiction, **44:3**
  - statutory mootness, **44:2**
  - time for filing action, **44:4**
- Successor liability
  - asset purchases through bankruptcy, **44:19**
  - collective bargaining agreements, **43:13**
  - environmental claims, **43:12**
  - health care provider, acquisition of, **43:14**
  - mass tort claims, protection from successor liability, **43:20**
  - products liability, **8:15**
- Tax considerations, **43:29**
- Taxes, asset purchases through bankruptcy, **44:15**
- Timing considerations
  - general discussion, **43:27**
  - assumption of executory contracts, **44:10**
- Trustee, appointment of, **43:28**
- Waiting period, **11:15**
- WARN Act (this index)

### **BASKETS**

- Sample agreement provisions, **App 14A**

### **BENEFITS**

- Employee Benefit Plans (this index)
- Severance pay plans, denial of benefits, **33:10**
- Spin-offs, **40:54**

### **BICYCLE COMMUTING BENEFIT**

- Health and welfare plans, **29:333**

### **BINDING PARTIES**

- Documents, **1:52**

### **BOARD**

- Directors (this index)
- Fiduciary Obligations (this index)



**BROWNFIELDS LAWS**

State transfer laws, **23:15**

**BULK SALES (ARTICLE 6)**

General discussion, **1:102, 36:1 to 36:29**

Common law, other sources requiring notification of bulk sales, **36:31**

Creditors

former Article 6, below

revised Article 6, **36:23**

Definitions

former Article 6, **36:3, 36:7**

revised Article 6, **36:20**

Exceptions where compliance not required

former Article 6, **36:8**

revised Article 6, **36:21**

Failure of Bulk Sales Act remedy, **36:28**

Former Article 6

general discussion, **36:3 to 36:18**

buyer's duty to see that creditors are paid, **36:16**

construing terms of definition, **36:7**

creditors  
buyer's duty to see that creditors are paid, **36:16**

compiling list, **36:10**

notifying, **36:11**

definitions, **36:3, 36:7**

exceptions where compliance not required, **36:8**

good faith transferee under Bankruptcy Code and waiver of notice requirements, **36:13**

notification

general discussion, **36:9**

creditors, notifying, **36:11**

insulating buyer from related fraud claims, **36:12**

list of creditors, compiling, **36:10**

waiver of notice requirements, **36:13**

recovery, **36:18**

sales from inventory/stock requirement, **36:6**

statute of limitations, **36:14**

**BULK SALES (ARTICLE 6)**

—Cont'd

Former Article 6—Cont'd

tax law, **36:17**

transfer of assets requirement

general discussion, **36:4 to 36:6**

sales from inventory/stock requirement, **36:6**

settlement or realization of lien or security interest, **36:5**

waiver by acceptance of payment, **36:15**

waiver of notice requirements and status as good faith transferee under Bankruptcy Code, **36:13**

which transactions are subject to law, **36:4 to 36:6**

Notification

former Article 6, above

revised Article 6, **36:22**

Other sources requiring notification of bulk sales

general discussion, **36:30**

common law, **36:31**

tax statutes, **36:32**

Practical application

general discussion, **36:26**

agreements to waive application, **36:26**

difficulty in application, **36:27**

failure of Bulk Sales Act remedy, **36:28**

when should bulk sales law be used, **36:29**

Revised Article 6

general discussion, **36:19 to 36:25**

definitions, **36:20**

exceptions where compliance not required, **36:21**

liability for failure to comply, **36:24**

notification, **36:22**

statute of limitations, **36:25**

substantive rule, **36:22**

transferees' duty to see that creditors are paid, **36:23**

Statute of limitations

former Article 6, **36:14**



## INDEX

### **BULK SALES (ARTICLE 6)**

#### **—Cont'd**

- Statute of limitations—Cont'd
  - revised Article 6, **36:25**
- Tax statutes, other sources requiring notification of bulk sales, **36:32**
- Three alternatives, bulk sales law, **36:2**
- Waiver
  - agreements to waive application of act, **36:26**
  - notice requirements, and status as good faith transferee under Bankruptcy Code, **36:13**
- When should bulk sales law be used, **36:29**

### **BURDEN OF PROOF**

- Economic Espionage Act of 1996, **12:50**
- Material adverse changes, litigation, **13:32**
- Worker Adjustment and Retraining Notification Act, **22:50**

### **BUSINESS ACTIVITIES**

#### **AFFECTING WORKERS**

- Antitrust guidelines for, **App 11B, App 24A**

### **BUSINESS JUDGMENT RULE**

- Standard of judicial review, **4:7**

### **CAFETERIA PLANS**

- General discussion, **29:266 to 29:286**
- Amounts paid for diagnostic procedures and devices, Revenue Ruling 2007-72, **29:282**
- Automatic enrollment, revenue ruling 2002-27
  - general discussion, **29:273 to 29:276**
  - analysis, **29:276**
  - fact patterns
    - general discussion, **29:274 to 29:276**
    - analysis, **29:276**
    - situation 1, **29:275**
    - situation 2, **29:275**
- Dependent care expenses, final regulations, **29:280**

### **CAFETERIA PLANS—Cont'd**

- Diagnostic procedures and devices, **29:282**
- Diet foods, **29:283**
- Dietary supplements, **29:283**
- Election changes, **29:267**
- Electronic payment cards, **29:279**
- Fact patterns
  - automatic enrollment, revenue ruling 2002-27
    - general discussion, **29:274 to 29:276**
    - analysis, **29:276**
    - situation 1, **29:275**
    - situation 2, **29:275**
  - flexible spending accounts in asset sales
    - general discussion, **29:269 to 29:271**
    - analysis, **29:271**
    - coverage continues under buyer's cafeteria plan, **29:270**
    - coverage continues under seller's FSA, **29:269**
    - salary reduction continues under buyer's cafeteria plan, **29:269, 29:270**
- Final regulations, dependent care expenses, **29:280**
- Flexible spending accounts, HEART Act provisions, **29:286**
- Flexible spending accounts, 2 1/2 month grace period, **29:278**
- Flexible spending accounts in asset sales
  - general discussion, **29:268 to 29:272**
  - fact patterns
    - general discussion, **29:269 to 29:271**
    - analysis, **29:271**
    - coverage continues under buyer's cafeteria plan, **29:270**
    - coverage continues under seller's FSA, **29:269**
    - salary reduction continues under buyer's cafeteria plan,

**CAFETERIA PLANS—Cont'd**

- Flexible spending accounts in asset sales—Cont'd
  - fact patterns—Cont'd
    - 29:269, 29:270**
  - observations, **29:272**
- Form 5500 filing requirements, suspension, **29:277**
- Grace period, flexible spending accounts, **29:278**
- HEART Act FSA provisions, **29:286**
- IRS information letters regarding medical care expenses, **29:285**
- Meal replacements, **29:283**
- Medical care expenses, IRS information letters, **29:285**
- Permitted election changes, **29:267**
- Preemption of state law, **29:284**
- Proposed regulations, **29:281**
- State law, preemption, **29:284**
- Suspension, form 5500 filing requirements, **29:277**
- 2 1/2 month grace period for flexible spending accounts, **29:278**

**CAPS**

- Sample agreement provisions, **App 14A**

**CARRYOVERS**

- Net operating loss carryovers. Tax Aspects (this index)

**CARVE-OUTS**

- Material Adverse Changes (this index)

**CASH PAYMENT**

- General discussion, **1:38**

**CHECKLISTS**

- General discussion, **3:1 to 3:11**
- Antitrust issues. Antitrust (this index)
- Board of directors and/or shareholder approval, **3:4**
- Closing the deal, **3:11**
- Compliance programs and business ethics, **3:5**
- Confidential information, exchange during acquisition negotiations, **App 12B**

**CHECKLISTS—Cont'd**

- Corporate law and commercial/contract law issues, **3:7**
- Documentation, **3:10**
- Due diligence, **2:7, 2:8, 3:8, 29:335**
- Health and welfare plans, **29:335**
- Letters of intent, **App 9A**
- Negotiations, **3:9**
- Opinions. Legal Opinions (this index)
- Poison pills, **App 48A**
- Preliminary matters, **3:2**
- Preparation of registration statement for merger of target with and into acquiror, **32:1**
- Section 355 checklist questionnaire contents, **App 39C**
- Special situations, **3:1**
- Substantive legal considerations, **3:6**
- WARN Act (this index)

**CHEWABLE PILLS**

- Poison pills, **48:4 to 48:9**

**CHOICE OF LAW**

- Covenants, enforceability of in context of sale of business, **38:9**
- Material adverse change clause, **13:33**

**CLARICARE INC.**

- Escrow agreements, **App 7C**

**CLASS ACTION**

- WARN Act, **25:46**

**CLOSING**

- General discussion, **1:104**
- Checklists, **3:11**
- Due diligence, pre-closing disclosure, **5:27**
- Failure to close, **1:106**
- Opinions. Legal Opinions (this index)
- Plant closings. WARN Act (this index)
- Post-closing considerations, **1:105**

**COBRA BENEFITS**

- General discussion, **29:16 to 29:68**
- Adverse determinations. Appeal of adverse benefit determinations, below

## INDEX

### **COBRA BENEFITS—Cont'd**

Allocating responsibility  
general discussion, **29:16**  
mergers and acquisitions, **29:45 to 29:51**

Reorganizations, below  
retiree benefit liabilities, **29:83**

Appeal of adverse benefit determinations

general discussion, **29:122**  
disability benefit plans, additional  
appeal requirements, **29:125**  
full and fair review, **29:123**  
group health plans, additional  
appeal requirements, **29:124**

timing of notice of benefit determination on review

general discussion, **29:126**

disability claims, special  
requirements, **29:132**

extension of time, **29:127**

group health plans, special  
requirements, **29:128 to 29:131**

multiemployer plan exception,  
**29:133**

postservice claims, **29:131**

preservice claims, **29:130**

urgent care claims, **29:129**

Applicability

general discussion, **29:18**

*Giddens v. University Yacht Club*,  
**29:21**

group health plan, **29:19**

small employers, **29:20**

Benefit determinations, timing of  
notification. Claims procedures,  
below

Case law, **29:71**

Claims procedures

general discussion, **29:102**

Appeal of adverse benefit  
determinations, above

background, **29:102**

benefit determinations

Appeal of adverse benefit  
determinations, above

Timing of notification of benefit  
determinations, below

### **COBRA BENEFITS—Cont'd**

Claims procedures—Cont'd

benefits, claim for, defined, **29:108**

definitions

benefits, claim for, **29:108**

claim involving urgent care,  
**29:107**

post-service claim, **29:110**

preservice claim, **29:109**

effective dates of regulations,  
**29:103**

extension of time, **29:114, 29:127**

post-service claim, **29:110**

Preemption of state law, below

preservice claim, **29:109**

reasonable procedures

general discussion, **29:104,**  
**29:105**

consequences of failure to estab-  
lish and follow, **29:112**

disability benefit plans,  
additional requirements,  
**29:111**

group health plans, additional  
requirements, **29:106**

summary plan description, **29:93**

timing of notification of benefit  
determinations

general discussion, **29:113**

concurrent care decisions,  
**29:118**

disability claims, **29:121**

extensions of time, **29:114**

group health plans, special rules,  
**29:115 to 29:120**

postservice claims, **29:120**

preservice claims, **29:119**

urgent care claims, **29:116,**  
**29:117**

urgent care claims, **29:107, 29:116,**  
**29:117**

Compliance problems, **1:83**

Consumer-Driven Health Plans  
(CDHPs), **29:317**

Continuation coverage, **29:16, 29:17**

Corporate reorganizations.

Reorganizations, below

**COBRA BENEFITS—Cont'd**

Definitions

claims procedures definitions.  
     Claims procedures, above  
     regulatory definitions applicable to  
     business reorganizations,  
     **29:64 to 29:70**

Disability benefit plans

appeal requirements, additional,  
     **29:125**  
     reasonable claims procedures,  
     additional requirements,  
     **29:111**  
     timing of notice of benefit  
     determinations, **29:121,**  
     **29:132**

Disclosures. Plan disclosures, below  
     Duration of coverage, **29:27**

Economic stimulus bill (2009),  
     premium subsidy resulting from  
     general discussion, **29:34**  
     amount of subsidy, **29:38**  
     COBRA premium subsidy, **29:35**  
     electing different coverage option,  
     **29:42**

election, second chance, **29:36**  
     eligibility, employees eligible for  
     subsidy, **29:41**  
     employees eligible for subsidy,  
     **29:41**

entities entitled to be reimbursed  
     for subsidy, **29:40**  
     implications for employers, **29:44**  
     new notices required, **29:37**  
     notice, new notices required, **29:37**  
     other continuation coverage, **29:43**  
     payroll tax credit, **29:39**  
     reimbursement, entities entitled to  
     be reimbursed for subsidy,  
     **29:40**

second chance to elect, **29:36**  
     tax credit, payroll, **29:39**

Effective dates, plan disclosures,  
     **29:91**

Election

economic stimulus bill (2009),  
     premium subsidy resulting  
     from, **29:36, 29:42**  
     election period, **29:25**

**COBRA BENEFITS—Cont'd**

Election—Cont'd

federal health coverage tax credit,  
     **29:26**  
     health coverage tax credit, federal,  
     **29:26**  
     notice, **29:31**  
     occurrence of qualifying event,  
     **29:24**  
     tax credit, federal health coverage,  
     **29:26**  
     two-month extension to subsidy,  
     **29:48**

Electronic communications

general discussion, **29:138-29:140**  
     accessibility, **29:141**  
     disclosure, recordkeeping and  
     transaction standards, **29:138**

HIPPA standards

general discussion, **29:143**  
     effective dates, **29:144**  
     plan sponsors, effects on,  
     **29:145**  
     security of electronic protected  
     health information, **29:146**

participants eligible to receive  
     electronic disclosures, **29:141**  
     recordkeeping, **29:138, 29:142**

Eligibility

economic stimulus bill (2009),  
     premium subsidy resulting  
     from, **29:41**  
     qualified beneficiaries, **29:22**  
     qualifying events, **29:23**  
     two-month extension to subsidy,  
     **29:51**

Enforceability of plan reimbursement  
     provisions, **29:136**

Erie County case and implications

general discussion, **29:84 to 29:88**  
     EEOC reaction, **29:85**  
     facts, **29:84**  
     *General Dynamics Land Systems v.*  
     *Cline*, **29:87**

medicare legislation, **29:86**

ERISA rights statement, **29:98**

Evaluator of claims, plan administra-  
     tor as, **29:137**

## INDEX

### COBRA BENEFITS—Cont'd

- Final regulations. Reorganizations, below
- FMLA and COBRA, interaction of
  - general discussion, **29:72**
  - cost of complying with FMLA information collection requirements, **29:75**
  - maximum coverage, calculation of, **29:73**
  - qualifying events, **29:72**
  - state and local laws, effect of, **29:74**
- General requirements, **29:17**
- Group health plans
  - additional requirements for group plans
    - appeal requirements, **29:124**
    - reasonable claims procedures, **29:106**
    - summary of material modifications, **29:100**
  - appeal of adverse determination, **29:124, 29:128**
  - applicability, **29:19**
  - corporate reorganizations, allocation of COBRA obligations, **29:62**
  - summary plan description, **29:94**
  - timing of notice of benefit determination, **29:115 to 29:120, 29:128**
- Health and welfare plans, **29:324**
- Hidden plan assets and liabilities, **1:83**
- HMOs, federally qualified, summary of material modifications, **29:101**
- Implications for employers
  - economic stimulus bill (2009), premium subsidy resulting from, **29:44**
- Insurer financing, summary plan description, **29:96**
- M&A qualified beneficiary, **29:68**
- Maternity and newborn coverage, summary plan description, **29:97**
- Michelle's Law, **29:78**

### COBRA BENEFITS—Cont'd

- Multiemployer plan exception, timing of notice of benefit determination on review, **29:133**
- National Defense Authorization Act, **29:77**
- Notice
  - general discussion, **29:28**
  - benefit determinations, timing of notification
    - Appeal of adverse benefit determinations, above
    - Claims procedures, above
  - early termination notice, **29:33**
  - economic stimulus bill (2009), premium subsidy resulting from, **29:37**
  - election notice, **29:31**
  - general notice of rights, **29:29**
  - qualifying event notices, **29:30**
  - two-month extension to subsidy, **29:50**
  - unavailability notice, **29:32**
- Panel discussion, **28:25**
- Payor of claims, plan administrator as, **29:137**
- Plan administrator, **29:137**
- Plan disclosures
  - general discussion, **29:89**
  - Claims procedures, above
  - COBRA provisions, **29:95**
  - effective dates, summary description, **29:91**
- ERISA rights statement, summary description, **29:98**
- federally qualified HMOs, **29:101**
- general requirements, summary description, **29:92**
- group health plans
  - material modifications, additional requirement for group plans, **29:100**
  - summary description, **29:94**
- insurer financing, summary description, **29:96**
- maternity and newborn coverage, summary description, **29:97**
- summary of material modifications
  - general discussion, **29:99**

**COBRA BENEFITS—Cont'd**

Plan disclosures—Cont'd

summary of material modifications  
—Cont'd

additional requirement for group  
health plans, **29:100**

federally qualified HMOs,  
**29:101**

summary plan descriptions, **29:90  
to 29:98**

Post-service claim, **29:110, 29:120,  
29:131**

Preemption of state law

general discussion, **29:134**

recent litigation, **29:135**

Premium subsidy resulting from eco-  
nomic stimulus bill (2009),  
**29:34 to 29:44**

Preservice claim, **29:109**

Qualified beneficiaries, **29:22, 29:68**

Qualifying events

asset sale, **29:70**

corporate reorganizations, **29:57**

determining whether sale is  
qualifying event, **29:69, 29:70**

election, occurrence of qualifying  
event, **29:24**

eligibility, **29:23**

FMLA and COBRA, interaction  
of, **29:72**

notices, **29:30**

stock sale, **29:69**

Reasonable claims procedures.

Claims procedures, above

Reorganizations

general discussion, **29:52**

allocation of COBRA obligations

general discussion, **29:58**

default rule, **29:59**

group health plan, **29:62**

if no group health plan provided,  
**29:60**

indemnification, **29:63**

multiple buyers, **29:61**

asset sales, **29:65, 29:67, 29:70**

covered business reorganizations,  
**29:64-29:67**

determining whether sale is  
qualifying event, **29:69**

**COBRA BENEFITS—Cont'd**

Reorganizations—Cont'd

final regulations

general discussion, **29:52**

cases, **29:54**

effective dates, **29:56**

guidance, **29:53**

noncorporate entities, **29:55**

M&A qualified beneficiary, **29:68**

qualifying events, **29:57**

regulatory definitions, applicable,  
**29:64 to 29:70**

stock sale, **29:69**

stock sales, **29:64, 29:66**

Retiree benefit liabilities

general discussion, **29:79**

allocation of responsibility among  
parties, **29:83**

modification and termination of  
retiree benefits

general discussion, **29:80**

retiree benefits, **29:81**

retiree claims, **29:80**

separate account rule and unrelated  
business income, **29:82**

Summary plan descriptions

general discussion, **29:90 to 29:98**

Plan disclosures, above

Timing of notice of benefit determi-

nation on review. Appeal of  
adverse benefit determinations,  
above

Timing of notification of benefit

determinations. Claims  
procedures, above

Urgent care claims, **29:107, 29:116,  
29:117, 29:129**

USERRA health care continuation  
coverage, **29:76**

**COLLECTIVE BARGAINING  
AGREEMENTS**

Labor and Employment (this index)

Welfare fund arrangements, **29:296**

**COLLUSION**

Due diligence, liability issues, **5:6**

**COMMON LAW**

Bulk sales, **36:31**

## INDEX

### COMMON LAW—Cont'd

Due diligence, fraud, **5:9**

### COMMUNICATIONS

Disclosure, **1:23**

Management, talking to, **1:22**

### COMPLIANCE

Checklists, compliance programs and business ethics, **3:5**

COBRA, compliance problems, **1:83**

Due diligence, international regulations, **5:15 to 5:16**

Export Controls (this index)

Government Contracts and Contractors (this index)

HIPPA, **29:199, 29:207**

Qualified medical child support orders, **29:253**

WARN act, good faith effort, **22:50**

Warranties, compliance with laws, **1:57**

### COMPUTERS

Export controls, due diligence review, **46:48**

Software (this index)

Substantive legal issues, **1:103**

### CONFIDENTIAL INFORMATION

Agreements. Confidentiality Agreements (this index)

Checklist, exchange of confidential information during acquisition negotiations, **App 12B**

Defined, **12:11 to 12:13**

Due Diligence (this index)

Espionage. Economic Espionage Act of 1996 (this index)

Exchanges

general discussion, **12:1**

agreements. Confidentiality Agreements (this index)

checklist, **App 12B**

Financial consultants, **10:7**

Genetic Information Nondiscrimination Act (GINA) (this index)

Securities laws, **1:67**

Statutory protection

general discussion, **12:36 to 12:51, 12:52**

### CONFIDENTIAL INFORMATION —Cont'd

Statutory protection—Cont'd

espionage. Economic Espionage Act of 1996 (this index)

Trade Secrets (this index)

Trade Secrets (this index)

