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Indemnification Claims – Follow the Letter of the Contract

In making or defending indemnification claims, parties should pay careful attention to the procedural requirements so that they are not disqualified on a technicality or foot-fault.

Purchase agreements typically include fairly elaborate provisions addressing the step-by-step process of how a buyer can pursue an indemnification claim against a seller for breaches of the terms of the sale. A number of recent Delaware decisions highlight how courts expect parties — both buyers and sellers — to strictly adhere to those terms in the event of a dispute over an indemnification claim or risk losing their right to pursue or defend the claim.

In the most recent decision, the court, in what itself noted "may seem like a harsh result", granted summary judgment to the buyer on an indemnification claim based on the failure of the seller to object to the buyer's claim notice within the mandated 10-day objection period. This outcome could be viewed as particularly unforgiving being that the seller did in fact deliver the objection a few days after the deadline and had previously objected in a timely fashion to an earlier claim notice that related to the same underlying claims. However, the second notice contained additional details and certain new claims, effectively restarting the clock for a timely objection notice. In addition, the court refused to even entertain the seller's counterclaim that the buyer's indemnification notice itself missed the contractual 10-business day deadline for the buyer to deliver a notice of claim, finding that the seller's failure to deliver a timely objection notice served as a full waiver of this assertion by the seller.

Similar themes underlie a 2015 decision in a long-running dispute between Al Gore and Al Jazeera over the sale of Current TV. In this case, the court held that certain of the buyer's indemnification claims were "facially invalid" because the words chosen by the buyer in the claim notice were that it "may incur Damages" from the seller's breaches, while the language of the merger agreement required the notice to state that that the buyer "reasonably believes it will incur or pay Damages". Similarly, in the context of an indemnification claim by buyer for expected third-party claims against the acquired business, the court strictly construed the requirement that the buyer's claim notice describe "the maximum amount reasonably believed by [Buyer] to be demanded by a third party". Because the merger agreement did not limit this requirement to state the maximum claim to what was then known or knowable by the buyer, the buyer's failure to predict and then state what was then likely unknowable — the maximum amount an independent third party would ultimately claim against the acquired business — made the claim notice defective and therefore invalid.

If an indemnification claim or dispute does arise, parties should pay careful attention to the procedural requirements such as timing and wording to maximize the chances that their claims will be evaluated on the merits rather than being disqualified on a technicality or foot-fault, even if otherwise massaging the language of the notice would preserve more optionality on the ultimate trajectory of the claim.

In his recent decision, VC Slights captured Delaware's "contractarian" approach to these issues that favors strict construction over perceived fairness by reiterating that "Delaware courts enforce bad deals the same as good deals…and cannot ignore the plain terms of the contract".

If you have any questions about the matters addressed in this *M&A Update*, please contact the following Kirkland authors or your regular Kirkland contact.

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