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**Negotiating Indemnification Clauses
in Acquisition Agreements:
A Checklist**

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Negotiating Indemnification Clauses in Acquisition Agreements: A Checklist	
Indemnification Issue:	Comments:
Distinguishing among Types of Indemnifiable Matters	
Breaches of reps and warranties	Statements of fact as of a particular date
Breaches of covenants	Obligations of a party to do something or refrain from doing something
Warranties that function as covenants	Statements of fact that a party agrees will be true at a future date
Documents covered	Consider whether agreements that are ancillary to the M&A transaction should be included in indemnification provision.
Third party claims	Claims by a third party against which one party to a contract must indemnify other party to the contract
Direct claims	Claims by one party against another for breach of a representation, warranty, or covenant. Court decisions have made clear that indemnification provision should expressly include direct claims in order for them to be included within the indemnification provision.
Duty to defend vs. obligation to indemnify	Courts treat the two concepts differently; if a duty to defend is desired it must be spelled out.

Defining Responsibility of Indemnifying Parties	
Several	Individual indemnity for rep breached. Typical for reps that are dependent upon individual circumstances, such as stock ownership.
Joint	Group indemnity. Each member of the group is liable for the full amount with right of contribution against the other group members.
Joint and several	Combined individual and group indemnity. Typical for most company reps.
Proportionate	Liability based on % of proceeds received.
Indemnified parties	List others who are to be indemnified in addition to the parties to the agreement; be careful to not unduly expand list. Examples: affiliates; employees; officers; directors, agents, representatives; etc.
Excluded persons/recovery	As use of contractual indemnification limitations increases, so do the efforts of creative plaintiffs' counsel to circumvent them, especially through the use of extra-contractual claims (e.g., fraud, intentional misrepresentation). These claims can be expensive to defend and difficult to dismiss because of their highly factual nature. Therefore, express provisions limiting recovery to the assets of the parties or expressly excluding claims against nonparties should be considered, especially if related parties have significant assets.

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"Trending Issues in Negotiation of Indemnification Provisions"