### CONFIDENTIALITY

#### AGREEMENTS

General discussion, **1:49, 12:2 et seq., App 12A**

Absence of confidential information, **12:30**

Breach, acts constituting  
general discussion, **12:32**  
compliance review, **12:34**  
improper purpose, **12:32**  
improper use, **12:33**  
legal remedies, **12:35**

Breadth of disclosure, **12:12**

Checklist, exchange of confidential information during acquisition negotiations, **App 12B**

Compliance review, acts constituting breach, **12:34**

Creation of confidentiality obligation, **12:3 to 12:7**

Definition of confidential information, **12:11 to 12:13**

Destruction of disclosed materials, **12:17**

Disclaimer, **12:18**

Disclosure, **12:19**

Discussion outline, **2:3**

Due Diligence (this index)

Enforcement upon breach, **12:23**

Exclusion, **12:15**

Express agreements, **12:4**

Form of agreement, **2:4**

Forms, sample, **App 12C**

Implied agreements, **12:5**

Legal remedies, **12:35**

Modification, **12:8**

Most favored nation, **12:25**

Nonsolicitation, **12:20**

Notice, **12:6**

Practice points, **App 12A**

Proposals, timing of, **12:22**



## CONFIDENTIALITY

### AGREEMENTS—Cont'd

- Provisions, **12:9 to 12:25**
- Public information, **12:31**
- Remedies, **12:35**
- Remedies upon breach, **12:23**
- Restrictions on use, **12:14**
- Return delivery, **12:17**
- Sample forms, **App 12C**
- Scope of protection
  - general discussion, **12:29**
  - absence of confidential information, **12:30**
  - public information, **12:31**
- Standards, **12:16**
- Standstill provision, **12:21**
- Statutory protection of confidential information. Confidential Information (this index)
- Survival, **12:24**
- Tax reporting implications
  - general discussion, **12:53 to 12:64**
  - exceptions
    - general discussion, **12:61**
    - IRS Commissioner, determination by, **12:62**
    - lease transactions, **12:64**
    - regulated investment companies, **12:63**
  - Form 8886, **12:58**
  - lease transactions, **12:64**
  - participant information, **12:60**
  - records retention, **12:59**
  - regulated investment companies, **12:63**
  - reportable transactions
    - general discussion, **12:54**
    - confidential transactions, **12:55**
    - participation, **12:56**
  - requirements
    - general discussion, **12:57**
    - Form 8886, **12:58**
    - participant information, **12:60**
    - records retention, **12:59**
- Technical information, **12:13**
- Term, **12:10**
- Timing of proposals, **12:22**
- Use restrictions, **12:14**

## CONFIDENTIALITY

### AGREEMENTS—Cont'd

- Waiver, **12:7**
- Warranties, **12:18**

## CONFLICTS OF INTEREST

- Statutes, **4:26**

## CONNECTICUT

- State transfer laws, **23:11**

## CONSULTANTS

- Contracting with Financial Consultants (this index)
- Due diligence, professionals and consultants, **5:35**
- Spin-offs, **40:55**

## CONSUMER-DRIVEN HEALTH PLANS (CDHPS)

- General discussion, **29:313 to 29:317**
- COBRA continuation coverage, **29:317**
- Flexible spending arrangements (FSAs), **29:313**
- Health reimbursement arrangements (HRAs), **29:314**
- Health savings accounts (HSAs), **29:315**
- Substantiation provisions, **29:316**

## CONTRACTING WITH FINANCIAL CONSULTANTS

- General discussion, **10:1 to 10:11**
- Confidentiality, **10:7**
- Consulting agreement, **App 10B**
- Exclusivity, **10:8**
- Fees, **10:4**
- Financial reporting, **10:10**
- Indemnification, **10:6**
- Letter agreement for management and financial advisory services, **App 10A**
- Merger clause, **10:9**
- Negligence, **10:12**
- Qualifications, **10:3**
- Reporting, financial, **10:10**
- Scope, **10:2**
- Status of parties, **10:5**
- Termination, **10:11**

## INDEX

### **COPYRIGHTS**

Intellectual Property (this index)

### **CORONAVIRUS**

WARN Act, **25:37, App 25B**

### **CORPORATE CONTACTS**

Severance pay plans, **33:5**

### **CORPORATE COUNSEL**

Guide to letters of intent. Letters of Intent (this index)

Primer on SEC Rule 145. SEC Rules (this index)

### **COUNSEL**

Attorneys (this index)

### **COURT ORDERS**

Bankruptcy, approving asset purchase agreement, **App 44B**

Qualified Medical Child Support Orders (this index)

### **COVENANTS**

General discussion, **38:1 to 38:45**

Abandonment, **38:39**

Activities prohibited. Enforceability, below

Advertising or soliciting as prohibited activity, **38:20**

Antitrust considerations, **38:38**

Certain products only, competition restricted regarding, **38:45**

Choice of law, enforceability of covenant in context of sale of business, **38:9**

Divisibility, **38:27**

Duration, reasonableness in context of sale of business, **38:17**

Employee benefit plans, issues relating to covenants, **28:21, 28:22**

Enforceability in context of sale of business

general discussion, **38:8 to 38:24**  
activities prohibited, reasonableness

general discussion, **38:18**

advertising or soliciting, **38:20**

recruiting employees, **38:21**

similar business activities, **38:19**

choice of law, **38:9**

### **COVENANTS—Cont'd**

Enforceability in context of sale of business—Cont'd

duration, reasonableness, **38:17**

forum selection clause, **38:10**

integrated transactions, **38:23**

party having right to enforce covenant, **38:11**

party to be bound, **38:24**

public policy, **38:22**

reasonableness

general discussion, **38:12 to 38:21**

Activities prohibited, above  
duration, **38:17**

Territorial scope, below

territorial scope, reasonableness

general discussion, **38:13**

express territorial restrictions, **38:14**

failure to provide territorial restrictions, **38:16**

statutorily prescribed area, **38:15**

Forms. Sample restrictive covenants, below

Franchise agreements, **38:5**

Goodwill, transfer of, **38:6**

Injunctive relief, **38:25**

Integrated transactions, **38:23**

Limiting environmental liabilities.

Environmental Liabilities (this index)

Modification in context of sale of business

general discussion, **38:26**

divisibility, **38:27**

vagueness, **38:28**

Neighborhood, competition within restricted, **38:43**

Non-compete

agreement, **App 38B**

due diligence, **5:13**

price determination, **1:44**

sample seller's covenant, **38:41, 38:42**

Nonowning and nonsigning party.

Third parties, below

**COVENANTS—Cont'd**

- Part of restricted area, competition permitted, **38:44**
- Public policy, **38:22**
- Reasonableness. Enforceability, above
- Recruiting employees as prohibited activity, **38:21**
- Restrictive covenants, sample
  - general discussion, **38:40**
  - certain products only, competition restricted regarding, **38:45**
  - neighborhood, competition within restricted, **38:43**
  - part of restricted area, competition permitted, **38:44**
  - seller's covenant not to compete, **38:41, 38:42**
- Sale of business, covenants connected to
  - general discussion, **38:1, 38:3**
  - Enforceability, above
  - franchise agreements, **38:5**
  - goodwill, transfer of, **38:6**
  - joint venture, **38:7**
  - stock purchase agreement, **38:4**
  - transfer of goodwill, **38:6**
  - types of contracts, **38:2**
- Signing but nonowning party, **38:34**
- Similar business activities as prohibited activity, **38:17**
- State statutes, selected, **App 38A**
- Stock purchase agreement, **38:4**
- Termination, **38:37**
- Third parties
  - general discussion, **38:29**
  - nonowning and nonsigning party
    - general discussion, **38:30**
    - covenantor not involved in competing business, **38:31**
    - interest in business, **38:32**
    - seller's employees, **38:33**
  - nonsigning but owning party
    - agent, **38:35**
    - corporate officer, **38:36**
  - signing but nonowning party, **38:34**
- Transfer of goodwill, **38:6**

**COVENANTS—Cont'd**

- Vagueness, **38:28**

**COVID-19**

- WARN Act, **25:37, App 25B**

**CREDITORS**

- Bulk Sales (this index)

**CRIMINAL LIABILITY**

- Espionage. Economic Espionage Act of 1996 (this index)
- Successor liability, **1:92**

**CUSTOMERS**

- Spin-offs, **40:42**

**DAMAGES**

- Environmental Liabilities (this index)

**DATA PROTECTION**

- Due diligence, **5:16**

**DEAD HAND PROVISIONS**

- Poison pills, definitions, **48:16**

**DEBT SECURITIES**

- Payment options, **1:39**

**DEFEND TRADE SECRETS ACT**

- Generally, **12:52**

**DEFENSE CONTRACTS**

- Government Contracts and Contractors (this index)

**DEFINED BENEFIT PLANS**

- Employee Benefit Plans (this index)

**DEFINITIONS**

- Article 6. Bulk Sales (this index)
- COBRA Benefits (this index)
- Confidential information, **12:11 to 12:13**
- Economic espionage, **12:45**
- Environmental Liabilities (this index)
- Health and welfare plans, dependent, **29:313**
- HIPPA, breach, **29:217**
- Mental Health Parity Act of 1996 (this index)
- Poison Pills (this index)
- Spin-Offs (this index)

## INDEX

### DEFINITIONS—Cont'd

Trade secrets, misappropriation,  
**12:37**

### DELAWARE

Poison pills, **48:17, App 48B**

### DENIAL OF BENEFITS

Severance pay plans, **33:10**

### DIRECTORS

Board action

general discussion, **4:6**

business judgment rule, **4:8**

enhanced scrutiny, **4:10**

entire fairness, **4:9**

standard of judicial review, **4:7 to 4:10**

Business judgment rule, **4:8**

Checklists, board of directors and/or  
shareholder approval, **3:4**

Duties. Fiduciary Obligations of  
Directors

### DISABILITY BENEFIT PLANS

COBRA Benefits (this index)

### DISAPPOINTED BIDDER LITIGATION

General discussion, **34:1 to 34:31**

Agency, law of, **34:4**

Aiding and abetting, breach of fidu-  
ciary duty, **34:26**

Antitrust claims, **34:27**

Bankruptcy, **34:31**

Breach of fiduciary duty, aiding and  
abetting, **34:26**

Contract rights

general discussion, **34:2 to 34:12**

Preliminary agreements and  
clauses, below

Tortious interference with contract,  
below

Expenses, recovery of, **34:28**

Fraud, **34:24**

Jury trial, **34:29**

Letters of confirmation, **34:11**

Letters of intent, **34:10**

Memoranda of agreement/  
understanding, **34:3**

Minutes of meeting, **34:8**

### DISAPPOINTED BIDDER LITIGATION—Cont'd

Misrepresentation, tort remedies,  
**34:25**

Preliminary agreements and clauses,  
**34:2 to 34:12**

general discussion, **34:2 to 34:12**

agency, law of, **34:4**

desire for legally enforceable  
contract at this point, **34:5**

how courts approach preliminary  
agreements, **34:12**

letters of confirmation, **34:11**

letters of intent, **34:10**

memoranda of agreement/  
understanding, **34:3**

minutes of meeting, **34:8**

standstill agreements, **34:9**

subject to legal approval clauses,  
**34:6**

subject to management approval  
clauses, **34:7**

Prospective business relations. Tor-  
tious interference, below

Recovery of expenses, **34:28**

Standing, **34:29**

Standstill agreements, **34:9**

Subject to legal approval clauses,  
**34:6**

Subject to management approval  
clauses, **34:7**

Tort remedies

general discussion, **34:13**

fraud, **34:24**

misrepresentation, **34:25**

Tortious interference, below

Tortious interference

general discussion, **34:14**

liability where no breach results  
from defendant's conduct,  
**34:19**

third party, interference by, **34:16**

with contract

general discussion, **34:15**

actual breach, **34:17**

contracts terminable at will,  
**34:20**

interference by third party,  
**34:16**

**DISAPPOINTED BIDDER  
LITIGATION—Cont'd**

Tortious interference—Cont'd  
     with contract—Cont'd  
         knowledge of contract, **34:18**  
         liability where no breach results  
         from defendant's conduct,  
         **34:19**  
     with prospective business relations  
         general discussion, **34:21**  
         protected business expectations,  
         **34:22**  
         wrongful conduct by defendant,  
         **34:23**

**DISCLAIMERS**

Confidentiality agreements, **12:18**  
 Legal opinions, factual issues, **42:7**  
 Seller's duty to disclose, **6:7**

**DISCLOSURE**

Antitrust issues, premerger notification, disclosure of submitted documents, **11:12**  
 Buyer's obligations to seller, **6:12**  
 COBRA plan disclosures. COBRA Benefits (this index)  
 Communications, **1:23**  
 Confidentiality agreements, **12:19**  
 Disclaimers, **6:7**  
 Due diligence  
     buyer's, **6:5**  
     pre-closing disclosure, **5:27**  
 Fraud, **30:12**  
 Fraudulent concealment and other types of nondisclosure, distinction between, **6:2**  
 Health and welfare plan liabilities, **29:4**  
 HIPPA, **29:172**  
 Labor law obligations, **24:28**  
 Legal opinions, disclosure of special relationship between attorney and client, **42:30**  
 Materiality, **6:4**  
 Mental Health Parity Act, increased cost exemption, disclosure requirements, **29:236**

**DISCLOSURE—Cont'd**

Merger negotiations  
     general discussion, **1:22, 30:1 to 30:21**  
     causation, **30:9**  
     contractual obligations, **30:11**  
     developments after *Basic, Inc. v. Levinson*  
         general discussion, **30:4**  
         contractual obligations, **30:11**  
         duty to disclose information, **30:6**  
         duty to update or correct prior statements, **30:8**  
         forward looking statements and progress reports, **30:10**  
     Private Securities Litigation Reform Act of 1995, **30:5**  
     reliance, causation, and materiality, **30:9**  
     when duty to disclose arises, **30:7**  
     duty to disclose generally, **30:6, 30:7**  
     duty to disclose in connection with certain stock transactions  
         general discussion, **30:13**  
         new shares, issuance of, **30:14**  
         purchase of shares by company, **30:17**  
         right of first offer, **30:16**  
         sale of shares in employee benefit plans, **30:15**  
     duty to update or correct prior statements, **30:8**  
     employee benefit plans, sale of shares, **30:15**  
     forward looking statements, **30:10**  
     materiality, **30:3, 30:9**  
     new shares, issuance of, **30:14**  
     premature disclosure, managing, **30:23**  
     Private Securities Litigation Reform Act of 1995, **30:5**  
     progress reports, **30:10**  
     purchase of shares by company, **30:17**  
     reliance, causation, and materiality, **30:9**

## INDEX

### DISCLOSURE—Cont'd

- Merger negotiations—Cont'd
  - right of first offer, **30:16**
  - sale of shares in employee benefit plans, **30:15**
- SEC regulations, **30:22**
- SEC rules, **App 30A**
  - general discussion, **30:18**
  - Rule 165, **30:19**
  - Rule 166, **30:20**
  - Rule 425, **30:21**
- Section 10(b) and Rule 10b-5
  - requirements, **30:2**
  - when duty to disclose arises, **30:7**
- Sandbagging, **6:13**
- Securities laws, **1:64**
- Seller's duty to disclose under state tort law
  - general discussion, **6:1 to 6:14**
  - buyer's due diligence, **6:5**
  - disclaimers, **6:7**
  - environmental contamination, **6:9**
  - fraudulent concealment and other types of nondisclosure, distinction between, **6:2**
  - half-truths, **6:6**
  - materiality, **6:4**
  - representations and warranties, **6:8**
  - sandbagging, **6:13**
  - suggestions for avoiding problems in merger negotiations, **6:11**
  - third party's obligation to disclose on behalf of seller, **6:10**
- Third party's obligation to disclose on behalf of seller, **6:10**

### DISCRIMINATION

- Age Discrimination in Employment Act, **18:15**
- Health and welfare plans, **29:322**
- HIPPA nondiscrimination requirements. HIPPA (this index)
- Labor and Employment (this index)
- Severance pay plans, **33:11**

### DOCUMENTS

- General discussion, **1:46 to 1:58**
- Binding parties, **1:52**
- Checklists, documentation, **3:10**

### DOCUMENTS—Cont'd

- Common documents
  - general discussion, **1:47**
- Confidentiality Agreements (this index)
  - investment bankers, agreements with, **1:48**
  - legal opinions, **1:51**
- Letters of Intent (this index)
- Confidentiality Agreements (this index)
- Content
  - general discussion, **1:53**
  - indemnification provisions, **1:59**
  - representations, **1:54**
  - Warranties (this index)
- Investment bankers, agreements with, **1:48**
- Legal opinions, **1:51**
- Letters of Intent (this index)
- Parties, binding, **1:52**
- Preparation, person responsible for, **1:46**
- Requests. Due Diligence (this index)
- Warranties (this index)

### DOMESTIC PARTNER BENEFITS

- Health and welfare plans, **29:314**

### DRAFTING HINTS

- Poison pills, **48:18**

### DUE DILIGENCE

- General discussion, **1:24 to 1:29, 5:1 to 5:24**
- Access to information, **5:19**
- Accountant, **1:28**
- Antitrust, pre-merger negotiations, **App 11E**
- Audits, **5:31**
- Change of contractual provisions, **5:33**
- Checklists, **2:7, 2:8, 3:8**
- Collusion, liability issues, **5:6**
- Common-law fraud, **5:9**
- Compliance with international regulations, **5:15 to 5:16**
- Confidential information
  - general discussion, **12:26**
  - bid solicitation, **12:27**

**DUE DILIGENCE—Cont'd**

Confidential information—Cont'd  
liability issues, **5:10**  
unsolicited information, **12:28**  
Consultants and professionals, **5:35**  
Contractual provisions  
general discussion, **5:28**  
audits, **5:31**  
change or modification, **5:33**  
financial information, **5:31**  
integration or merger clause, **5:30**  
material adverse change clause,  
**5:32**  
modification, **5:33**  
non-reliance clause, **5:29**  
representations and warranties,  
**5:34**  
Covenants not to compete, **5:13**  
Creating record, **5:4**  
Data protection, **5:16**  
Discussion outline, **2:7**  
Document request  
general discussion, **5:18**  
long form, **App 5B**  
short form, **App 5A**  
Environmental, health and safety  
documents  
general discussion, **21:1**  
initial information request, **22:1**  
Export Controls (this index)  
Failure to discover, **5:26**  
Fiduciary duties, **5:11**  
Financial information, **5:31**  
Fraud  
common-law, **5:9**  
securities, **5:8**  
Government contracts, **47:54 to**  
**47:56**  
Health and welfare plans, **29:2,**  
**29:335**  
Insider trading, liability issues, **5:7**  
Integration or merger clause, **5:30**  
Intellectual property, special  
concerns, **App 5C**  
Jurisdiction, personal, **5:14**  
Lead attorney, **1:27**  
Legal and ethical conduct, **5:22**

**DUE DILIGENCE—Cont'd**

Liability issues  
general discussion, **5:4**  
collusion, **5:6**  
common-law fraud, **5:9**  
compliance with international  
regulations  
generally, **5:15 to 5:16**  
data protection, **5:16**  
export controls, **5:17**  
confidentiality, **5:10**  
covenants not to compete, **5:13**  
data protection, **5:16**  
export controls, **5:17**  
fiduciary duties, **5:11**  
fraud  
common-law, **5:9**  
securities, **5:8**  
insider trading, **5:7**  
jurisdiction, personal, **5:14**  
negligence, **5:12**  
noncompetition covenants, **5:13**  
personal jurisdiction, **5:14**  
securities fraud, **5:8**  
Material adverse change clause, **5:32**  
Modification of contractual provi-  
sions, **5:33**  
Negligence, **5:12**  
Non-compete covenants, **5:13**  
Non-reliance clause, **5:29**  
Personal jurisdiction, **5:14**  
Personnel  
general discussion, **1:26**  
accountant, **1:28**  
lead attorney, **1:27**  
selecting, **5:3**  
Planning stage, **1:25**  
Pre-closing disclosure, **5:27**  
Preparation  
general discussion, **5:2**  
creating record, **5:4**  
identifying priorities, **5:2**  
selecting personnel, **5:3**  
Priorities, identifying, **5:2**  
Privileged records, **5:24**  
Procedures  
access to information, **5:19**



## INDEX

### **DUE DILIGENCE—Cont'd**

- Procedures—Cont'd
  - document request, **5:18, App 5A, App 5B**
  - seller's due diligence, **5:20**
- Process, **1:29**
- Professionals and consultants, **5:35**
- Records
  - creating, **5:4**
  - privileged, **5:24**
- Reliance
  - general discussion, **5:25 to 5:26**
  - failure to discover, **5:26**
  - non-reliance clause, **5:29**
  - pre-closing disclosure, **5:27**
- Scope
  - general discussion, **5:21**
  - legal and ethical conduct, **5:22**
  - privileged records, **5:24**
  - sources other than company to be acquired, **5:23**
- Securities fraud, **5:8**
- Seller's due diligence, **5:20**
- Seller's duty to disclose and buyer's due diligence, **6:3, 6:5, 6:6**
- Sources other than company to be acquired, **5:23**

### **EARNOUT**

- Determining price, **1:42**
- Escrow agreements, **7:4**
- Purchase price, **1:42**

