Indemnification Provisions in Private Company M&A: How Would Your Provision Hold up in Court?

The University of Texas School of Law
21st Annual Mergers and Acquisitions Institute

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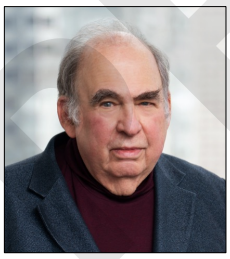

Joel I. Greenberg
Arnold & Porter
Joel.Greenberg@arnoldporter.com

Lisa J. Hedrick
Hirschler
lhedrick@hirschlerlaw.com

Glenn D. West
Weil
glenn.west@retired.weil.com

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Agenda

- Indemnification – General Background
- Third Party Claims v. First Party Claims
- Survival Periods
- Notification of Claims
- *Potential* Claims

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What is Indemnification?

"When the Court considers the indemnity clause here, even if the Court was kind in its description, it would have to guess that it was written by counsel who never litigate, whose days are filled with the excitement of writing contract terms that only they will understand or can reasonably interpret, and who obviously have lost the ability to write in a clear and common-sense manner. While this may be a well-respected and sought-after art form, it does not help the client insure their expectations and demands are understood by all parties. Instead, the Court is left with the challenge of deciphering terms that were perhaps in vogue in the nineteenth century but whose days have clearly passed."

TranSched Sys. Ltd. v. Versyss Transit Sols., LLC, 2012 WL 1415466, at *3 (Del. Super. Mar. 29, 2012).

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Indemnification v. Breach of Contract

Breach of Contract	Indemnification
Requires breach of an underlying contract	Does not require breach of an underlying contract
Available remedy for any breach of contract	Indemnification is not available unless specified in applicable agreement
Damages intended to compensate for losses as a result of the breach	Damages intended to compensate for all losses, not just those related to breach
First Party Claims	Usually covers only Third Party Claims unless otherwise specified
Without fee shifting provision, generally does not entitle party to attorneys' fees	Usually covers attorneys' fees and other expenses

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Sample Indemnification Provision

Sellers, jointly and severally, shall **indemnify and hold harmless** Buyer, the Acquired Companies, and their respective Representatives, shareholders, Subsidiaries, and Related Persons (collectively, the "Buyer Indemnified Persons") from, and shall **pay to** Buyer Indemnified Persons the amount of, or **reimburse** Buyer Indemnified Persons for, any Loss that Buyer Indemnified Persons or any of them may suffer, sustain, or become subject to, as a result of, in connection with, or relating to:

Model Stock Purchase Agreement, American Bar Association

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