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Trending Issues in Negotiation of Indemnification Provisions

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Topics Covered

- How buyers can do an end run around indemnification limits (p. 3)
- Integration of indemnification provisions with representations and warranties insurance (p. 27)
- Interplay of pro/anti-sandbagging clauses with other clauses (p. 34)
- Control and settlement of third party claims (p. 50)
- Survival periods (p. 63)



How Buyers Can Do an End Run Around Indemnification Limits



Purchase Price Adjustments

- Agreements for the sale of privately held businesses often provide for post-closing purchase price adjustments based on the extent to which a financial account – such as Net Working Capital – exceeds a previously agreed upon estimate at Closing.
- Purchase price adjustments are typically submitted to an accounting firm for determination and are made from the first dollar, not subject to deductibles, caps or baskets.

Purchase Price Adjustments

- As a result, whether a disputed amount is categorized as a purchase price adjustment or indemnity claim (which will generally be limited by a deductible, basket and/or cap) can play a significant role in determining the amount of damages available, or whether such claim is even actionable under the purchase agreement.

Purchase Price Adjustments

- When the financial statements used in determining the purchase price adjustment are challenged as improperly prepared, such claim may be categorized as either (1) an unlimited purchase price adjustment (to be determined by an accountant), or (2) a limited indemnity claim for breach of the financial statement GAAP-compliance representation.
 - Alliant Techsystems, Inc. v. MidOcean Bushnell Holdings, L.P. (requiring dispute over accounting methodology related to the calculation of net working capital to be submitted to an accounting firm pursuant to the purchase price adjustment procedures provided in the purchase agreement, despite seller's contention that non-compliance with GAAP was a breach of rep claim subject to indemnification limits).

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