### **ECONOMIC ESPIONAGE ACT OF 1996**

- General discussion, **12:44 to 12:12:51**
- Burden of proof, **12:50**
- Definition, **12:45**
- Elements of crime
  - general discussion, **12:46**
  - burden of proof, **12:50**
  - intent, **12:48**
  - knowledge, **12:49**
  - prohibited acts, **12:47**
- Intent, **12:48**
- Knowledge, **12:49**
- Penalties, **12:51**
- Prohibited acts, **12:47**

### **ECONOMIC REALITIES TEST**

- Environmental liabilities, **18:17**

### **ECONOMIC STIMULUS BILL (2009)**

- COBRA Benefits (this index)

### **EMPLOYEE BENEFIT PLANS**

- General discussion, **1:81, 24:27**
- Accounting issues, **28:27**
- COBRA Benefits (this index)
- Compensation, executives, **28:26, 28:28**
- Deferred compensation plans, nonqualified, **28:3**
- Defined benefit plans
  - general discussion, **28:13**
  - deduction issues, **28:15**
  - nondiscrimination testing and deduction issues relating to section 401(k) plans, **28:14**
- Defined contribution plan defects, correcting, **28:16**
- Employee stock ownership plans, **28:18**
- Executive plans
  - general discussion, **1:84**
  - compensation, **28:26, 28:28**
- Fiduciary duty concerns, **28:17**
- Health and Welfare Plans (this index)
- Hidden plan assets and liabilities, **28:5**
  - general discussion, **28:1 to 28:9**
  - COBRA benefits, **28:8**
  - defined benefit pension plans, **28:2**
  - nonqualified deferred compensation plans, **28:3**
  - plan defects, **28:7**
  - retiree medical and life insurance benefits, **28:5**
  - severance benefits, **28:6**
  - techniques for dealing with benefit plans, **28:9**
  - union contracts, **28:4**
- Joint ventures, **28:20**
- Multiemployer plans, **1:86**
- National Institute on Employee Benefits in Mergers and Acquisitions, Fifteenth Annual, **28:1 to 28:28**

## EMPLOYEE BENEFIT PLANS

### —Cont'd

- Pension Plans (this index)
- Qualified plan design and administration, spotting hazards
  - general discussion, **28:10**
  - final section 411(d)(6) regulations, **28:12**
  - same desk rule and Revenue Ruling 2000-27, **28:11**
- Representations, warranties and covenants, issues relating to, **28:21, 28:22**
- Retirement and Retirees (this index)
- Section 401(k) plans, nondiscrimination testing and deduction issues, **28:14**
- Severance benefits. Severance Pay Plans (this index)
- Single employer plans, **1:85**
- Spin-offs, **40:54**
- Stock ownership plans, **28:18**
- Techniques for dealing with benefit plans, **28:9**
- Union contracts, **28:4**
- Union-negotiated plans, **28:19**
- Valuation, **1:35**
- WARN Act, **22:52**
- Welfare. Health and Welfare Plans (this index)

## EMPLOYEE STOCK OWNERSHIP PLANS

- General discussion, **28:18**

## EMPLOYEES, LOSS OF

- Material adverse changes, carve-outs, **13:19**

## EMPLOYMENT

- Labor and Employment (this index)

## ENVIRONMENTAL LIABILITIES

- General discussion, **1:79**
- Agency protections, **19:6**
- Allocation agreements
  - as-is clauses, **19:32, 19:40**
  - Cleanup liabilities, below damages not specified, **19:34, 19:42**

## ENVIRONMENTAL LIABILITIES

### —Cont'd

- Allocation agreements—Cont'd
  - effective allocations
    - general discussion, **19:39 to 19:45**
    - as-is clauses, **19:40**
    - damages not specified, **19:42**
    - liability under law not in existence, **19:41**
    - like facilities treated differently, **19:44**
    - releases of indemnification agreements, **19:43**
    - unknown liabilities, **19:45**
  - environmental damages not included in specified damages, **19:35**
  - general enforceability, **19:28, 19:29**
  - ineffective allocations
    - general discussion, **19:32 to 19:38**
    - as-is clauses, **19:32**
    - better indemnification in other party's contract, existence of, **19:38**
    - conditions precedent to indemnification, failure to abide by, **19:37**
    - damages not specified, **19:34**
    - environmental damages not included in specified damages, **19:35**
    - insufficient notice, **19:36**
    - liability under law not in existence, **19:33**
    - interpretation of agreements, what law applies, **19:30**
    - liability under law not in existence, **19:33, 19:41**
    - like facilities treated differently, **19:44**
    - notice, insufficient, **19:36**
    - releases of indemnification agreements, **19:43**
    - statutes of limitation, **19:29**
    - unknown liabilities, **19:45**
- As-is clauses, **19:32, 19:40**

## INDEX

### ENVIRONMENTAL LIABILITIES

#### —Cont'd

- Bankrupt debtor, acquisition of, successor liability, **43:12**
- Cleanup liabilities, allocating through purchase price discounts
  - general discussion, **20:1 to 20:4**
  - allocation mechanism, need for, **20:1**
  - contractual allocation mechanism, using discounts as, **20:3**
  - purchase price discounts, **20:2**
- Closing. Limiting liabilities, below
- Contractual remedies, **19:25, 19:26**
- Corporate protections, **19:5**
- Corporate veil, piercing or refusing to pierce, **18:21, 18:22**
- Covenants. Limiting liabilities, below
- Damages
  - general discussion, **19:26**
  - allocation agreements, damages not specified, **19:34, 19:42**
  - defining, **19:18**
  - time-warp damages, **19:17**
- Definitions
  - damages, **19:18**
  - limiting liabilities, drafting framework, **19:9**
- Disclosure of environmental contamination, seller's duty under state tort law, **6:9**
- Discounts. Cleanup liabilities, allocating through purchase price discounts, above
- Drafting concerns, **App 19A**
- Due diligence documents
  - general discussion, **21:1**
  - initial request, **22:1**
- Economic realities test, **18:17**
- Exposure. Managing exposure, below
- Government and third parties, liability to, **19:3**
- Indemnities
  - general discussion, **19:15**
  - better indemnification in other party's contract, existence of, **19:38**
  - conditions precedent to indemnification, failure to

### ENVIRONMENTAL LIABILITIES

#### —Cont'd

- Indemnities—Cont'd
  - abide by, **19:37**
  - defining damages, **19:18**
  - mechanics of indemnification, **19:21**
  - other indemnification tips, **19:22**
  - releases of indemnification agreements, **19:43**
  - scope of indemnity, **19:16**
  - time limitations, **19:20**
  - time-warp damages, **19:17**
  - type of contractual remedy, **19:26**
  - who should be indemnified, **19:19**
- Limiting liabilities
  - general discussion, **19:1 to 19:45**
  - agency protections, **19:6**
  - Allocation agreements, above
  - closing
    - conditions precedent to closing, **19:13**
    - post-closing covenants, **19:14**
  - conditions precedent, **19:13, 19:37**
  - contractual remedies, **19:25, 19:26**
  - corporate protections, **19:5**
  - covenants
    - pending closing, **19:12**
    - post-closing, **19:14**
  - definitions
    - damages, defining, **19:18**
    - drafting framework, **19:9**
  - drafting concerns, **App 19A**
  - drafting framework
    - general discussion, **19:8**
    - allocating liability, **19:10**
    - conditions precedent to closing, **19:13**
    - covenants, **19:12, 19:14**
    - definitions, **19:9**
    - Indemnities, below
      - representations and warranties, **19:11**
    - exposure, managing. Allocation agreements, above
    - government and third parties, liability to, **19:3**
  - Indemnities, above

## ENVIRONMENTAL LIABILITIES

### —Cont'd

- Limiting liabilities—Cont'd
  - insurance, **19:31**
  - legal issues to address in drafting environmental provisions
    - general discussion, **19:2 to 19:6**
    - agency protections, **19:6**
    - corporate protections, **19:5**
    - liability to government and third parties, **19:3**
    - mutual liabilities of contracting parties, **19:4**
  - managing exposure, **19:27**
  - mutual liabilities of contracting parties, **19:4**
  - practical limitations on environmental provisions
    - general discussion, **19:23**
    - contractual remedies, **19:25, 19:26**
    - limitations on provision's utility, **19:24**
  - representations and warranties, **19:11**
  - rescission, **19:26**
  - sample provisions, **App 19A**
  - specific considerations, **19:7**
  - specific performance, **19:26**
  - time-warp damages, **19:17**
  - types of contractual remedies, **19:26**
- Managing exposure
  - general discussion, **19:27**
- Mutual liabilities of contracting parties, **19:4**
- Parent liability for violations of subsidiary
  - general discussion, **18:18 to 18:35**
  - active participation and control, **18:30**
  - actual control requirement, **18:25, 18:32**
  - applicable law, **18:20**
  - authority to control subsidiary's activities, **18:26, 18:33**
  - direct parental liability
    - general discussion, **18:23 to 18:35**

## ENVIRONMENTAL LIABILITIES

### —Cont'd

- Parent liability for violations of subsidiary—Cont'd
  - direct parental liability—Cont'd
    - active participation and control, **18:30**
    - actual control requirement, **18:25, 18:32**
    - authority to control subsidiary's activities, **18:26, 18:33**
    - concomitant general authority or ability to control, **18:32**
    - current view, **18:27 to 18:35**
    - early years, **18:24 to 18:26**
    - operator vs. arranger liability, **18:34**
    - owner/operator liability, **18:24, 18:28**
    - rejection of direct liability, **18:29**
    - significant management and control, **18:31**
    - voluntary disclosure, impact of, **18:35**
  - economic realities test, **18:17**
  - operator vs. arranger liability, **18:34**
  - owner/operator, direct liability
    - distinction between owners and operators, **18:28**
    - early years, **18:24**
  - piercing or refusing to pierce corporate veil, **18:21, 18:22**
  - rejection of direct liability, **18:29**
  - significant management and control, **18:31**
  - Supreme Court standard, **18:19**
  - voluntary disclosure, impact of, **18:35**
- Piercing or refusing to pierce corporate veil, **18:21, 18:22**
- Purchase price discounts. Cleanup liabilities, allocating through purchase price discounts, above
- Rescission, **19:26**
- Specific performance, **19:26**
- Subsidiaries. Parent liability for violations of subsidiary, above

## INDEX

### ENVIRONMENTAL LIABILITIES —Cont'd

- Successor liability, acquisition of debtor in Chapter 11, **43:12**
- Time-warp damages, **19:17**

### EQUITY AND ASSET PURCHASE AGREEMENTS

- Martin Marietta Materials Inc., **App A1**

### EQUITY SECURITIES

- Payment options, **1:40**

### ERISA

- COBRA benefits, ERISA rights statement, **29:98**
- Severance benefits. Severance Pay Plans (this index)

### ESCROW AGREEMENTS

- General discussion, **7:1 to 7:36, App 7C**
- Account. Establishing account, below Agent
  - general discussion, **7:10**
  - appointment, **7:10**
  - change of entity, **7:16**
  - duties, **7:11**
  - liability, **7:12**
  - resignation or removal, **7:14**
  - successor, **7:15**
  - termination, **7:13 to 7:15**
- Appointment of escrow agent, **7:10**
- Arbitration of disputes, **7:31**
- Available on EDGAR, **App 7B**
- Claim, existence of, **7:20**
- Conclusion, **7:36**
- Counsel, escrow disputes, **7:35**
- Deposit of funds, **7:7**
- Disputes
  - general discussion, **7:29**
  - arbitration, **7:31**
  - counsel, **7:35**
  - expert determination, **7:32**
  - litigation/interpleader, **7:33**
  - releases, **7:34**
  - resolution mechanism, **7:30 to 7:33**

### ESCROW AGREEMENTS—Cont'd

- Distribution of funds
  - form, **7:27**
  - security, **7:28**
- Duties of escrow agent, **7:11**
- Earnings and dividends, **7:9**
- Earnouts, **7:4**
- Establishing account
  - general discussion, **7:6**
  - deposit of funds, **7:7**
  - earnings and dividends, **7:9**
  - investment of funds, **7:8**
- Existence of claim, **7:20**
- Expert determination, **7:32**
- ICoreConnect Inc. and ClariCare Inc., **App 7C**
- Indemnification, **7:5**
- Investment of funds, **7:8**
- Liability of escrow agent, **7:12**
- Litigation/interpleader, escrow disputes, **7:33**
- Notice of claim, release of funds, **7:21**
- Price adjustments, **7:3**
- Purpose
  - general discussion, **7:2**
  - earnouts, **7:4**
  - indemnification, **7:5**
  - price adjustments, **7:3**
- Release of funds
  - general discussion, **7:17**
  - claim, existence of, **7:20**
  - disputes, **7:34**
  - distributions, **7:27, 7:28**
  - entitlement
    - general discussion, **7:18**
    - claim, existence of, **7:20**
    - delivery, notice of, **7:22**
    - existence of claim, **7:20**
    - expiration, **7:19**
    - notice of claim, **7:21**
    - third-party claims, **7:23-7:26**
  - existence of claim, **7:20**
  - expiration, **7:19**
  - notice of claim, **7:21**
  - third-party claims, **7:23-7:26**
- Resignation or removal of escrow agent, **7:14**

**ESCROW AGREEMENTS—Cont'd**

- Sample agreement for merger transactions, **App 7A**
- Security for distribution of funds, **7:28**
- Successor escrow agent, **7:15**
- Third-party claims, release of funds, **7:23-7:26**

**ESPIONAGE**

- Economic Espionage Act of 1996 (this index)

**ESTOPPEL**

- Letters of intent, **9:12**

**ETHICS**

- Compliance programs and business ethics, **3:5**
- Due diligence, legal and ethical conduct, **5:22**
- Legal opinions, reliance by third parties, ethical concerns, **42:29**

**EXCHANGE OF INFORMATION**

- Antitrust issues, premerger exchanges, **11:82**
- Confidential information. Confidentiality Agreements (this index)

**EXECUTIVE PLANS**

- Employee Benefit Plans (this index)

**EXECUTORY CONTRACTS**

- Bankruptcy (this index)

**EXON-FLORIO**

- Government contracts and contractors, **47:38**

**EXPENSES**

- Disappointed bidder litigation, recovery of expenses, **34:28**

**EXPORT CONTROLS**

- General discussion, **46:1 to 46:102, App 46A**
- Acquisition of U.S. target by foreign company
  - general discussion, **46:69**
  - export licenses for transfer of certain assets to foreign buyers, **46:70, 46:71**

**EXPORT CONTROLS—Cont'd**

- Acquisition of U.S. target by foreign company—Cont'd
  - Munitions List items, transactions involving, **46:73**
- Arms Export Controls Act (ITAR regulations)
  - general discussion, **46:19 to 46:31**
  - brokers, **46:60, 47:26**
  - compliance program, **46:62**
  - debarred parties list, **46:56**
  - deemed exports, **46:52**
  - defense articles, regulation of, **46:20, 47:28**
  - defense services, **46:23, 46:54**
  - due diligence
    - general discussion, **46:49 to 46:63**
    - brokers, **46:60**
    - debarred parties list, **46:56**
    - deemed exports, **46:52**
    - defense services, **46:54**
    - distributions, **46:53**
    - export clearance procedures, **46:58**
    - export compliance program, **46:62**
    - export due diligence, **46:61**
    - export violations, **46:63**
    - foreign employees, **46:52**
    - joint venture partners, **46:53**
    - Munitions List, **46:49**
    - munitions manufacturer, registration as, **46:25, 46:55**
    - political contributions, fees, and commissions, **46:59**
    - recordkeeping requirements, **46:57**
    - re-exports and foreign products based on U.S.-origin components or technology, **46:50**
    - software exports, **46:51**
    - subcontractors, **46:53**
    - technology exports, **46:51**
  - Export Administration regulations, overlap with, **46:24**
  - export clearance procedures, **46:58**

## INDEX

### EXPORT CONTROLS—Cont'd

- Arms Export Controls Act (ITAR regulations)—Cont'd
  - export licenses, transfer in acquisition transaction
    - general discussion, **46:74**
    - government contractors, **47:27 to 47:30**
    - notification to State Department, **46:75**
    - second notification to state, **46:76**
    - transfer of licenses, **46:77**
    - transfer of technical assistance, **46:78**
  - foreign employees, **46:52**
  - government contractors, **47:23 to 47:33**
  - joint venture partners, **46:53**
  - license certifications, **46:27**
  - munitions broker, registration as, **46:26**
  - Munitions List, **46:21, 46:49, 47:24**
  - munitions manufacturer, registration as, **46:25, 46:55, 47:25**
  - political contributions, fees, and commissions, **46:59**
  - recordkeeping requirements, **46:57**
  - re-exports and foreign products based on U.S.-origin components or technology, **46:50**
  - sanctions, **46:28**
  - software, **46:22, 46:51**
  - subcontractors, **46:53**
  - technology, **46:22, 46:51**
  - violations, **46:63**
- Assignment of export licenses, **46:72**
- Brokers, **46:60, 47:26**
- Cessation of illegal activity, **46:91**
- Clearance procedures, **46:43, 46:58**
- Commerce control list, **46:4, 46:33**
- Commerce Department sanctions, **46:40**
- Compliance programs
  - adoption, post-acquisition, **46:87**
  - contents, **46:31**
  - due diligence, **46:45, 46:62**

### EXPORT CONTROLS—Cont'd

- Compliance programs—Cont'd
  - ongoing violations, **46:96**
  - past violations, **46:102**
- Compliance systems, **46:30**
- Computer system, due diligence review, **46:48**
- Debarred parties list, **46:56**
- Deemed exports, **46:36, 46:52, 46:82 to 46:85**
- Defense articles, regulation of, **46:20, 47:28**
- Defense services, **46:23, 46:54**
- Denied persons list, **46:41, 46:80**
- Dual use items, **46:5**
- Due diligence review
  - general discussion, **46:32**
  - Arms export controls Act (ITAR regulations), above
  - Export Administration regulations, below
    - government contracts, **47:56**
    - liability issues, **5:17**
    - other export statutes, **46:67**
    - Sanctions programs, below
- Embargoed countries, termination of business with, **46:86**
- End-use-based controls, **46:6**
- Enforcement priorities, **46:11**
- Entities list, transactions with parties on, **46:80**
- Executing the transaction
  - general discussion, **46:68 to 46:73**
- Export licenses, below
- Export Administration regulations
  - general discussion, **46:3 to 46:11**
  - Acquisition of U.S. target by foreign company, above
  - clearance procedures, **46:43**
  - commerce control list, **46:4, 47:20**
  - Commerce Department sanctions, **46:40**
  - computer system, **46:48**
  - deemed exports, **46:36**
  - denied persons list, **46:41**
  - dual use items, **46:5**
  - due diligence review
    - general discussion, **46:33**



**EXPORT CONTROLS—Cont'd**

Export Administration regulations  
—Cont'd  
due diligence review—Cont'd  
commerce control list, **46:33**  
Commerce Department sanctions, **46:40**  
computer system, **46:48**  
deemed exports, **46:36**  
denied persons list, **46:41**  
distributions, **46:37**  
end-use and end-user-based controls, **46:38, 46:39**  
export clearance procedures, **46:43**  
export compliance program, **46:45**  
export due diligence, **46:44**  
export violations, **46:46**  
foreign employees, **46:36**  
high risk countries, **46:47**  
information exports, **46:35**  
joint venture partners, **46:37**  
prohibited services, end-use-based, **46:39**  
recordkeeping requirements, **46:42**  
re-exports and foreign products based on U.S.-origin components or technology, **46:34**  
subcontractors, **46:37**  
end-use-based controls, **46:6, 46:38**  
end-use-based prohibited services, **46:39**  
enforcement, **46:11, 47:22**  
executing the transaction, **46:68 to 46:72**  
foreign employees, **46:36**  
government contractor, acquisition of, **47:19 to 47:22**  
high risk countries, **46:47**  
information exports, **46:35**  
ITAR, overlap with, **46:24**  
joint venture partners, **46:37**  
penalties, **46:10**  
recordkeeping requirements, **46:42**  
re-exports, **46:7, 46:34**

**EXPORT CONTROLS—Cont'd**

Export Administration regulations  
—Cont'd  
regulatory requirements for all exports, **46:9**  
software, **46:8**  
subcontractors, **46:37**  
technology, **46:8**  
Export licenses  
assets, transfer to foreign buyers, **46:70, 46:71**  
assignment, **46:72**  
government contractors, **47:21**  
ITAR export licenses, transfer in acquisition transaction, **46:74 to 46:78**  
Foreign employees, **46:36, 46:52**  
High risk countries, **46:47**  
Information exports, **46:35**  
International traffic in arms regulations (ITAR). Arms export controls Act, above  
ITAR. Arms export controls Act, above  
Joint venture partners, **46:37, 46:53**  
Licenses. Export licenses, above  
Munitions broker, registration as, **46:26**  
Munitions List  
general discussion, **46:21**  
due diligence, **46:49**  
executing transaction involving items on list, **46:73**  
government contractors, **47:24**  
transfer of ITAR export licenses in acquisition transaction, **46:74 to 46:78**  
Munitions manufacturer, registration as, **46:25, 46:55, 47:25**  
OFAC entities list, transactions with parties on, **46:80**  
On-going violations. Violations, below  
Other export statutes, **46:29**  
Past violations. Violations, below  
Penalties  
export administration regulations, **46:10**  
sanctions programs, **46:18**

