

Key Issues in Corporate Transactions: Lessons Learned from Select Delaware Cases

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Are the Selling Stockholders Bound by the Indemnity ?

Cigna Health and Life Insurance Co. v. Audax Health Solutions, Inc.

- Post-closing indemnification obligations contained in a merger agreement were not enforceable against the target's stockholders if the obligations (1) put all the merger consideration at risk; and (2) were not limited in duration
- A release could not be imposed on the target's stockholders post-closing absent additional consideration

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Cigna: Background

- Stockholder of target sought \$46 million in merger consideration arising from the company's acquisition
- The merger agreement expressly conditioned receipt of the merger consideration on execution of a LoT
- Stockholders who had executed joinders or support agreements prior to closing were not asked to sign the LoT

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Cigna: Background

- The LoT required stockholders to
 - Release acquirer for any claims associated with the merger
 - Indemnify acquirer for breaches of target's representations and warranties
 - Appoint a stockholders' representative
- Plaintiff refused to sign the LoT, claimed that the LoT was unenforceable and sought its merger consideration

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Cigna Holding

- Indemnification obligations were unenforceable
 - DGCL Section 251 requires that a merger agreement specify the consideration to be received by the target's stockholders unless the shares are cancelled
 - The amount of merger consideration must be determinable

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