## INDEX

### EXPORT CONTROLS—Cont'd

- Post-acquisition issues
  - deemed exports, **46:82 to 46:85**
  - export compliance program, adoption of, **46:87**
  - export violation, post-closing discovery, **46:88**
  - foreign company acquiror, post-acquisition integration, **46:84, 46:85**
  - foreign target company, post-acquisition integration, **46:82, 46:83**
  - termination of business with embargoed countries, **46:86**
- Recordkeeping requirements, **46:42, 46:57**
- Re-exports, **46:7, 46:34, 46:50**
- Regulatory requirements for all exports, **46:9**
- Reporting of past violations, **46:93**
- Sanctions programs
  - general discussion, **46:12 to 46:18**
  - business with sanctioned countries, **46:64**
  - comprehensive sanctions, **46:14**
  - countries covered, **46:13**
  - due diligence
    - business with sanctioned countries, **46:64**
    - limited sanctions, **46:65**
    - specially designated nationals, **46:66**
  - entity-based sanctions, **46:17, 46:79, 46:80**
  - extraterritorial application, **46:16**
  - limited sanctions, **46:15, 46:65**
  - penalties, **46:18**
  - specially designated nationals, **46:66**
  - transactions with countries subject to sanctions, **46:81**
- Software, **46:8, 46:22, 46:51**
- Subcontractors, **46:37, 46:53**
- Summary of U.S. law
  - general discussion, **46:2**
  - Arms export controls Act, above
  - Export Administration regulations, above

### EXPORT CONTROLS—Cont'd

- Summary of U.S. law—Cont'd
  - Sanctions programs, above
  - Technology, **46:8, 46:22, 46:51**
  - Termination of business with embargoed countries, **46:86**
  - Text of U.S. laws, **App 46A**
- Violations
  - breach of contract action, considering, **46:95, 46:101**
  - cessation of illegal activity, **46:91**
  - compliance program, **46:96, 46:102**
  - discovery, **46:88, 46:89**
  - due diligence, **46:46, 46:63**
  - internal investigation, **46:92, 46:98**
  - on-going violations
    - general discussion, **46:90**
    - breach of contract action, considering, **46:95**
    - cessation of illegal activity, **46:91**
    - compliance program, **46:96**
    - internal investigation, **46:92**
    - reporting of past violations, **46:93**
    - voluntary disclosure, **46:94**
  - past violations
    - general discussion, **46:97**
    - breach of contract action, considering, **46:101**
    - compliance program, **46:102**
    - internal investigation, **46:98**
    - reporting of past violations, **46:99**
    - voluntary disclosure, **46:100**
  - post-closing discovery, **46:88**
  - reporting of past violations, **46:93, 46:99**
  - voluntary disclosure, **46:94, 46:100**

### FACT SHEET

- Warn act, **App 25C**

### FAMILY AND MEDICAL LEAVE ACT (FMLA)

- Interaction of FMLA and COBRA. COBRA Benefits (this index)

**FEDERAL RESERVE  
REQUIREMENTS**

Registration and other requirements,  
**1:69 to 1:72**

**FEDERAL TRADE COMMISSION  
ACT**

Scope of unfair methods of competi-  
tion, Section 5, **App 11F**

**FEES**

Breakup fees, asset purchases  
through bankruptcy, **44:13**  
Financial consultants, **10:4**  
Protecting the deal, **4:4**

**FIDUCIARY OBLIGATIONS OF  
DIRECTORS**

General discussion, **1:93, 4:11**  
Care, duty of, **4:13**  
Due diligence, **5:11**  
General duties, **4:12**  
Loyalty, duty of, **4:14**  
Sale or change of control, **4:15**

**FIDUCIARY OBLIGATIONS OF  
OFFICERS**

General discussion, **1:93**  
Due diligence, **5:11**

**FILINGS**

Poison pills, securities  
considerations, **48:24, 48:26**

**FINANCIAL CONSULTANTS**

Contracting with Financial  
Consultants (this index)

**FINANCIAL INFORMATION**

Due diligence, **5:31**

**FINANCIAL REPORTING**

Contracting with financial  
consultants, **10:10**

**FINDERS' AGREEMENTS**

Discussion outline, **2:1**  
Form (nonexclusive), **2:2**

**FLEXIBLE SPENDING  
ARRANGEMENTS (FSAS)**

Cafeteria Plans (this index)

**FLEXIBLE SPENDING  
ARRANGEMENTS (FSAS)**

—**Cont'd**

Consumer-Driven Health Plans  
(CDHPs), **29:313**

**FLIP-IN PROVISIONS**

Poison pills, definitions, **48:13-48:15**

**FLIP-OVER PROVISIONS**

Poison pills, definitions, **48:13-48:15**

**FOREIGN TRANSACTIONS**

Premerger notification, special rules,  
**11:32**

**FORMS**

Agreements and plans of merger,  
**App A7**  
Asset purchase agreement, **37:1,**  
**37:2, App A1, App A2, App A6,**  
**App A8 to App A10, App A9**  
Baskets, sample agreement provi-  
sions, **App 14A**  
Caps, sample agreement provisions,  
**App 14A**  
Confidentiality agreements, **2:4, App**  
**12C**  
Due diligence, documents requests,  
**App 5A, App 5B**  
Environmental liabilities, limiting,  
sample provisions, **App 19A**  
Escrow funds, distribution of, **7:27**  
Finders' agreement, nonexclusive,  
**2:2**  
Illustrative mergers and acquisitions  
forms, **App C**  
Indemnities, sample agreement provi-  
sions, **App 14A**  
Intellectual property transfers. Intel-  
lectual Property (this index)  
Knowledge, sample agreement provi-  
sions, **App 14A**  
Letter of intent for auction process,  
**2:6**  
Letters of intent, sample letters, **App**  
**9B**  
Material adverse change, sample  
clauses, **App 13A**  
Materiality, sample agreement provi-  
sions, **App 14A**

## INDEX

### **FORMS—Cont'd**

- Poison pills, sunset provision, **48:8**
- Purchase price adjustment provision, **2:10**
- Restrictive covenants. Covenants (this index)
- Spin-offs, **41:2**
- Warranties, sample agreement provisions, **App 14A**

### **FORUM SELECTION**

- Clause, enforceability in context of sale of business, **38:10**

### **FRANCHISE AGREEMENTS**

- Restrictive covenants, **38:5**

### **FRAUD**

- Disappointed bidder litigation, **34:24**
- Disclosure, **30:12**
- Due Diligence (this index)
- Products liability of successor corporations, fraud exception, **8:5**

### **FRAUDULENT CONCEALMENT**

- Distinguished from other types of nondisclosure, **6:2**

### **FRAUDULENT CONVEYANCES**

- Leveraged Buyout as Fraudulent Conveyance (this index)

### **FSAS**

- Cafeteria Plans (this index)
- Consumer-Driven Health Plans (CDHPs), **29:313**

### **GENETIC INFORMATION**

#### **NONDISCRIMINATION ACT (GINA)**

- General discussion, **29:298 to 29:303**
- Confidentiality, **29:302**
- Exceptions, **29:301**
- Interim final regulations
  - general discussion, **29:304 to 29:309**
  - collecting information prior to or in connection with enrollment, **29:307**
  - effective date, **29:308**
  - health risk assessments, **29:305**

### **GENETIC INFORMATION**

#### **NONDISCRIMINATION ACT (GINA)—Cont'd**

- Interim final regulations—Cont'd
  - HIPAA privacy proposed regulations, **29:309**
  - medically appropriate determinations, **29:306**
  - underwriting, **29:305**
- Noncompliance penalties, **29:303**
- Penalties for noncompliance, **29:303**
- Prohibitions, **29:300**

### **GOOD FAITH**

- Letters of Intent (this index)
- WARN Act, **22:50, 25:40**

### **GOODWILL**

- Restrictive covenants, **38:6**

### **GO-SHOP**

- Protecting the deal, **4:22**

### **GOVERNING LAW**

- Choice of Law (this index)

### **GOVERNMENT CONTRACTS AND CONTRACTORS**

- General discussion, **47:1 to 47:57**
- Accounting issues, **47:8**
- Anti-assignment statutes, **47:4**
- Arms export controls Act (ITAR regulations)
  - general discussion, **47:23 to 47:33**
  - broker licensing, **47:30**
  - broker registration, **47:26**
  - defense articles, **47:28**
  - enforcement, **47:33**
  - foreign persons, proposals to, **47:32**
  - licensing requirements
    - general discussion, **47:27**
    - brokering, **47:30**
    - defense articles, **47:28**
    - technical data, **47:29**
  - manufacturers and exporters, registration, **47:25**
  - manufacturing licensing agreements, **47:31**
- Munitions List, **47:24**
- proposals to foreign persons, **47:32**

**GOVERNMENT CONTRACTS  
AND CONTRACTORS—Cont'd**

Arms export controls Act (ITAR regulations)—Cont'd  
     registration  
         brokers, **47:26**  
         manufacturers and exporters, **47:25**  
         technical assistance agreements, **47:31**  
         technical data, **47:29**  
 Classified information, restrictions on release, **47:39 to 47:41**  
 Company as government contractor, **47:2**  
 Compliance issues  
     general discussion, **47:4, 47:7**  
     accounting, **47:8**  
     contract pricing, **47:8, 47:9**  
     cost recovery, **47:8**  
     other unique elements of government contracts, **47:11**  
     representations and certifications, **47:10, 47:45**  
     Transfers of contracts, below  
 Conditions to closing, drafting considerations, **47:52**  
 Contract pricing, **47:8, 47:9**  
 Cost recovery, **47:8**  
 Covenants of seller, drafting considerations, **47:51**  
 CRADAs and co-sponsored research, intellectual property issues, **47:17**  
 Data rights under FAR, **47:16**  
 Department of Defense  
     industrial security program, **47:40**  
     technical data, rights in, **47:15**  
 DOE/Nuclear Regulatory Commission restriction on classified contracts, **47:41**  
 Drafting considerations  
     general discussion, **47:42 to 47:53**  
     conditions to closing, **47:52**  
     covenants of seller, **47:51**  
     indemnities, **47:53**  
     Seller's representations and warranties, below  
 Due diligence, **47:54 to 47:56**

**GOVERNMENT CONTRACTS  
AND CONTRACTORS—Cont'd**

Enforcement  
     Arms export controls Act (ITAR regulations), **47:33**  
     Export Administration regulations, **47:22**  
 Exon-Florio, **47:38**  
 Export Administration regulations  
     general discussion, **47:19**  
     commerce control list/country chart, **47:20**  
     enforcement, **47:22**  
     licensing, **47:21**  
 Export controls issues  
     general discussion, **47:18**  
     Arms export controls Act (ITAR regulations), above  
     due diligence, **47:56**  
     Export Administration regulations, above  
     National security, below  
     OFAC, below  
 Indemnities, drafting considerations, **47:53**  
 Intellectual property issues  
     general discussion, **47:12**  
     CRADAs and co-sponsored research, **47:17**  
     patentable inventions, **47:13**  
     seller's representations and warranties, **47:47**  
     Technical data and computer software, below  
 ITAR. Arms export controls Act, above  
 Litigation, claims, investigations, and audits, seller's representations and warranties, **47:46**  
 Material contracts, seller's representations and warranties, **47:48**  
 National security issues  
     general discussion, **47:37**  
     classified information, restrictions on release, **47:39 to 47:41**  
     DOD industrial security program, **47:40**

## INDEX

### GOVERNMENT CONTRACTS AND CONTRACTORS—Cont'd

- National security issues—Cont'd
  - DOE/Nuclear Regulatory Commission restriction on classified contracts, **47:41**
  - Exon-Florio, **47:38**
- Novation requirements, **47:5, 47:6**
- OFAC, laws and regulations administered by
  - general discussion, **47:34**
  - destinations, prohibited, **47:35**
  - end users, prohibited, **47:36**
- Overview, **47:1**
- Patentable inventions, **47:13**
- Qualification of seller's representations and warranties, **47:49**
- Recognizing government contract, **47:2**
- Seller's representations and warranties
  - general discussion, **47:43**
  - compliance issues, **47:10, 47:45**
  - intellectual property, **47:47**
  - litigation, claims, investigations, and audits, **47:46**
  - material contracts, **47:48**
  - qualification, **47:49**
  - scope, **47:44 to 47:48**
  - survival, **47:50**
- Software. Technical data and computer software, below
- Subcontractors and procurement law requirements, **47:3**
- Survival of seller's representations and warranties, **47:50**
- Technical assistance agreements, ITAR regulations, **47:31**
- Technical data, ITAR regulations, **47:29**
- Technical data and computer software, contractor rights in
  - general discussion, **47:14**
  - data rights under FAR, **47:16**
  - DOD rights in technical data, **47:15**
- Transfers of contracts
  - general discussion, **47:4**
  - anti-assignment statutes, **47:4**

### GOVERNMENT CONTRACTS AND CONTRACTORS—Cont'd

- Transfers of contracts—Cont'd
  - novation requirements, **47:5, 47:6**
- Treasury Department OFAC, laws and regulations administered by, above
- Unique elements of government contracts, **47:11**
- Warranties. Seller's representations and warranties, above

### GROUP HEALTH PLANS

- COBRA Benefits (this index)
- Mental Health Parity Act of 1996, **29:230**

### HART-SCOTT-RODINO

- General discussion, **1:62**

### HEALTH AND WELFARE PLANS

- General discussion, **29:1 to 29:335**
- Abusive use of life insurance and annuity contracts, **29:311**
- Accrued amounts, **29:11**
- Affected employees, **29:9**
- Annuity contracts, abusive use, **29:311**
- Association health plans, **29:315**
- Bicycle commuting benefit, **29:333**
- Cafeteria Plans (this index)
- Cancer. Women's Health and Cancer Rights Act (this index)
- Child support. Qualified Medical Child Support Orders (this index)
- COBRA Benefits (this index)
- Consumer-Driven Health Plans (CDHPs) (this index)
- Continuation of plans, concerns for sellers, **29:8**
- Corporate-Owned Life Insurance Policies (COLI), **29:310**
- Definition, dependent, **29:313**
- Dependent defined, **29:313**
- Domestic partner benefits, **29:314**
- Due diligence
  - general discussion, **29:2**
  - document checklist, **29:335**
- Excise tax reporting, **29:334**

## HEALTH AND WELFARE PLANS

### —Cont'd

- Genetic Information Nondiscrimination Act (GINA) (this index)
- Latent conditions including occupational diseases, **29:14**
- Liabilities, identification and assessment
  - general discussion, **29:3**
  - determinations, **29:5**
  - disclosures, **29:4**
  - special concerns, **29:6**
- Liabilities, post-closing, concerns for sellers, **29:8**
- Liabilities, types of
  - general discussion, **29:10**
  - accrued amounts, **29:11**
  - accrued portion of post-retirement benefits, **29:13**
  - claims incurred but unpaid prior to closing, **29:12**
  - HIPAA privacy and security compliance, **29:15**
  - latent conditions including occupational diseases, **29:14**
  - privacy compliance, HIPAA, **29:15**
  - security compliance, HIPAA, **29:15**
- Life insurance, abusive use, **29:311**
- Mandatory medicare reporting, **29:332**
- Medical child support. Qualified Medical Child Support Orders (this index)
- Medicare, mandatory reporting, **29:332**
- Mental health. Mental Health Parity Act (this index)
- Newborns. Newborns' and Mothers' Health Protection Act (this index)
- Occupational diseases, **29:14**
- Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (this index)
- "Pay or play" legislation
  - general discussion, **29:327 to 29:331**

## HEALTH AND WELFARE PLANS

### —Cont'd

- "Pay or play" legislation—Cont'd
  - Maryland Fair Share Act, **29:328**
  - Massachusetts Affordability Act, **29:330**
  - San Francisco's employer health spending mandate, **29:331**
  - Suffolk County, New York law, **29:329**
- Portability. HIPPA (this index)
- Taxation
  - excise tax reporting, **29:334**
  - premium payments on after-tax basis, **29:326**
- Voluntary insurance arrangements, **29:312**
- Welfare benefit plan issues, **28:24**
- Welfare benefit plans, applicability of new code section 409A
  - general discussion, **29:321 to 29:326**
  - discriminatory arrangements under Code section 105(h), **29:322**
  - special provisions for health care plans
    - general discussion, **29:323 to 29:326**
  - COBRA exemption, **29:324**
  - payments of premiums on after-tax basis, **29:326**
  - premium payments on after-tax basis, **29:326**
  - special compliance rule, **29:325**
  - taxation, premium payments on after-tax basis, **29:326**
- Welfare Fund Arrangements (this index)
- Women's health
  - Newborns' and Mothers' Health Protection Act (this index)
  - Women's Health and Cancer Rights Act (this index)

## HEALTH CARE PROVIDER

- Acquisition of provider in Chapter 11, successor liability, **43:14**



## INDEX

### **HEALTH INFORMATION TECHNOLOGY FOR ECONOMIC AND CLINICAL HEALTH ACT (HITECH)**

HIPPA (this index)

### **HEALTH INSURANCE**

Group plans. COBRA Benefits (this index)

Portability. HIPPA (this index)

### **HEALTH REIMBURSEMENT ARRANGEMENTS (HRAS)**

Consumer-Driven Health Plans  
(CDHPs), **29:314**

HIPPA, **29:183**

### **HEALTH SAVINGS ACCOUNTS (HSAS)**

Consumer-Driven Health Plans  
(CDHPs), **29:315**

### **HEART ACT**

Cafeteria plans, **29:286**

### **HIPPA**

General discussion, **29:147 to 29:206**

Background, **29:148, 29:197**

Benefits excluded from HIPPA  
requirements, **29:185**

Bona fide wellness programs, **29:180**

Civil penalties and complaints,  
**29:205**

COBRA benefits, HIPPA standards  
for electronic transactions,  
**29:143 to 29:146**

Compliance and enforcement Web  
site, **29:207**

Discrimination. Nondiscrimination  
requirements, below

Effective dates

electronic transactions, **29:144**

Health Information Technology for  
Economic and Clinical Health  
Act (HITECH), **29:213,**  
**29:215**

nondiscrimination provisions,  
**29:175**

privacy standards, **29:187**

Eligibility rules, nondiscrimination  
requirements, **29:177**

### **HIPPA—Cont'd**

Enforcement

compliance and enforcement Web  
site, **29:207**

standards for security of electronic  
protected health information,  
**29:204**

Enhanced privacy compliance and  
enforcement Web site, **29:207**

Health Information Technology for  
Economic and Clinical Health  
Act (HITECH)

general discussion, **29:208 to**  
**29:219**

data states and methods, **29:210**

destruction, **29:212**

effective date, **29:213, 29:215**

encryption, **29:211**

interim final regulations

general discussion, **29:214 to**  
**2:219**

breach, defined, **29:217**

breach notification, **29:218**

definition of breach, **29:217**

effective date, **29:215**

FTC rule applicable to  
noncovered entities, **29:219**

noncovered entities, **29:219**

notification of breach, **29:218**

PHI, securing, **29:216**

securing PHI, **29:216**

HITECH. Health Information  
Technology for Economic and  
Clinical Health Act, above

Individually identifiable health infor-  
mation. Privacy standards,  
below

National Provider Identifier (NPI),  
**29:206**

Nondiscrimination requirements

general discussion, **29:174, 29:176**  
actively-at-work provisions,  
**29:182**

applicability, **29:176**

background, **29:174**

bona fide wellness programs,  
**29:180**

effective date, **29:175**

eligibility rules, **29:177**

**HIPPA—Cont'd**

- Nondiscrimination requirements
  - Cont'd
  - health factors, discrimination based on, **29:179**
  - Health Reimbursement Arrangements (HRAs), **29:183**
  - nonconfinement provision, **29:181**
  - similarly situated individuals, treatment of, **29:178**
  - source of injury rule, **29:184**
  - uniform benefits, **29:178**
- Notice
  - preexisting condition exclusions, below
  - SCHIP special enrollment rights, **29:171**
  - special enrollment rights, **29:167**
- Preexisting condition exclusions
  - general discussion, **29:149**
  - creditable coverage
    - certificates, **29:161 to 29:163**
    - content of certificates, **29:162**
    - methods of calculating, alternative method election, **29:164, 29:165**
    - methods of calculating, standard method, **29:163**
    - reduction of exclusion periods, **29:157**
    - required notice, alternative method of calculating, **29:165**
    - timing of certificates, **29:161**
  - enrollment date, **29:152**
  - excepted benefits, **29:158**
  - exclusion periods
    - limits on, **29:150**
  - Reduction of exclusion periods, below
  - late enrollees, **29:151**
  - prohibitions on exclusions, **29:160**
  - reduction of exclusion periods
    - general discussion, **29:156**
    - creditable coverage, periods of, **29:157**
    - excepted benefits, **29:158**
    - significant breaks in coverage, **29:159**

**HIPPA—Cont'd**

- Preexisting condition exclusions
  - Cont'd
  - required notices
    - first notice of preexisting condition exclusion, general notice, **29:154**
    - second notice of preexisting condition exclusion, individual notice, **29:155**
  - requirements for imposition of exclusion
    - general discussion, **29:150**
    - enrollment date, **29:152**
    - late enrollees, **29:151**
    - waiting period, **29:153**
  - restrictions on exclusions, **29:149**
  - significant breaks in coverage, **29:159**
  - waiting period, **29:153**
- Privacy and security compliance, **29:15, 29:207**
- Privacy proposed regulations, Genetic Information Nondiscrimination Act (GINA), **29:309**
- Privacy standards, individually identifiable health information
  - general discussion, **29:186**
  - applicability, **29:189**
  - background, **29:186**
  - change of legal ownership, special rules involving, **29:196**
  - effective dates, **29:187**
  - employer health coverage
    - fully insured plans, **29:195**
    - self-insured plans, **29:194**
  - general rule, **29:190**
  - legal ownership, special rules involving change, **29:196**
  - obligations imposed on covered entities, **29:192**
  - permitted disclosures, **29:193**
  - protected information, **29:191**
  - special rules involving changes of legal ownership, **29:196**
- SCHIP. Special enrollment rights, below
- Similarly situated individuals, treatment of, **29:178**

## INDEX

### HIPPA—Cont'd

- Source of injury rule  
nondiscrimination requirements,  
**29:184**
- Special enrollment rights  
general discussion, **29:166 to  
2:166**  
notice, **29:167, 29:171**
- SCHIP special enrollment rights  
general discussion, **29:168 to  
29:173**  
additional special enrollment  
rights, **29:170**  
disclosure to states, **29:172**  
noncompliance penalty, **29:173**  
notice to employees, **29:171**  
penalty for noncompliance,  
**29:173**  
premium assistance subsidy,  
**29:169**
- Standards for security of electronic  
protected health information  
general discussion, **29:197 to  
29:36:196**  
administration, **29:204**  
applicability, **29:198**  
background, **29:197**  
compliance dates, **29:199**  
employer health plan action steps,  
**29:202**  
enforcement, **29:204**  
ePH, remote access, **29:203**  
general rule, **29:200**  
off-site use, **29:203**  
remote access of ePH, **29:203**  
security safeguards, **29:201**
- Uniformity of benefits, **29:178**
- Web site, enhanced privacy compli-  
ance and enforcement, **29:207**
- Wellness programs, bona fide, **29:180**

### HORIZONTAL MERGERS

- Antitrust (this index)

### HOSPITALS

- Merger analysis, **11:61**

### ICORECONNECT INC.

- Escrow agreements, **App 7C**

### INDEMNIFICATION

- General discussion, **14:2**
- COBRA obligations, allocation of,  
**29:63**
- Escrow agreements, **7:5**
- Financial consultants, **10:6**
- Government contracts, drafting  
considerations, **47:53**
- Intellectual property, **15:3**
- Limiting environmental liabilities.  
Environmental Liabilities (this  
index)
- Provisions, **1:59**
- Sample agreement provisions, **App  
14A**
- Spin-offs, indemnification obligation  
to parent, **40:50**

### INDEPENDENT CONTRACTORS

- Employee status, **24:18**
- Noncompetition agreements, **24:36**

### INDIVIDUALS

- WARN Act, covered employers, **25:8**

### INDUSTRIAL ESPIONAGE

- Economic Espionage Act of 1996  
(this index)

### INJUNCTIVE RELIEF

- Antitrust, horizontal mergers, **11:38**
- Covenants, **38:25**
- Protecting the deal, **4:16**

### INSIDER TRADING

- Due diligence, liability issues, **5:7**

### INSTALLMENT SALES

- Tax aspects, **16:39**

### INSURANCE

- Corporate successors  
General discussion, **45:1 to 45:7**  
acquired corporation's liability  
use of acquired corporation's  
policies, **45:2**  
use of successor's own policies,  
**45:3**
- cases denying coverage, **45:5**
- ownership of property during  
policy period, **45:4**

**INSURANCE—Cont'd**

- Corporate successors—Cont'd
  - vicarious liability for conduct of acquired corporation, **45:6**
- Coverage, **8:16**
- Limiting environmental liabilities, **19:31**
- Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008, **29:246**
- Spin-offs, **40:56**

**INTANGIBLES**

- Amortization of purchased intangibles under section 197, **16:36**
- Valuation, **1:34**

**INTELLECTUAL PROPERTY**

- General discussion, **1:73, 15:1**
- Antitrust, **15:4, App 11C, App 15A**
- Application for registration of mark, assignment of, **15:8**
- Assignments
  - copyrights, **15:7**
  - inventions and patents, **15:6**
  - registration of mark, **15:8, 15:9**
- Basic legal issues, **15:2**
- Copyrights
  - assignment of, **15:7**
  - debtor's representations re trademarks, patents, and copyrights, **15:10**
  - security agreement, **15:13**
- Debtor's representations re trademarks, patents, and copyrights, **15:10**
- Documentation, **1:76**
- Due diligence, special concerns, **App 5C**
- Forms, illustrative, less complex transactions
  - general discussion, **15:5**
  - copyrights, assignment of, **15:7**
  - debtor's representations re trademarks, patents, and copyrights, **15:10**
  - inventions and patents, assignment of, **15:6**
  - license agreement, **15:10**

**INTELLECTUAL PROPERTY  
—Cont'd**

- Forms, illustrative, less complex transactions—Cont'd
  - registration of mark, **15:8, 15:9**
- Security agreements, below
- Forms, illustrative, more complex transactions
  - ICBD technology ownership and license agreement, **15:18**
  - master patent ownership and license agreement, **15:16**
  - master technology ownership and license agreement, **15:15**
  - master trademark ownership and license agreement, **15:17**
- Government-related issues, **47:12 to 47:17**
- ICBD technology ownership and license agreement, **15:18**
- Indemnification, **15:3**
- Inventions, assignment of, **15:6**
- Licensing, **15:10, 15:15 to 15:18, App 11C, App 15A**
- Patents
  - general discussion, **1:77**
  - assignment of, **15:6**
  - debtor's representations re trademarks, patents, and copyrights, **15:10**
  - government contractors and patentable inventions, **47:13**
  - master patent ownership and license agreement, **15:16**
  - security agreement, **15:12**
- Registration of mark, assignment of, **15:8, 15:9**
- Security agreements
  - copyrights, **15:13**
  - patents, **15:12**
  - trademarks, **15:11**
- Software (this index)
- Trademarks
  - general discussion, **1:78**
  - debtor's representations re trademarks, patents, and copyrights, **15:10**
  - master trademark ownership and license agreement, **15:17**

## INDEX

### INTELLECTUAL PROPERTY —Cont'd

Trademarks—Cont'd  
security agreements, **15:11**

### INTERNATIONAL ENFORCEMENT AND COOPERATION

Antitrust, **App 11D**

### INTERNATIONAL LAW

General discussion, **1:100**

### INTERNATIONAL TRAFFIC IN ARMS (ITAR)

Arms Control Export Act. Export  
Controls (this index)

### INTERPLEADER

Escrow disputes, **7:33**

### INVENTORY

Adjustment, **1:43**  
Valuation, **1:33**

### INVESTMENT BANKERS

Agreements with, **1:48**

### INVESTMENT COMPANY ACT OF 1940

Poison pills, **48:21**

### IOWA

State transfer laws, **23:10**

### JOINT VENTURES

Antitrust, premerger notification,  
**11:30**  
Employee benefit plans, **28:20**  
Export controls, **46:37, 46:53**  
Sale of business, covenants con-  
nected to, **38:7**

### JUDICIAL REVIEW

Business judgment rule, **4:8**  
Enhanced scrutiny, **4:10**  
Entire fairness, **4:9**

### JURISDICTION

WARN Act, **22:61, 25:44**  
Withdrawal liability in corporate  
transactions, **26:3**

### JURISDICTION, PERSONAL

Due diligence, **5:14**

### JURY TRIAL

Disappointed bidder litigation, **34:29**

### KNOWLEDGE

Sample agreement provisions, **App  
14A**

### LABOR AND EMPLOYMENT

General discussion, **1:80, 24:1**  
Alter ego doctrine, **24:9**  
Antitrust guidelines for business  
activities affecting workers, **App  
11B, App 24A**  
Antitrust red flags for employment  
practices, **App 24B**  
Bargaining. Duty to bargain, below  
Benefit plans. Employee Benefit  
Plans (this index)  
Borrowed employees, **24:19**  
Business activities affecting workers,  
antitrust guidelines for, **App  
11B, App 24A**  
Collective bargaining agreements  
general discussion, **1:87, 24:21**  
bargaining. Duty to bargain, below  
state successorship and severance  
statutes, **24:23**  
successor liability, acquisition of  
debtor in Chapter 11, **43:13**  
successors and assigns clauses,  
**24:22**  
Contracts  
noncompetition agreements, **24:35,**  
**24:36**  
price determination, **1:45**  
Disclosure, **24:28**  
Discrimination  
hiring, discriminatory, **24:25**  
parent's liability for statutory  
violations by subsidiary,  
**18:15, 18:16**  
Duty to bargain  
general discussion, **24:24**  
reduction in force, **24:31**  
relocation, **24:34**  
Employee policies, **24:27**

## LABOR AND EMPLOYMENT

### —Cont'd

- Employee status
  - general discussion, **24:14**
  - accretion, **24:16**
  - borrowed employees, **24:19**
  - independent contractors, **24:18**
  - single bargaining unit, **24:15**
  - wage-and-hour classifications, **24:17**
- Employer status
  - general discussion, **24:2**
  - alter ego doctrine, **24:9**
  - joint employer doctrine, **24:8**
  - Single employer doctrine, below
  - Successorship doctrine, below
- Employment practices
  - general discussion, **24:20**
  - discriminatory hiring, **24:25**
  - employee policies, **24:27**
- Independent contractors
  - generally, **24:18**
  - noncompetition agreements, **24:36**
- Joint employer doctrine, **24:8**
- Labor law obligations
  - general discussion, **24:20**
  - Collective bargaining agreements, above
  - discriminatory hiring, **24:25**
  - Duty to bargain, above
  - Pension Plans (this index)
  - reduction in force, below
  - WARN Act (this index)
- Noncompetition agreements
  - general discussion, **24:35**
  - independent contractors, **24:36**
- Pension Plans (this index)
- Recruiting employees, restrictive covenants, **38:21**
- Reduction in force
  - general discussion, **24:29**
  - duty to bargain, **24:31**
  - partial termination of pension plans in RIFs. Pension Plans (this index)
  - Severance Pay Plans (this index)
  - WARN Act, **24:30**

## LABOR AND EMPLOYMENT

### —Cont'd

- Relocation
  - general discussion, **24:32**
  - duty to bargain, **24:34**
  - WARN Act, **24:33**
- Single employer doctrine
  - general discussion, **24:3**
  - centralized control of labor relations, **24:5**
  - common management, **24:7**
  - common ownership, **24:4**
  - interrelation of operations, **24:6**
- State successorship and severance statutes, **24:23**
- Successorship doctrine
  - general discussion, **1:88, 24:10**
  - business operations, continuity in, **24:12**
  - liberalized successor liability under employment statutes, **24:13**
  - workforce, continuity in, **24:11**
- Wage-and-hour classifications, employee status, **24:17**
- Worker adjustment and retraining. WARN Act (this index)

## LAYOFFS

- WARN Act (this index)

## LEGAL OPINIONS

- General discussion, **1:51, 42:1 to 42:33**
- Accord, **42:25**
- Applicable law, **42:3**
- Approvals and filings, closing opinion, **42:21**
- Assumptions, **42:11**
- Attorney and client, special relationship between, disclosure of, **42:30**
- Certificates, factual issues, **42:6**
- Checklists for drafting
  - liability of opinion preparer, **42:33**
  - substance of opinion, **42:32**
  - whether to request opinion, **42:31**
- Closing opinions
  - general discussion, **42:14**
  - approvals and filings, **42:21**

## INDEX

### LEGAL OPINIONS—Cont'd

- Closing opinions—Cont'd
  - corporate action, **42:18**
  - corporate power, **42:17**
  - corporate status, **42:15**
  - no breach or default, **42:19**
  - no litigation, **42:22**
  - no violations of law, **42:20**
  - stock, **42:16**
- Corporate action, closing opinion, **42:18**
- Corporate power, closing opinion, **42:17**
- Corporate status, closing opinion, **42:15**
- Customary practice
  - general discussion, **42:2 to 42:13**
  - applicable law, **42:3**
  - Duty to investigate, below
  - Limitations in opinion, below
- Disclaimers, factual issues, **42:7**
- Documents reviewed, **42:10**
- Duty of care, reliance by third parties, **42:28**
- Duty to investigate
  - general discussion, **42:4**
  - factual issues, **42:5 to 42:7**
  - opinions of others, **42:8**
  - reasonable reliance, **42:4**
- Ethical concerns, reliance by third parties, **42:29**
- Exclusions, **42:12**
- Factual issues
  - general discussion, **42:5**
  - certificates, **42:6**
  - disclaimers, **42:7**
- Investigations. Duty to investigate, above
- Liability of opinion preparer, **42:33**
- Limitations in opinion
  - general discussion, **42:9**
  - assumptions, **42:11**
  - documents reviewed, **42:10**
  - exclusions, **42:12**
  - qualifications, **42:13**
- No breach or default, closing opinion, **42:19**
- No litigation, closing opinion, **42:22**

### LEGAL OPINIONS—Cont'd

- No violations of law, closing opinion, **42:20**
- Opinions of others, **42:8**
- Qualifications, **42:13**
- Reliance by third parties
  - general discussion, **42:26**
  - duty of care, **42:28**
  - ethical concerns, **42:29**
  - special relationship between attorney and client, disclosure of, **42:30**
  - statutes of limitation, **42:27**
- Remedies opinion, **42:23**
- Sample opinions, **App 42A**
- Special relationship between attorney and client, disclosure of, **42:30**
- Specialized contexts, opinions in, **42:24**
- Statutes of limitation, reliance by third parties, **42:27**
- Stock, closing opinion, **42:16**
- Substance of opinion, drafting checklist, **42:32**
- Third parties. Reliance by third parties, above
- Types of opinions
  - general discussion, **42:14**
  - Closing opinions, above
  - remedies opinion, **42:23**
  - specialized contexts, opinions in, **42:24**
- Whether to request opinion, **42:31**

### LENDER LIABILITY

- WARN act, **25:7**

### LETTERS OF INTENT

- General discussion, **1:50, 9:1 to 9:43**
  - conclusion, **9:43**
- Additional considerations, **9:4**
- Binding character
  - general discussion, **9:13**
  - cases finding binding character or triable issue
    - general discussion, **9:25**
    - conduct of parties, **9:33**
    - consideration provided, **9:31**
    - contingent events, **9:32**



**LETTERS OF INTENT—Cont'd**

Binding character—Cont'd  
     cases finding binding character or triable issue—Cont'd  
         intent to be bound, statement of, **9:26**  
         joint letter of intent, **9:35**  
         jury issue, **9:28**  
         more formal document, provision for, **9:27**  
         mutual consideration, **9:36**  
         prior representations, **9:30**  
         sufficient terms provided, **9:29**  
         terms subject to later negotiation, **9:34**  
     cases finding no binding character.  
         No binding character, cases finding, below  
         conduct of parties, **9:33**  
         contingent events, **9:32**  
         joint letter of intent, **9:35**  
         jury issue, **9:28**  
         more formal document, provision for, **9:27**  
         mutual consideration, **9:36**  
         No binding character, cases finding, below  
         prior representations, **9:30**  
         statement of intent to be bound, **9:26**  
         sufficient terms provided, **9:29**  
         terms subject to later negotiation, **9:34**  
     Checklist for drafting, **App 9A**  
     Conduct of parties  
         binding character, cases finding, **9:33**  
         no binding character, cases finding, **9:23**  
     Contingencies, binding character, **9:24, 9:32**  
     Disappointed bidder litigation, **34:10**  
     Discussion outline for model letter of intent, **2:5**  
     Discussion outline of confidentiality agreements, **2:3**  
     Effects  
         general discussion, **9:5**  
         estoppel, **9:12**

**LETTERS OF INTENT—Cont'd**

Effects—Cont'd  
     expiration, **9:10**  
     intent of parties, **9:7**  
     legal principles, **9:6**  
     merger provision, **9:11**  
     parol evidence, **9:8**  
     statute of frauds, **9:9**  
     Estoppel, **9:12**  
     Form of letter for auction process, **2:6**  
     Good faith, obligation to negotiate in  
         general discussion, **9:37**  
         damages, **9:41**  
         duty, cases imposing, **9:39**  
         fulfilling duty, **9:40**  
         no duty, cases finding, **9:38**  
     Intent of parties, **9:7**  
     Joint letter of intent, **9:35**  
     Jury issue, binding character, **9:28**  
     Legal principles, **9:6**  
     Merger provision, **9:11**  
     Mutual consideration, **9:36**  
     No binding character, cases finding  
         general discussion, **9:14 to 9:24**  
         agreement to agree, **9:21**  
         all material terms, failure to state, **9:20**  
         clear statement of nonbinding effect, **9:14**  
         conduct of parties, **9:23**  
         consideration, lack of, **9:22**  
         cost allocation provision, **9:16**  
         exclusivity provision, **9:15**  
         failure to state all material terms, **9:20**  
         more formal agreement, reference to, **9:18**  
         Teachers factors, courts applying, **9:17**  
         type of transaction, **9:19**  
         unresolved contingencies, **9:24**  
     Parol evidence, **9:8**  
     Reasons not to use, **9:3**  
     Reasons to use, **9:2**  
     Sample letters, **App 9B**  
     Statute of frauds, **9:9**

## INDEX

### **LETTERS OF INTENT—Cont'd**

Sufficient terms provided, binding character, **9:29**

Tort claims, **9:42**

### **LEVERAGED BUYOUT AS FRAUDULENT CONVEYANCE**

General discussion, **35:1 to 35:21**

Applicable law

general discussion, **35:2**

Bankruptcy Code section 548 text, **35:4**

comparisons of fraudulent conveyance laws, **35:6**

negligence and fraud theories, **35:7**

UFCA text, **35:3**

UFTA text, **35:5**

Bankruptcy, disposition of claim, **35:19**

Bankruptcy Code section 548 text, **35:4**

Collapsing separate transactions, **35:11**

Comparisons of fraudulent conveyance laws, **35:6**

Creditor status, **35:17**

Disposition of claim in bankruptcy, **35:19**

Dividends or corporate distributions, **35:10**

Duration of transaction, **35:16**

Elements of LBO challenges

fair consideration, **35:13**

financial condition following transfer, **35:14**

foreseeability, **35:14**

good faith, lack of, **35:12**

Fair consideration, **35:13**

Financial condition following transfer, **35:14**

Foreseeability, **35:15**

Form of transaction

general discussion, **35:8**

dividends or corporate distributions, **35:10**

intercorporate guaranties, **35:9**

Good faith, lack of, **35:12**

Intercorporate guaranties, **35:9**

### **LEVERAGED BUYOUT AS FRAUDULENT**

#### **CONVEYANCE—Cont'd**

Negligence and fraud theories, **35:7**

Nonprincipal figures, recovery against, **35:18**

Solvency letters, **35:20**

UFCA text, **35:3**

UFTA text, **35:5**

### **LIABILITY**

Due diligence, liability issues. Due

Diligence (this index)

Environmental Liabilities (this index)

Health and Welfare Plans (this index)

Opinion preparer, liability of, **42:33**

Subsidiaries. Parent's Liability for Subsidiaries (this index)

Warranties, **1:56**

Withdrawal Liability in Corporate Transactions (this index)

### **LICENSE**

Intellectual property, **15:10, 15:15 to 15:18, App 11C, App 15A**

### **LIENS**

Bankruptcy (this index)

### **LIMITATION OF ACTIONS**

Statute of Limitations (this index)

### **LIMITED LIABILITY COMPANIES**

Income tax considerations, **17:5, 17:19**

Premerger notification, special rules, **11:29**

### **LITIGATION**

Adverse changes. Material Adverse Changes (this index)

Disappointed Bidder Litigation (this index)

Escrow disputes, **7:33**

Material Adverse Changes (this index)

Private Securities Litigation Reform Act of 1995, **30:5**

### **LOCK-UPS**

Protecting the deal, **4:2**

**LOYALTY**

Duty of loyalty, **4:14**

**MARKS**

Assignment of registration and application for registration, **15:8, 15:9**

**MARYLAND FAIR SHARE ACT**

Health and welfare plans, **29:328**

**MASS LAYOFFS**

WARN Act (this index)

**MASS TORT CLAIMS**

Under plan of reorganization, protection from successor liability, **43:20**

**MASSACHUSETTS**

**AFFORDABILITY ACT**

Health and welfare plans, **29:330**

**MATERIAL ADVERSE CHANGES**

General discussion, **13:1 to 13:36**

Arbitration, **13:34**

Burden of proof, **13:32**

Business prospects, **13:28**

Carve-outs

generally, **13:9 et seq.**

accounting principles, **13:20**

acts under the agreement, **13:21**

announcement of merger, **13:14**

economy, **13:16**

employees, loss of, **13:19**

industry, **13:17**

laws, **13:18**

limits

generally, **13:10**

disproportionate effect, **13:11**

underlying causes, **13:12**

litigation, **13:26**

markets, **13:16**

performance forecasts, **13:24**

political conditions, **13:15**

seasonal fluctuations, **13:22**

stock activity, **13:25**

types

generally, **13:13**

accounting principles, **13:20**

acts under the agreement, **13:21**

**MATERIAL ADVERSE CHANGES**

—Cont'd

Carve-outs—Cont'd

types—Cont'd

announcement of merger, **13:14**

economy, **13:16**

employees, loss of, **13:19**

industry, **13:17**

laws, **13:18**

litigation, **13:26**

markets, **13:16**

natural disasters and calamities, **13:27**

performance forecasts, **13:24**

political conditions, **13:15**

seasonal fluctuations, **13:22**

stock activity, **13:25**

union activity, **13:23**

union activity, **13:23**

Cause of action, **13:31**

Choice of law, **13:33**

Defined, **13:2**

Due diligence, material adverse change clause, **5:32**

General clauses

general discussion, **13:4 to 13:6**

other provisions, effect of, **13:6**

significance of event, **13:5**

Known risks, **13:7**

Litigation

general discussion, **13:30 to 13:35**

arbitration, **13:34**

burden of proof, **13:32**

cause of action, **13:31**

choice of law, **13:33**

remedy, **13:35**

Remedy, **13:35**

Risks, known risks, **13:7**

Sample clauses, **App 13A**

Scope of clause

general discussion, **13:3 to 13:28**

business prospects, **13:28**

carve outs, **13:9 et seq.**

general clauses, **13:4 to 13:6**

specific clauses, **13:8**

Significance of event, **13:5**

Specific clauses, **13:8**

Termination, **13:29**

## INDEX

### **MATERIAL ADVERSE CHANGES —Cont'd**

Warranties against, **1:55**

### **MATERIALITY**

Sample agreement provisions, **App 14A**

Seller's duty to disclose under state tort law, **6:4**

### **MATERNITY**

COBRA, maternity and newborn coverage, **29:97**

Statutory rights. Newborns' and Mothers' Health Protection Act (this index)

### **MEDICAL CHILD SUPPORT**

Qualified Medical Child Support Orders (this index)

### **MENTAL HEALTH PARITY ACT OF 1996**

General discussion, **29:220 to 29:237**

Aggregate limits, **29:222, 29:224**

Definitions

general discussion, **29:223**

aggregate lifetime limit, **29:224**

annual limit

general discussion, **29:225 to 29:227**

medical/surgical benefits, **29:226**

mental health benefits, **29:227**

making 1/3-2/3 determination, **29:228**

1/3-2/3 determination, **29:228**

Disclosure requirement, increased cost exemption, **29:236**

Exemptions, **29:233, 29:234**

General requirements

general discussion, **29:221 to 29:236**

aggregate limits, **29:222**

applicability

group health plans, **29:230**

health insurance issuers, **29:232**

definitions, **29:223 to 29:228**

exemptions, **29:233, 29:234**

group health plans, applicability, **29:230**

### **MENTAL HEALTH PARITY ACT OF 1996—Cont'd**

General requirements—Cont'd  
health insurance issuers, applicability, **29:232**

Increased cost exemption, below other plans, **29:229**

small employer exemption, **29:233**

Group health plans, applicability, **29:230**

Health insurance issuers, applicability, **29:232**

Increased cost exemption

general discussion, **29:234**

disclosure requirement, **29:236**

notice requirement, **29:235**

Notice requirement, increased cost exemption, **29:235**

Other plans, **29:229**

Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (this index)

Small employer exemption, **29:233**

Sunset date extension, **29:237**

### **MERGER AGREEMENTS**

Agreements and Plans of Merger (this index)

### **MERGER CLAUSE**

Due diligence, integration or merger clause, **5:30**

Financial consultants, contracting with, **10:9**

Letters of intent, **9:11**

### **MERGER NEGOTIATIONS**

Disclosure (this index)

### **MERGER PLAN**

Agreement and Plan of Merger (this index)

### **MICHELLE'S LAW**

COBRA benefits, **29:78**

### **MOST FAVORED NATION**

Confidentiality agreements, **12:25**

### **MUNITIONS LIST**

Export Controls (this index)

**NATIONAL DEFENSE  
AUTHORIZATION ACT**

COBRA benefits, **29:77**

**NATIONAL PROVIDER  
IDENTIFIER (NPI)**

HIPPA, **29:206**

**NATIONAL SECURITY**

Government Contracts and Contractors (this index)

**NATURAL DISASTERS AND  
CALAMITIES**

Material adverse changes, carve-outs, **13:27**

**NEGLIGENCE**

Contracting with financial consultants, **10:12**

**NEGOTIATIONS**

General discussion, **1:5 to 1:23**

Antitrust, pre-merger negotiations, **App 11E**

Checklists, **3:9**

Comments, reacting to, **1:9**

Communications, **1:22, 1:23**

Compromise, **1:13**

Control of session, maintaining, **1:11**

Directors. Fiduciary Obligations of Directors (this index)

Disclosure of merger negotiations. Disclosure (this index)

Facilitating the agreement, **1:15**

Issues, identify and prioritize, **1:21**

Letters of intent, obligation to negotiate in good faith. Letters of Intent (this index)

Management, talking to, **1:22**

One-sided document, dealing with, **1:8**

Organization, **1:20, 1:21**

Persistence, **1:16**

Preparation, **1:20**

Seller's duty to disclose under state tort law, suggestions for avoiding problems in merger negotiations, **6:11**

Skills

general discussion, **1:12 to 1:17**

**NEGOTIATIONS—Cont'd**

Skills—Cont'd

compromise, **1:13**

facilitating the agreement, **1:15**

other side, making a hero, **1:17**

persistence, **1:16**

Strategy

general discussion, **1:6**

Skills, above

Style, below

timing, **1:18**

weaknesses, **1:19**

Style

general discussion, **1:7 to 1:11**

comments, reacting to, **1:9**

control of session, maintaining, **1:11**

one-sided document, dealing with, **1:8**

Timing, **1:18**

Weaknesses, **1:19**

**NEWBORNS' AND MOTHERS'  
HEALTH PROTECTION ACT**

General discussion, **29:254, 29:255**

Exceptions and limitations, **29:257**

Final regulations, **29:259**

Notice requirements, **29:258**

Prohibitions, **29:256**

**NO HAND PROVISIONS**

Poison pills, definitions, **48:16**

**NO SHOP**

Protecting the deal, **4:3**

**NONCOMPETITION  
AGREEMENTS**

General discussion, **24:35**

Independent contractors, **24:36**

Restrictive covenants. Covenants (this index)

**NONSOLICITATION**

Confidentiality agreements, **12:20**

**NOTICE**

Article 6. Bulk Sales (this index)

COBRA benefits (this index)

Confidentiality agreements, **12:6**

## INDEX

### NOTICE—Cont'd

- Environmental liabilities, allocation agreements, insufficient notice, **19:36**
- HIPPA (this index)
- Mental Health Parity Act, increased cost exemption, notice requirements, **29:235**
- National Medical Support Notice, **29:252**
- Newborns' and Mothers' Health Protection Act, notice requirements, **29:258**
- Premerger notification. Antitrust (this index)
- Qualified medical support orders, **29:251, 29:252**
- WARN Act requirements. WARN Act (this index)
- Women's health. Women's Health and Cancer Rights Act (this index)

### NOVATION

- Government contracts, **47:5, 47:6**

### NUCLEAR REGULATORY COMMISSION

- DOE/Nuclear Regulatory Commission restriction on classified contracts, **47:41**

### OBLIGATION TO REDEEM POISON PILLS

- General discussion, **48:20**

### OFAC

- Government Contracts and Contractors (this index)

### OFFICERS

- Covenants, third parties, **38:36**
- Fiduciary duties, **1:93, 5:11**

### OPINIONS

- Legal Opinions (this index)
- Merger analysis, opinion letter, **11:70**
- Solvency opinions, **1:36**

### ORDERS

- Bankruptcy, approving asset purchase agreement, **App 44B**

### ORDERS—Cont'd

- Qualified Medical Child Support Orders (this index)

### OWNERSHIP OF CLAIM

- WARN Act, penalties, **22:47**

### PANDEMIC

- WARN Act, **25:37, App 25B**

### PARENT'S LIABILITIES FOR SUBSIDIARIES

- General discussion, **18:1 to 18:34**
- Age Discrimination in Employment Act, violation of, **18:15**
- Alter ego exception
  - general discussion, **18:4**
  - inadequate capitalization, **18:11**
  - mere unity of financial interest, ownership, and control not enough for alter ego, **18:7**
  - standing, **18:12**
  - subsidiary as "shell" of parent, **18:6**
  - substance rules over form, **18:5**
  - tort and contract cases, **18:8 to 18:10**
- Assumption of subsidiary's duty by parent, **18:36**
- Economic realities test, **18:17**
- Environmental Liabilities (this index)
- Fraud prevention, piercing the veil, **18:3**
- Inadequate capitalization, alter ego exception, **18:11**
- Piercing the veil
  - general discussion, **18:2**
  - Alter ego exception, above
  - environmental cases, **18:21, 18:22**
  - fraud prevention, **18:3**
  - Statutory violations, below
- Planning suggestions, **18:37**
- Standing, alter ego exception, **18:12**
- Statutory violations
  - general discussion, **18:13**
  - Age Discrimination in Employment Act, **18:15**
  - Environmental Liabilities (this index)

**PARENT'S LIABILITIES FOR  
SUBSIDIARIES—Cont'd**

Statutory violations—Cont'd  
Worker Readjustment and Retraining Notification Act (WARN),  
**18:14**  
Tort and contract cases, alter ego  
exception, **18:8 to 18:10**  
WARN Act, **25:6**

**PAROL EVIDENCE**

Letters of intent, **9:8**

**PARTNERSHIPS**

Income tax considerations, **17:19**  
Premerger notification, special rules,  
**11:28**

**PATENTS**

Intellectual Property (this index)

**PAUL WELLSTONE AND PETE  
DOMENICI MENTAL  
HEALTH PARITY AND  
ADDICTION EQUITY ACT OF  
2008**

General discussion, **29:238 to 29:248**  
Interim final regulations  
general discussion, **29:239 to  
29:248**  
aggregate lifetime and annual  
limits, **29:240**  
cost exemption, **29:245**  
exemption, cost, **29:245**  
financial requirements, **29:241**  
independent standards, **29:243**  
insurers, **29:246**  
nonquantitative treatment limita-  
tions, **29:242**  
provision of benefits, **29:244**  
special parity rule, applicability  
date, **29:248**  
special parity rule, prescription  
drug programs, **29:247**  
treatment limitations, **29:241**  
Mental Health Parity Act of 1996  
(this index)

**“PAY OR PLAY” LEGISLATION**

Health and Welfare Plans (this index)

**PAYMENT**

Health and welfare plans, **29:326**  
Purchase Price (this index)

**PENALTIES**

Economic Espionage Act of 1996,  
**12:50**  
Export Controls (this index)  
Genetic Information Nondiscrimina-  
tion Act (GINA), **29:303**  
HIPPA, **29:173**  
WARN Act (this index)

**PENSION PLANS**

General discussion, **1:81**  
Defined benefit plans, **28:2**  
Labor law obligations, **24:26**  
Partial termination of plans in RIFs  
general discussion, **27:1 to 27:14**  
determining whether percentage is  
“significant,” **27:12**  
horizontal partial termination,  
**27:13**  
In re Gulf Pension litigation,  
background, **27:4**  
relevant time period, **27:10**  
remedies for partial termination,  
**27:14**  
significant corporate event, **27:11,**  
**27:12**  
statutory framework, **27:2**  
successor employer, transfer to,  
**27:8**  
turnover rate, **27:9**  
vertical partial termination  
general discussion, **27:5**  
factors used in calculating  
number or percentage, **27:6**  
**to 27:10**  
relevant time period, **27:10**  
successor employer, transfer to,  
**27:8**  
turnover rate, **27:9**  
vested vs. nonvested employees,  
**27:7**  
vested vs. nonvested employees,  
**27:7**  
when does partial termination  
occur, **27:3**



## INDEX

### PERFORMANCE FORECASTS

Material adverse changes, carve-outs,  
**13:24**

### PERSONAL JURISDICTION

Due diligence, **5:14**

### PERSONNEL

Checklists, **3:3**

Consultants. Contracting with  
Financial Consultants (this  
index)

Due Diligence (this index)

### PIERCING THE VEIL

Parent's Liabilities for Subsidiaries  
(this index)

### PLANT CLOSINGS

WARN Act (this index)

### POISON PILLS

General discussion, **48:1, App 48A,**  
**App 48B**

Amendments to bylaws: filings, secu-  
rities considerations, **48:26**

Checklist, **App 48A**

Chewable pills, poison pills and  
general discussion, **48:4**

form: sunset provision, **48:8**

redemption, **48:9**

sample: chewable pill/board evalu-  
ated qualifying offer, **48:7**

sample: chewable pill/independent  
board determines exempt  
offer, **48:6**

sample: chewable pill/permitted  
offer involving two classes of  
stock, **48:5**

Dead hand provisions, definitions,  
**48:16**

Definitions

dead hand provisions, **48:16**

flip-in and flip-over provisions  
general discussion, **48:13**

sample: flip-in provision, **48:14**  
sample: flip-over provision,  
**48:15**

form: sunset provision, **48:8**

no hand provisions, **48:16**

### POISON PILLS—Cont'd

Definitions—Cont'd

poison pills and chewable pills

general discussion, **48:4**

form: sunset provision, **48:8**

redemption, **48:9**

sample: chewable pill/board  
evaluated qualifying offer,  
**48:7**

sample: chewable pill/  
independent board  
determines exempt offer,  
**48:6**

sample: chewable pill/permitted  
offer involving two classes  
of stock, **48:5**

redemption, **48:9**

samples

“acquiring person” defined,  
triggers, **48:12**

chewable pill/board evaluated  
qualifying offer, **48:7**

chewable pill/independent board  
determines exempt offer,  
**48:6**

chewable pill/permitted offer  
involving two classes of  
stock, **48:5**

flip-in provision, **48:14**

flip-over provision, **48:15**

rights nullified, triggers, **48:12**

triggers, **48:11, 48:12**

slow hand provisions, **48:16**

triggers

general discussion, **48:10**

sample: “acquiring person”  
defined, **48:12**

sample: rights nullified, **48:12**

sample: trigger, **48:11**

Delaware, **48:17, App 48B**

Drafting hints, **48:18**

Filings, securities considerations,  
**48:24**

Flip-in and flip-over provisions

general discussion, **48:13**

sample: flip-in provision, **48:14**

sample: flip-over provision, **48:15**

Form, sunset provision, **48:8**

**POISON PILLS—Cont'd**

- Inclusion of shareholder bylaw proposals in proxy statements, securities considerations, **48:25**
- Investment Company Act of 1940, **48:21**
- No hand provisions, **48:16**
- Obligation to redeem poison pills, **48:20**
- Poison puts, **48:27**
- Protecting the deal, relief from poison pills, **4:5**
- Proxy statements, shareholder bylaw proposals in, securities considerations, **48:25**
- Purpose, **48:2**
- Redemption, **48:9, 48:20**
- Rescission, support for, **48:3**
- Samples
  - “acquiring person” defined, triggers, **48:12**
  - chewable pill/board evaluated qualifying offer, **48:7**
  - chewable pill/independent board determines exempt offer, **48:6**
  - chewable pill/permitted offer involving two classes of stock, **48:5**
  - flip-in provision, **48:14**
  - flip-over provision, **48:15**
  - rights nullified, triggers, **48:12**
  - triggers, **48:11, 48:12**
- Securities considerations
  - general discussion, **48:23**
  - amendments to bylaws: filings, **48:26**
  - filings, **48:24**
  - inclusion of shareholder bylaw proposals in proxy statements, **48:25**
- Shareholder bylaws
  - amendments, **48:22**
  - proposals in proxy statements, securities considerations, **48:25**
- Slow hand provisions, **48:16**
- States other than Delaware, **48:19**
- Sunset provision, form, **48:8**
- Support for rescission, **48:3**

**POISON PILLS—Cont'd**

- Triggers
  - general discussion, **48:10**
  - samples
    - “acquiring person” defined, **48:12**
    - rights nullified, **48:12**
    - trigger, **48:11**
- Wesco International, Inc rights agreement, **App 48C**

**POISON PUTS**

- General discussion, **48:27**

**POLITICAL CONDITIONS**

- Material adverse changes, carve-outs, **13:15**

**POST-ACQUISITION ISSUES**

- Export Controls (this index)

**POST-CLOSING**

**CONSIDERATIONS**

- General discussion, **1:105**

**PRE-DEAL CONSIDERATIONS**

- General discussion, **2:1 to 2:10**
- Confidentiality Agreements (this index)
- Due Diligence (this index)
- Finders' agreements, **2:1, 2:2**
- Letters of Intent (this index)
- Price. Purchase Price (this index)

**PREEMPTION**

- Cafeteria plans, **29:284**
- COBRA Benefits (this index)

**PREEXISTING CONDITIONS**

- HIPPA (this index)

**PREGNANCY**

- COBRA, maternity and newborn coverage, **29:97**
- Statutory rights. Newborns' and Mothers' Health Protection Act (this index)

**PRICE**

- Purchase Price (this index)

**PRIORITY STATUS OF CLAIM**

- WARN Act, **22:59**

## INDEX

### PRIVACY

- Health and welfare plans, **29:15**
- HIPPA (this index)

### PRIVATE SECURITIES LITIGATION REFORM ACT OF 1995

- Disclosure of merger negotiations,  
**30:5**

### PRIVILEGE

- General discussion, **1:60**
- Antitrust issues, attorney-client privilege, **11:11**
- Due diligence, privileged records,  
**5:24**

### PRODUCTS LIABILITY OF SUCCESSOR CORPORATIONS

- General discussion, **1:91, 8:1 to 8:17**
- Assumption of liability, express or implied, **8:3**
- Bankruptcy, successor actions in,  
**8:15**
- Conclusion, **8:17**
- Consolidation or merger exception to general rule, **8:4**
- Continuity of enterprise, **8:8**
- Dissolution of corporation, **8:13**
- Duty to warn, **8:10**
- Exceptions to general rule
  - general discussion, **8:2 to 8:9**
  - assumption of liability, express or implied, **8:3**
  - consolidation or merger, **8:4**
  - fraud, **8:5**
  - Mere continuation, below product line theory, **8:9**
- Fraud exception to general rule, **8:5**
- Limitations of actions, **8:12**
- Mere continuation exception to general rule
  - general discussion, **8:6**
  - continuity of enterprise, **8:8**
  - traditional exception, **8:7**
- Product line theory, exceptions to general rule, **8:9**
- Repose, statute of, **8:14**

### PRODUCTS LIABILITY OF SUCCESSOR CORPORATIONS—Cont'd

- Statutory issues
  - general discussion, **8:11**
  - corporate dissolution, **8:13**
  - limitations of actions, **8:12**
  - statute of repose, **8:14**
- Warranties, **1:58**

### PROTECTING THE DEAL

- General discussion, **4:1, 4:18**
- Cases addressing protective measure provisions, **App 4A**
- Contract provisions, **4:19 to 4:22**
- Cumulative effect of protective measures, **4:17**
- Delegation, **4:25**
- Exculpatory provisions, **4:24**
- Fees, **4:4**
- Fiduciary-out, **4:21**
- Go-shop, **4:22**
- Injunctive relief, **4:16**
- Lock-ups, **4:2**
- No shop, **4:3**
- Poison pills, relief from, **4:5**
- Procedures and practices, **4:27**
- Relief from poison pills, **4:5**
- Sample protective measure provisions, **App 4B**
- Statutes
  - general discussion, **4:23**
  - conflicts of interest, **4:26**
  - delegation, **4:25**
  - exculpatory provisions, **4:24**
- Walk rights, **4:20**

### PROXY STATEMENTS

- Poison pills, securities considerations, **48:25**

### PURCHASE PRICE

- Adjustment of price, escrow agreements, **7:3**
- Allocation of purchase price in taxable transactions. Tax Aspects (this index)
- Balance sheet and inventory adjustment, **1:43**
- Cash payment, **1:38**

**PURCHASE PRICE—Cont'd**

- Covenant not to compete, **1:44**
- Debt securities, way of paying, **1:39**
- Determining price
  - general discussion, **1:41**
  - balance sheet and inventory adjustment, **1:43**
  - covenant not to compete, **1:44**
  - earnout, **1:42**
  - employment contracts, **1:45**
- Discounts for cleanup liabilities.
  - Environmental Liabilities (this index)
- Discussion outline, purchase price considerations, **2:9**
- Earnout, **1:42**
- Equity securities, way of paying, **1:40**
- Form of purchase price adjustment provision, **2:10**
- Payment options
  - general discussion, **1:38**
  - cash, **1:38**
  - debt securities, **1:39**
  - equity securities, **1:40**

**PURSUIT OF CLAIM**

- WARN Act, **22:58**

**QUALIFIED MEDICAL CHILD SUPPORT ORDERS**

- General discussion, **29:249, 29:250**
- Compliance guide, **29:253**
- National Medical Support Notice, **29:251**
- Notice, required, **29:251**

**RECORDKEEPING**

**REQUIREMENTS**

- COBRA benefits, electronic communications, **29:138**
- Export controls, **46:42, 46:57**

**RECOVERY OF EXPENSES**

- Disappointed bidder litigation, **34:28**

**REDEMPTION**

- Poison pills, **48:9, 48:20**

**REDUCTION IN FORCE**

- Labor and Employment (this index)

**REDUCTION IN FORCE—Cont'd**

- Pension Plans (this index)

**REGISTRATION**

- Brokers, export controls, **46:60, 47:26**
- Federal Reserve requirements, **1:69, 1:71**
- Mark, assignment of registration and application for registration, **15:8, 15:9**
- Munitions manufacturer, registration as, **46:25, 46:55, 47:25**
- Securities laws, **1:65**

**REHIRINGS**

- Warn act
  - counting rules, **25:20**

**RELEASES**

- WARN Act, **22:55**

**RELIANCE**

- Disclosure of merger negotiations,
  - reliance, causation, and materiality, **30:9**
- Due Diligence (this index)
- Opinions. Legal Opinions (this index)

**RELOCATION**

- Labor and Employment (this index)

**REORGANIZATIONS**

- Bankruptcy and reorganization
  - issues. Bankruptcy (this index)
- COBRA in corporate reorganizations.
  - COBRA Benefits (this index)
- Tax-free reorganizations. Tax Aspects (this index)

**REPORTING, FINANCIAL**

- Contracting with financial consultants, **10:10**

**REPOSE, STATUTE OF**

- Products liability of successor corporations, **8:14**

**REPRESENTATIONS**

- General discussion, **14:1**
- Confidentiality agreements, **12:18**
- Content of documents, **1:54**

## INDEX

### REPRESENTATIONS—Cont'd

- Debtor's representations re trademarks, patents, and copyrights, **15:14**
- Employee benefit plans, issues relating to representations, **28:21, 28:22**
- Environmental liabilities, limiting, **19:11**
- Government Contracts and Contractors (this index)
- Letters of intent, prior representations, **9:30**
- Warranties (this index)

### RESCISSION

- Environmental liabilities, **19:26**
- Poison pills, **48:3**

### RESTRICTIVE COVENANTS

- Covenants (this index)

### RETIREMENT AND RETIREES

- Benefit costs, **1:82**
- COBRA liabilities. COBRA Benefits (this index)
- Liabilities, accrued portion of post-retirement benefits, **29:13**
- Medical and life insurance benefits, **28:5**
- Pension Plans (this index)

### S CORPORATIONS

- Tax Aspects (this index)

### SAMPLES

- Poison Pills (this index)

### SAN FRANCISCO'S EMPLOYER HEALTH SPENDING MANDATE

- Health and welfare plans, **29:331**

### SANCTIONS PROGRAMS

- Export Controls (this index)

### SCHIP

- HIPPA (this index)

### SEASONAL FLUCTUATIONS

- Material adverse changes, carve-outs, **13:22**

### SEC FILINGS

- Materials from, **App B**

### SEC RULES

- Disclosure of merger negotiations.
  - Disclosure (this index)
- Mergers, SEC rules governing, **31:16**
- Rule 145
  - general discussion, **31:1 to 31:16**
  - domicile, change in
    - general discussion, **31:8**
    - application, **31:9**
    - extension, **31:10**
- Form S-4 registration statement, **App 31B**
- mergers, SEC rules governing, **31:16**
- nonregistered securities, **31:15**
- no-sale theory, rejection of, **31:2**
- private sale, **31:14**
- reclassifications, **31:4**
- registration, **31:11**
- resale restrictions
  - general discussion, **31:12**
  - nonregistered securities, **31:15**
  - private sale, **31:14**
  - sales by underwriters, **31:13**
- safe harbor, **31:7**
- text of rule, **App 31A**
- transactions constituting sales
  - general discussion, **31:3**
  - reclassifications, **31:4**
  - transfers of assets, **31:5**
- transactions excluded from rule
  - general discussion, **31:6**
  - Domicile, change in, above
    - exempt transactions, **31:6**
    - safe harbor, **31:7**
  - transfers of assets, **31:5**
  - underwriters, sales by, **31:13**

### SECTION 401(K) PLANS

- Nondiscrimination testing and deduction issues, **28:14**

### SECURITIES CONSIDERATIONS

- Poison pills, **48:23-48:26**

### SECURITIES FRAUD

- Due diligence, **5:8**

## SECURITIES LAW

- General discussion, **1:64**
- Confidentiality, maintaining, **1:67**
- Disclosure, **1:66**
- Private Securities Litigation Reform Act of 1995, **30:5**
- Registration, **1:65**
- Short swing profits, **1:68**

## SECURITIES OFFERINGS

- Tax Aspects (this index)

## SECURITY AGREEMENTS

- Intellectual Property (this index)

## SEVERANCE PAY PLANS

- General discussion, **33:1 to 33:9**
- Absence of written policy, **33:3**
- Benefits, denial of, **33:10**
- Corporate contacts, **33:5**
- Denial of benefits, **33:10**
- Discrimination in severance pay, **33:11**
- ERISA and regulations
  - general discussion, **33:2**
  - termination or amendment of plan before RIF, ERISA notification and disclosure issues, **33:8**
- Establishment of plan
  - general discussion, **33:3**
  - absence of written policy, **33:3**
  - corporate contacts, **33:5**
  - internal policy statements, **33:4**
  - ongoing administrative scheme, **33:6**
- Hidden plan assets and liabilities, **28:6**
- Internal policy statements, **33:4**
- Interpreting plan language, **33:9**
- Ongoing administrative scheme, **33:6**
- Panel discussion, **28:25**
- Sample policies, **App 33A**
- Termination or amendment of plan before RIF
  - ERISA notification and disclosure issues, **33:8**
  - fiduciary duty, **33:7**
- Window and severance pay arrangements, **28:23**

## SHARES AND SHAREHOLDERS

- Checklists, board of directors and/or shareholder approval, **3:4**
- Merger negotiations, required disclosures. Disclosure (this index)
- Poison pills, bylaws, **48:22, 48:25**
- Spin-Offs (this index)

## SINGLE EMPLOYER DOCTRINE

- Labor and Employment (this index)

## SLOW HAND PROVISIONS

- Poison pills, **48:16**

## SOFTWARE

- Export controls, **46:8, 46:51**
- Government contractors, rights in technical data and computer software, **47:14 to 47:16**
- Ownership, **1:74**
- Third-party software, **1:75**

## SOLVENCY OPINIONS

- General discussion, **1:36**

## SPECIFIC PERFORMANCE

- Environmental liabilities, **19:26**

## SPIN-OFFS

- General discussion, **39:5, 40:1 to 40:57**
- Asset transfer. Transfer of assets, below
- Borrowing costs, increase in, **40:49**
- Conflicts of interest, risk of, **40:41**
- Conoco Phillips/Phillips 66, **40:13**
- Consultants, **40:55**
- Corporate services, replacement of, **40:46**
- Customer relationships, risk to, **40:42**
- Dean Foods/TreeHouse Foods, **40:16**
- Debt, increased, risk of, **40:45**
- Definition
  - general discussion, **40:1**
  - dividend, **40:2**
  - not a sale of securities, **40:4**
  - transfer of assets, **40:3**
- Description, **40:5**
- Distributed shares, sales of, **40:48**

## INDEX

### SPIN-OFFS—Cont'd

- Distribution of shares
  - general discussion, **40:23**
  - parent, retention of shares by, **40:26**
  - set terms, **40:24**
  - transfer of ownership, **40:25**
- Dividend defined, **40:2**
- Documenting
  - general discussion, **41:1**
  - forms, illustrative, **41:2**
- Economies of scale, loss of, **40:43**
- Employment benefits issues, **40:54**
- Fluor Corp./Massey Energy, **40:15**
- Forms, illustrative, **41:2**
- Indemnification obligation to parent, **40:50**
- Information statement, **40:22**
- Initial public offering, **40:27**
- Insurance, **40:56**
- Key personnel, loss of, **40:53**
- Lucent Technologies/Avaya, **40:14**
- Multiple agreements, **40:19**
- Not a sale of securities, **40:4**
- Parent
  - retention of shares by, **40:26**
  - risks to parent. Risks, below
- Proxy material and prospectus, **40:21**
- Pure, **39:6, 40:8**
- Reasons for
  - general discussion, **40:12**
  - Conoco Phillips/Phillips 66, **40:13**
  - Dean Foods/TreeHouse Foods, **40:16**
  - Fluor Corp./Massey Energy, **40:15**
  - Lucent Technologies/Avaya, **40:14**
  - Sara Lee/Hanesbrands, **40:17**
- Reorganized (“D”/355), **39:7, 40:9**
- Revenue Procedure 2024-24 (Internal Revenue Service), **App 40-B**
- Risks
  - general discussion, **40:29**
  - borrowing costs, increase in, **40:49**
  - conflicts of interest, **40:41**
  - corporate services, replacement of, **40:46**
  - customers, relationship with, **40:42**
  - debt, increased, **40:45**

### SPIN-OFFS—Cont'd

- Risks—Cont'd
  - distributed shares, sales of, **40:48**
  - economies of scale, loss of, **40:43**
  - financial information, **40:40**
  - indemnification obligation to parent, **40:50**
  - key personnel, loss of, **40:53**
  - no existing market for shares, **40:44**
  - parent, risks to
    - general discussion, **40:46, 40:51**
    - borrowing costs, increase in, **40:49**
    - corporate services, replacement of, **40:46**
    - distributed shares, sales of, **40:48**
    - indemnification obligation to parent, **40:50**
    - key personnel, loss of, **40:53**
    - shareholder base, fluctuation in, **40:52**
    - strategic transaction, limitation on ability to pursue, **40:47**
  - shareholder base, fluctuation in, **40:52**
  - shareholder litigation, **40:32**
  - strategic transaction, limitation on ability to pursue, **40:47**
- subsidiary, risks to
  - general discussion, **40:39**
  - conflicts of interest, **40:41**
  - customers, relationship with, **40:42**
  - debt, increased, **40:45**
  - economies of scale, loss of, **40:43**
  - financial information, **40:40**
  - no existing market for shares, **40:44**
  - tax-free status, revocation, **40:31**
- transaction, risks created by
  - general discussion, **40:30**
  - breach of contract, **40:36**
  - breach of duties, shareholder litigation, **40:33**
  - corporate waste, shareholder litigation, **40:34**



**SPIN-OFFS—Cont'd**

Risks—Cont'd  
 transaction, risks created by  
   —Cont'd  
     fiduciary duty, **40:38**  
     fraudulent transactions,  
       shareholder litigation,  
       **40:35**  
     security fraud, shareholder liti-  
       gation, **40:37**  
     shareholder litigation, **40:32,**  
       **40:37**  
     tax-free status, revocation, **40:31**  
 Sara Lee/Hanesbrands, **40:17**  
 SEC Staff Legal Bulletin No. 4, **App**  
   **40A**  
 Separation agreement, illustrative  
   forms, **41:2**  
 Set terms, **40:24**  
 Shareholder base, fluctuation in,  
   **40:52**  
 Shareholder information  
   general discussion, **40:20**  
   information statement, **40:22**  
   proxy material and prospectus,  
   **40:21**  
 Shareholder litigation, risk of  
   generally, **40:32**  
   breach of contract, **40:36**  
   breach of duties, **40:33**  
   fiduciary duty, **40:38**  
   fraudulent transfers, **40:35**  
   security fraud, **40:37**  
 Split-off, **39:8, 40:10**  
 Split-up, **39:9, 40:11**  
 Strategic transaction, limitation on  
   ability to pursue, **40:47**  
 Structure of transaction  
   general discussion, **40:18 to 40:28**  
   asset transfer, **40:28**  
   Distribution of shares, above  
   initial public offering, **40:27**  
   multiple agreements, **40:19**  
   Shareholder information, above  
   transfer of assets, **40:28**  
 Subsidiaries, risks to. Risks, above  
 Tax-free status, risk of revocation,  
   **40:31**

**SPIN-OFFS—Cont'd**

Transaction risks. Risks, above  
 Transfer of assets  
   defined, **40:3**  
   structure of transaction, **40:28**  
 Transfer of ownership, **40:25**  
 Types of transactions  
   general discussion, **40:6**  
   spin-off  
     general discussion, **40:7**  
     pure, **39:6, 40:8**  
     reorganized (“D”/355), **39:7,**  
       **40:9**  
   split-off, **39:8, 40:10**  
   split-up, **39:9, 40:11**

**STANDING**

Disappointed bidder litigation, **34:29**  
 Parent’s liabilities for subsidiaries,  
   alter ego exception, **18:12**  
 WARN Act, **25:42**

**STANDSTILL PROVISIONS**

Confidentiality agreements, **12:21**  
 Disappointed bidder litigation, **34:9**

**STATE TRANSFER LAWS**

General discussion, **23:1 to 23:16**  
 Brownfields laws, **23:15**  
 California laws, **23:13**  
 Connecticut laws, **23:11**  
 How state laws affect corporate  
   transactions, **23:2**  
 Indiana laws, **23:12**  
 Iowa laws, **23:10**  
 Michigan laws, **23:13**  
 New Jersey laws  
   general discussion, **23:3**  
   general exemptions, **23:6**  
   other provisions in ISRA, **23:9**  
   process, **23:7**  
   subject parties, **23:4**  
   trigger of statute, **23:5**  
   violation and penalty provisions,  
   **23:8**  
 Ohio laws, **23:14**  
 Oregon laws, **23:12**

**STATUTE OF FRAUDS**

Letters of intent, **9:9**

## INDEX

### STATUTE OF LIMITATIONS

- Antitrust, merger analysis, post-merger challenges, **11:64**
- Bulk sales, **36:14, 36:25**
- Environmental liabilities, allocation agreements, **19:29**
- Legal opinions, reliance on, **42:27**
- Products liability of successor corporations, **8:12**
- WARN Act, **22:49**

### STAYS

- Bankruptcy, automatic stay, **44:18**

### STOCK ACTIVITY

- Material adverse changes, carve-outs, **13:25**

### STOCK PURCHASE AGREEMENT

- Restrictive covenants, **38:4**

### STRATEGY

- Negotiations (this index)

### SUBCONTRACTORS

- Export controls, **46:37, 46:53**
- Government contracts, **47:3**

### SUBSIDIARIES

- Employment discrimination, parent's liability for statutory violations, **18:15, 18:16**
- Environmental violations.
  - Environmental Liabilities (this index)
- Forward subsidiary merger, **16:15**
- Liabilities. Parent's Liability for Subsidiaries (this index)
- Reverse subsidiary merger, **16:16**
- Spin-Offs (this index)
- WARN Act, **25:6**

### SUBSTANTIVE LEGAL ISSUES

- General discussion, **1:61**
- Antitrust (this index)
- Bankruptcy (this index)
- Bulk sales (UCC Article 6), **1:102**
- Checklist, **3:6**
- Computer issues, **1:103**
- Employees
  - Employee Benefit Plans (this index)

### SUBSTANTIVE LEGAL ISSUES

#### —Cont'd

- Employees—Cont'd
  - Labor and Employment (this index)
- Environmental Liabilities (this index)
- Federal Reserve requirements, **1:69 to 1:72**
- Intellectual Property (this index)
- International law, **1:100**
- Securities Laws (this index)
- Successor Liability (this index)
- Tax Aspects (this index)
- Tort law, state, **1:101**
- Uniform Commercial Code Article 6, **1:102**

### SUCCESSOR LIABILITY

- General discussion, **1:90**
- Acquisition of debtor in Chapter 11.
  - Bankruptcy (this index)
- Bankruptcy (this index)
- Criminal liability, **1:92**
- Employers. Labor and Employment (this index)
- Insurance Coverage for Corporate Successors (this index)
- Products Liability of Successor Corporations (this index)
- Withdrawal liability in corporate transactions, **26:31**

### SUFFOLK COUNTY, NEW YORK LAW

- Health and welfare plans, **29:329**

### SUNSET PROVISION

- Poison pills, form, **48:8**

### SUPPORT

- Poison pills, support for rescission, **48:3**
- Qualified Medical Child Support Orders (this index)

### TAX ASPECTS

- General discussion, **16:1 to 16:54**
- Active businesses. Tax-free distributions, below
- Allocation of purchase price. Taxable transactions, below

**TAX ASPECTS—Cont'd**

- Amortization of purchased intangibles under section 197, **16:36**
- Asset purchase taxable transactions
  - general discussion, **16:21**
  - aggregate basis to P, determination general discussion, **16:22**
  - assumption of liabilities, **16:24**
  - cash, **16:23**
  - deferred purchase price, **16:25**
  - allocation of purchase price in asset acquisitions, **16:35**
  - assumption of liabilities, **16:24**
  - deferred purchase price, **16:25**
  - model asset purchase agreement, **37:1, 37:2**
  - rules, **16:21**
  - special problems in taxable transactions. Taxable transactions, below
- Asset sale, should target be liquidated, **16:38**
- Assets, unwanted, disposition of, **16:20**
- Bankruptcy
  - asset purchases through bankruptcy, **44:15**
  - reorganization, and, **43:29**
- Bulk sales, tax statutes, **36:32**
- Carryovers. Net operating loss carryovers, below
- Cash, problems in getting to T shareholders, **16:19**
- COBRA benefits
- Confidentiality agreements, tax reporting implications. Confidentiality Agreements (this index)
- Continuity issues. Tax-free reorganizations, below
- Device factors. Tax-free distributions, below
- Disposition of unwanted assets, **16:20**
- Distributions. Tax-free distributions, below
- Drafting acquisition agreement, **16:54**

**TAX ASPECTS—Cont'd**

- Election under section 338(h)(10). Mergers and acquisitions, below
- Expenses, **1:99**
- Foreign offering issues. Public securities offerings, below
- Forms of corporate acquisitions, **App 17A**
- Forward subsidiary merger, **16:15**
- General rules, **1:97**
- Health and welfare plans, **29:326, 29:334**
- Installment sales (I.R.C. section 453), **16:39**
- Intangibles, purchased, amortization under section 197, **16:36**
- Joint buyer strategies, **16:53**
- Merger transactions. Tax-free reorganizations, below
- Mergers and acquisitions, federal income tax considerations
  - general discussion, **17:1 to 17:19**
  - ancillary considerations
    - choice of entity for buyer, **17:19**
    - documentation, **17:18**
    - LLCs and partnerships, **17:19**
  - asset deal
    - general discussion, **17:2**
    - reasons to prefer, **17:8**
    - tax consequences, **17:13**
- basic acquisition structures
  - general discussion, **17:2 to 17:7**
  - asset deal, **17:2**
  - consideration, forms of, **17:7**
  - hybrids, **17:4, 17:5**
  - LLCs, **17:5**
  - Selecting a structure, below
  - stock deal, **17:3, 17:4**
  - Tax consequences, below
  - tax-free deals, **17:6**
- buyer, choice of entity for, **17:19**
- consideration, forms of, **17:7**
- documentation, **17:18**
- election under section 338(h)(10), stock deal with
  - acquisition structure, **17:4**
  - reasons to prefer, **17:10**
  - tax consequences, **17:14, 17:15**

## INDEX

### TAX ASPECTS—Cont'd

- Mergers and acquisitions, federal income tax considerations
  - Cont'd
  - forms of corporate acquisitions, **App 17A**
  - hybrids, **17:4, 17:5**
  - LLCs, **17:5, 17:19**
  - partnerships, **17:19**
  - selecting a structure
    - general discussion, **17:8 to 17:12**
    - asset deal, reasons to prefer, **17:8**
    - choosing among alternatives, **17:12**
    - stock deal, reasons to prefer, **17:9, 17:10**
  - Tax consequences, below
  - tax-free deal, reasons to prefer, **17:11**
- stock deal
  - general discussion, **17:3**
  - reasons to prefer, **17:9, 17:10**
  - with section 338(h)(10) election, **17:4, 17:10**
- tax consequences of structures
  - general discussion, **17:13 to 17:19**
  - asset deal, **17:13**
  - spin-offs, **17:17**
  - stock deal with section 338(h)(10) election, **17:15**
  - stock deal without section 338(h)(10) election, **17:14**
  - tax-free reorganizations, **17:16**
- tax-free deals
  - general discussion, **17:6**
  - reasons to prefer, **17:11**
  - summary, **App 17B**
  - tax consequences, **17:16**
  - Tax-free reorganization, below
- Net operating loss carryovers
  - general discussion, **16:46**
  - consolidated return regulations, **16:51**
  - Lisbon Shops doctrine, **16:50**
  - operation of section 382, **16:47**

### TAX ASPECTS—Cont'd

- Net operating loss carryovers
  - Cont'd
  - other restrictions on use
    - consolidated return regulations, **16:51**
    - Lisbon Shops doctrine, **16:50**
    - relationship of sections 269 and 382, **16:49**
    - section 269, **16:48, 16:49**
    - relationship of sections 269 and 382, **16:49**
    - state and local tax considerations, **16:52**
- Nondevice factors. Tax-free distributions, below
- Nondevice transactions, **39:23, 39:24**
- Operating loss carryovers. Net operating loss carryovers, above
- Planning for purchase or sale of corporate business
  - general discussion, **16:1 to 16:54**
  - Asset purchase taxable transactions, above
  - cast of characters, **16:1**
  - Net operating loss carryovers, above
  - S corporations, below
  - setting, **16:2**
  - Stock purchase taxable transactions, below
  - tax stakes, **16:3 to 16:7**
  - Taxable transactions, below
  - Tax-free reorganizations, below
  - transaction patterns, **16:6**
- Public securities offerings, federal income tax considerations
  - general discussion, **17:20 to 17:28**
  - asset securitization, **17:28**
  - debt instruments, significant modifications, **17:25**
  - foreign offering issues
    - inbound offerings, **17:27**
    - outbound offerings, **17:26**
  - original issue discount, **17:22**
  - preferred OID, **17:24**
  - tax disclosure, need for, **17:21**
  - tax-exempt bonds, discount and premium, **17:23**

**TAX ASPECTS—Cont'd**

- Purchase price, allocation of. Taxable transactions, below
- Rates, **1:98**
- Reporting requirements, tax-free distributions, **39:38**
- Reverse subsidiary merger, **16:16**
- S corporations, acquisitions involving
  - general discussion, **16:40**
  - assets, acquisition in exchange for stock of buyer or its parent (section 368(a)(1)(C)), **16:44**
  - mergers, tax-free, under I.R.C. section 368(a)(1), **16:42 to 16:45**
  - stock, acquisition in exchange for stock of buyer or its parent (section 368(a)(1)(B)), **16:43**
  - taxable sales, **16:41**
  - tax-free reorganizations
    - acquisition of target's stock in exchange for stock of buyer or its parent (section 368(a)(1)(B)), **16:43**
    - general problems of S corporation as buyer, **16:45**
    - statutory mergers (I.R.C. section 368(a)(1)), **16:42 to 16:45**
    - target's assets, acquisition in exchange for stock of buyer or its parent (section 368(a)(1)(C)), **16:44**
- Section 355. Tax-free distributions, below
- Securities offerings. Public securities offerings, above
- Spin-Offs (this index)
- State tax laws, tax-free distributions, **39:40**
- Stock purchase taxable transactions
  - general discussion, **16:26**
  - allocation of purchase price, **16:34**
  - buying subsidiary from affiliated group filing consolidated returns (Section 338(h)(10)), **16:31**
  - consistency requirement, **16:30**
  - disallowance of losses on sale of subsidiaries, **16:32**

**TAX ASPECTS—Cont'd**

- Stock purchase taxable transactions
  - Cont'd
  - general treatment of stock
    - purchase as asset purchase (Section 338)
    - general discussion, **16:27**
    - allocation of purchase price, **16:34**
    - buying subsidiary from affiliated group filing consolidated returns (Section 338(h)(10)), **16:31**
    - consistency requirement, **16:30**
    - purchase defined, **16:29**
    - treatment of target corporation as new corporation, **16:28**
  - purchase defined, **16:29**
  - special problems in taxable transactions. Taxable transactions, below
  - target corporation, treatment as new corporation, **16:28**
- Stock-for-asset exchanges (“C” exchanges), **16:13**
- Stock-for-stock exchanges (“B” reorganizations), **16:12**
- Straight merger of T into P, **16:14**
- Tax rates, **1:98**
- Taxable transactions
  - allocation of purchase price
    - amortization of purchased intangibles under section 197, **16:36**
    - asset acquisitions, **16:35**
    - significance of allocation, **16:33**
    - stock acquisitions under section 338, **16:34**
    - supporting allocations among assets, **16:37**
  - amortization of purchased intangibles under section 197, **16:36**
  - Asset purchase taxable transactions, above
  - asset sale, should target be liquidated, **16:38**
  - installment sales (I.R.C. section 453), **16:39**

## INDEX

### TAX ASPECTS—Cont'd

#### Taxable transactions—Cont'd

##### S corporations, **16:41**

##### special problems

general discussion, **16:33 to 16:39**

allocation of purchase price, **16:33 to 16:37**

asset sale, should target be liquidated, **16:38**

installment sales (I.R.C. section 453), **16:39**

Stock purchase taxable transactions, above

vs. tax-free reorganization, **16:7**

#### Tax-free distributions

general discussion, **39:1, 39:2**

##### acquisitions, limitations

general discussion, **39:34**

part of plan, **39:35**

stock acquisition, **39:32**

successor or predecessor, **39:36**

##### active businesses

general discussion, **39:25**

active conduct, **39:27**

examples, **39:29**

five-year threshold, **39:28**

trade or business, **39:26**

assets, nature and use, **39:17**

checklist questionnaire contents

(section 355), **App 39C**

control, relinquishing, **39:30**

corporate business purpose, **39:20**

##### device factors

general discussion, **39:14**

assets, nature and use, **39:17**

Nondevice factors, below

pro rata distribution, **39:15**

related function, **39:18**

subsequent sale or exchange of stock, **39:16**

device for distributing earnings, **39:13**

disqualified distribution, **39:37**

excess principal, limitations, **39:33**

federal income tax consequences

Masterbrand, Inc., spin-off, **App 39B**

### TAX ASPECTS—Cont'd

#### Tax-free distributions—Cont'd

federal income tax consequences—Cont'd

Vitesse Energy, spin-off, **App 39A**

five-year threshold, active businesses, **39:28**

##### limitations

general discussion, **39:30**

acquisitions, **39:34 to 39:36**

disqualified distribution, **39:37**

excess principal, **39:33**

stock acquisition, **39:31**

##### nondevice factors

general discussion, **39:19**

corporate business purpose, **39:20**

Device factors, above

domestic corporate shareholders, distributions to, **39:22**

publicly traded, widely held corporations, distributions by, **39:21**

nondevice transactions, **39:23, 39:24**

pro rata distribution, **39:15**

publicly traded, widely held corporations, distributions by, **39:21**

related function, **39:18**

reorganization of ownership. Tax-free reorganizations, below

reporting requirements, **39:38**

##### requirements

general discussion, **39:11 to 39:30**

Active businesses, above

control, relinquishing, **39:30**

Device factors, above

Nondevice factors, above

reporting requirements, **39:38**

stock or securities, distribution of, **39:12**

state tax laws, **39:40**

subsequent sale or exchange of stock, **39:16**

third-party review, **39:39**

**TAX ASPECTS—Cont'd**

Tax-free reorganizations  
 general discussion, **16:8, 39:3, App 17B**  
 boot issues, **16:18**  
 business enterprise, continuity of, **16:11**  
 cash, problems in getting to T shareholders, **16:19**  
 continuity issues  
   general discussion, **16:9**  
   business enterprise, continuity of, **16:11**  
   interest, continuity of, **16:10, 39:10**  
 disposition of unwanted assets, **16:20**  
 forward subsidiary merger, **16:15**  
 interest, continuity of, **16:10, 39:10**  
 merger transactions  
   forward subsidiary merger, **16:15**  
   Mergers and acquisitions, above  
   S corporations, above  
   straight merger of T into P, **16:14**  
   triangular mergers, **16:15 to 16:17**  
 other differences, **16:17**  
 reverse subsidiary merger, **16:16**  
 S corporations, above  
 shareholder treatment (“boot” issues), **16:18**  
 Spin-Offs (this index)  
 stock-for-asset exchanges (“C” exchanges), **16:13**  
 stock-for-stock exchanges (“B” reorganizations), **16:12**  
 straight merger of T into P, **16:14**  
 summary, **App 17B**  
 triangular mergers, **16:15 to 16:17**  
 types of transactions  
   general discussion, **39:4**  
   Spin-Offs (this index)  
   split-off, **39:8**  
   split-up, **39:9**  
 vs. taxable sale, **16:7**

**TAX ASPECTS—Cont'd**

Third-party review, tax-free distributions, **39:39**  
 Triangular mergers, **16:15 to 16:17**  
 Unwanted assets, disposition, **16:20**  
 Welfare Fund Arrangements

**TECHNICAL INFORMATION**

Confidentiality agreements, **12:13**

**TECHNOLOGY**

Antitrust issues, relevant “product” market in high technology cases, **11:43**  
 Computer issues, **1:103**  
 Export controls, **46:8, 46:51, 46:78, 47:31**  
 Government Contracts and Contractors (this index)  
 ICBD technology ownership and license agreement, **15:18**  
 Intellectual Property (this index)

**TERMINATION**

Escrow agent, **7:13 to 7:15**  
 Financial consultants, **10:11**  
 Material adverse change clauses, **13:29**  
 Termination fees. Protecting the Deal (this index)  
 Withdrawal liability in corporate transactions, termination premium, **26:29**

**THIRD PARTIES**

Disclosure on behalf of seller, third party’s obligation, **6:10**  
 Escrow funds, release of, third-party claims, **7:23-7:26**  
 Legal opinion, reliance on. Legal Opinions (this index)  
 Restrictive covenants. Covenants (this index)  
 Software, third-party, **1:75**

**TORTS**

Mass tort claims under plan of reorganization, protection from successor liability, **43:20**  
 Remedies. Disappointed Bidder Litigation (this index)



## INDEX

### **TORTS—Cont'd**

- Seller's duty to disclose under state tort law. Disclosure (this index)
- State tort law, **1:101**

### **TRADE SECRETS**

- Confidential relationships, **12:43**
- Defend Trade Secrets Act, **12:52**
- Misappropriation
  - general discussion, **12:37 to 12:42**
  - application, **12:40, 12:41**
  - confidential relationships, **12:43**
  - definition, **12:37**
  - Restatement of Torts, **12:38, 12:40**
  - unfair trade advantage, **12:42**
  - Uniform Trade Secrets Act, **12:39, 12:40**
  - UTSA vs. Restatement definitions, **12:40**
- Restatement of Torts, **12:38**
- Unfair trade advantage, **12:42**
- Uniform Trade Secrets Act, **12:39, 12:40**

### **TRADEMARKS**

- General discussion, **1:78**

### **TRANSFER LAWS**

- State Transfer Laws (this index)

### **TRANSFER OF ASSETS**

- Spin-Offs (this index)

### **TRANSFER OF GOODWILL**

- Restrictive covenants, **38:6**

### **TRIGGERS**

- Poison pills, **48:10-48:12**

### **UNFAIR COMPETITION**

- Federal Trade Commission Act, Section 5, **App 11F**

### **UNIFORM COMMERCIAL CODE**

- Article 6. Bulk Sales (this index)

### **UNINCORPORATED ENTITIES**

- Premerger notification, special rules, **11:27 to 11:29**

### **UNION ACTIVITY**

- Material adverse changes, carve-outs, **13:23**

### **UNION CONTRACTS**

- Employee benefit plans, **28:4, 28:19**

### **UNITED SERVICES**

#### **EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT**

- COBRA benefits, **29:76**

### **USERRA**

- COBRA benefits, **29:76**

### **VALUATION**

- Accounting (this index)

### **WAIVER**

- Article 6. Bulk Sales (this index)
- Confidentiality agreements, **12:7**

### **WALK RIGHTS**

- Protecting the deal, **4:20**

### **WARN ACT**

- General discussion, **1:89, 25:1 to 25:71**
- Arbitration, **25:47**
- Arbitration, **22:56**
- Bankruptcy
  - general discussion, **25:59 to 25:61**
  - claim, priority status of, **22:59**
  - claim, pursuit of, **22:58**
  - priority status of WARN Act claim, **22:59**
  - pursuit of WARN Act claim, **22:58**
- Burden of proof, penalties, **22:50**
- Checklist
  - general discussion, **22:60**
  - jurisdiction, **22:61**
  - mass layoffs, **22:62**
  - ninety-day rule, **22:64**
  - notice obligations, **25:68 to 25:71**
  - plant closings, **22:63**
  - sale of business, employment losses as result of, **22:65**
- Claims
  - priority status, **22:59**
  - pursuit, **22:58**
- Class action, **25:46**
- Compliance, good faith effort, **22:50**
- Contents
  - unrepresented employees, **25:32**

**WARN ACT—Cont'd**

- Control of claim, **22:47**
- Counting rules
  - aggregation of all employment losses, **25:19**
  - employees, counting, **25:3**
  - employer-initiated terminations, long-term layoffs, and long-term reductions in hours, **25:17**
  - excluded terminations, **25:18**
  - layoffs/terminations at “single site,” **25:16**
  - rehirings, **25:20**
- Covered employers
  - general discussion, **25:2**
  - counting employees, **25:3**
  - individuals, **25:8**
  - laid-off and on-leave employees, **25:4**
  - lender liability, **25:7**
  - other factors, **25:5**
  - parent companies, subsidiaries, and related entities, **25:6**
- Employee benefits, **22:52**
- Employees who may, but are not certain to lose their jobs, notice requirements, **25:27**
- Employer’s Guide to Advance Notice of Closings and Layoffs, **App 25A**
- Exceptions. Notice requirements, below
- Fact sheet, **App 25C**
- Faltering company exception, **25:38**
- Good faith
  - compliance effort, **22:51**
  - exception, **25:40**
- Individuals
  - covered employers, **25:8**
- Jurisdiction, **22:61, 25:44**
- Laid-off and on-leave employees, **25:4**
- Layoffs. Mass layoffs, below
- Lender liability, **25:7**
- Mass layoffs
  - general discussion, **25:14**
  - checklist, **22:62**
  - Counting rules, above

**WARN ACT—Cont'd**

- Mass layoffs—Cont’d
  - plant closing, **25:15**
- Natural disaster exception, **25:39**
- Ninety-day rule, checklist, **22:64**
- Notice requirements
  - general discussion, **25:23 to 25:44**
  - affected employees, notice to
    - general discussion, **25:23**
    - employees who may, but are not certain to lose their jobs, **25:27**
    - other sites, employees at, **25:25**
    - part-time employees, **25:24**
    - temporary layoff, employees already on, **25:26**
  - checklist, **25:68 to 25:71**
- contents
  - general discussion, **25:30**
  - checklist, **22:68**
  - exceptions, **25:41**
  - state and local government officials, **25:33**
  - union-represented employees, **25:31**
- delivery method, **25:34**
- employees who may, but are not certain to lose their jobs, **25:27**
- exceptions
  - general discussion, **25:35**
  - checklist, **22:67**
  - faltering company, **25:38**
  - good faith, **25:40**
  - natural disasters, **25:39**
  - notice content regarding exception, **25:41**
  - pandemic, **25:37**
  - unforeseeable business circumstances, **25:36, 25:37**
  - good faith exception, **25:40**
  - other sites, employees at, **25:25**
  - part-time employees, **25:24**
  - state and local governments, **25:29, 25:33**
  - temporary layoff, employees already on, **25:26**
  - union representatives, **25:28**

## INDEX

### **WARN ACT—Cont'd**

- Offsets, **22:53**
- Operating units, distinct, closure of, **25:13**
- Other sites, employees at, notice requirements, **25:25**
- Ownership of claim, **22:47**
- Parent companies, subsidiaries, and related entities, **25:6**
- Part-time employees, notice requirements, **25:24**
- Penalties
  - general discussion, **25:46 to 25:55**
  - burden of proof, **22:50**
  - calculation of amount, **22:48**
  - checklist, **22:69**
  - compliance, good faith effort, **22:51**
  - control of claim, **22:47**
  - employee benefits, **22:52**
  - good faith compliance effort, **22:51**
  - offsets, **22:53**
  - ownership of claim, **22:47**
  - statute of limitations, **22:49**
- Plant closings
  - general discussion, **25:11**
  - checklist, **22:63**
  - Counting rules, above
  - distinct operating units, closure of, **25:13**
  - employer-initiated, **25:12**
- Priority status of claim, **22:59**
- Pursuit of claim, **22:58**
- Reduction in force, **29:55**
- Rehirings, **25:20**
- Releases, **22:55**
- Relocation of business, **25:22, 29:59**
- Right to jury trial, **22:45**
- Sale of business, **22:65, 25:21**
- Standing, **25:42**
  - voluntary departure, **25:43**
- State and local governments, notice requirements, **25:29, 25:33**
- Statute of limitations, **22:49**
- Subsidiary, violation by, parent's liability, **18:14**

### **WARN ACT—Cont'd**

- Temporary layoff, employees already on, notice requirements, **25:26**
- Triggering events
  - general discussion, **25:9**
  - Counting rules, above
  - employment losses, **25:10**
  - Mass layoffs, above
  - Plant closings, above
  - sale or relocation of business, **25:21, 25:22**
- Unforeseeable business circumstances exception, **25:36**
- Union representatives, notice requirements, **25:28**
- Union-represented employees, contents of notice, **25:31**
- Unrepresented employees, contents of notice, **25:32**

### **WARRANTIES**

- General discussion, **1:54, 14:1**
- Commonly requested warranties
  - general discussion, **1:55**
  - compliance with laws, **1:57**
  - liabilities, **1:56**
  - material adverse changes, warranties against, **1:55**
  - product liability/litigation, **1:58**
- Compliance with laws, **1:57**
- Confidentiality agreements, **12:18**
- Employee benefit plans, issues relating to warranties, **28:21, 28:22**
- Environmental liabilities, limiting, **19:11**
- Government Contracts and Contractors (this index)
- Liabilities, **1:56**
- Material adverse changes, warranties against, **1:55**
- Product liability/litigation, **1:58**

### **WELFARE FUND**

#### **ARRANGEMENTS**

- General discussion, **29:287 to 29:297**
- Multiple employer welfare arrangements, **29:297**
- Tax rules
  - general discussion, **29:288 to 29:296**

**WELFARE FUND**

**ARRANGEMENTS—Cont'd**

- Tax rules—Cont'd
  - account limits
    - general discussion, **29:293, 29:294**
    - exceptions, **29:294**
  - collectively bargained welfare plans, **29:296**
  - deduction limits
    - general discussion, **29:288 to 29:292**
    - qualified asset account, **29:292**
    - qualified cost, **29:290**
    - qualified direct cost, **29:291**
    - welfare benefit fund, **29:289**
  - ten or more employer plans, **29:295**

**WELFARE PLANS**

- Health and Welfare Plans (this index)

**WESCO INTERNATIONAL, INC**

- Poison pills, rights agreement, **App 48C**

**WITHDRAWAL LIABILITY IN CORPORATE TRANSACTIONS**

- General discussion, **26:1 to 26:31**
- Actuarial assumptions and interest rates, **26:12**
- Allocation formulas and relief provisions
  - general discussion, **26:11**
- Complete withdrawal liability, below
  - partial withdrawal liability, **26:27, 26:28**
- Arbitration, **26:30**
- Cessation of all covered operations, **26:7**
- Complete withdrawal liability
  - general discussion, **26:4 to 26:8**
  - actuarial assumptions and interest rates, **26:12**
  - allocation formulas and relief provisions
    - general discussion, **26:11**

**WITHDRAWAL LIABILITY IN CORPORATE**

**TRANSACTIONS—Cont'd**

- Complete withdrawal liability
  - Cont'd
    - allocation formulas and relief provisions—Cont'd
      - actuarial assumptions and interest rates, **26:12**
      - calculation methods, **26:13 to 26:17**
      - de minimis* rules, **26:20**
      - direct attribution method and other PBGC-approved methods, **26:16**
      - evading or avoiding liability, **26:24**
      - free look rule, **26:21**
      - individual employer exemptions, **26:26**
      - insolvent employer rules, **26:25**
      - modified presumptive method of calculation, **26:14**
      - presumptive method of calculation, **26:13**
      - rolling-five method, **26:15**
      - rules, **26:18 to 26:25**
      - sale of assets limitation, **26:23**
      - twenty year cap, **26:22**
      - underfunded plans, **26:18**
      - withdrawal liability under fully funded plans, **26:17**
  - cessation of all covered operations, **26:7**
  - de minimis* rules, **26:20**
  - effective date of complete withdrawal, **26:7**
  - employers and common controlled groups, **26:5**
  - free look rule, **26:21**
  - fully funded plans, withdrawal liability under, **26:17**
  - individual employer exemptions, **26:26**
  - insolvent employer rules, **26:25**
  - obligation to contribute, **26:6**
  - sale of assets limitation, **26:23**
  - twenty year cap, **26:22**
  - de minimis* rules, **26:20**

## INDEX

### **WITHDRAWAL LIABILITY IN CORPORATE TRANSACTIONS—Cont'd**

- Effective date
  - complete withdrawal, **26:8**
  - partial withdrawal, **26:10**
- Evading or avoiding liability, **26:24**
- Free look rule, **26:21**
- Individual employer exemptions, **26:26**
- Insolvent employer rules, **26:25**
- Jurisdiction, **26:3**
- Obligation to contribute, **26:6**
- Overview, **26:2**
- Partial withdrawal liability
  - general discussion, **26:9**
  - allocation formulas and relief provisions
  - calculation methods, **26:27**
  - case law, **26:28**
  - effective date of partial withdrawal, **26:10**
- Sale of assets limitation, **26:23, 26:24**

### **WITHDRAWAL LIABILITY IN CORPORATE TRANSACTIONS—Cont'd**

- Successor liability, **26:31**
- Termination premium, **26:29**
- Twenty year cap, **26:22**

### **WOMEN'S HEALTH AND CANCER RIGHTS ACT OF 1998**

- General discussion, **29:260 to 29:265**
- Coverage, **29:260**
- Notice requirements
  - general discussion, **29:261 to 29:265**
  - additional one-time notice, **29:264**
  - contents, **29:261**
  - form of notice, **29:263**
  - proposed legislation, **29:265**
  - timing of notice, **29:263**

### **WORKER READJUSTMENT AND RETRAINING NOTIFICATION ACT**

- WARN Act (this index)