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## A Seller's Market: Looking Past the Closing

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Statistics from recently published deal studies suggest that a "seller's market" has developed. This market is evidenced by an abundant supply of active buyers, increasing valuations and less onerous escrow and indemnity provisions. When negotiating indemnity provisions against this backdrop, legal counsel to sellers should ensure that hard won concessions from the buyer are not eviscerated by overly broad post-closing remedies for the buyer. Conversely, legal counsel to buyers should provide for adequate and clearly defined post-closing remedies to ensure full protection for any indemnifiable obligations that arise post-closing.

When negotiating indemnity and post-closing remedy provisions, buyers, sellers and their legal counsel should carefully address these common issues:

► **Defense and Settlement of Third-Party Claims.** Acquisition agreements frequently provide that buyers or sellers will have the right to defend third-party claims under certain circumstances. Buyers and sellers should address how to properly select appropriate legal counsel to defend those claims, regardless of which party controls the defense, to ensure not only that competent attorney are retained, but also that the legal fees to be incurred will be commensurate to the claim asserted. Additionally, many third-party claims will ultimately be settled out of court pursuant to a negotiated settlement agreement, and buyers and sellers should address to what extent payments made in settlement without the indemnifying party's consent are evidence of actual damages incurred by the indemnified party. Finally, the agreement should provide for what happens to funds released from escrow to defend a third-party claim that is ultimately resolved in favor of the indemnifying party.

► **Damage Exclusions.** Damage exclusions are frequently the subject of intense negotiations between buyers and sellers, as buyers generally resist any type of limitation or exclusion on damages, and seller's frequently want all damages other than those resulting from a direct breach of the acquisition agreement excluded (e.g., incidental or exemplary damages). Buyers should carefully review damage exclusions to ensure they do not impair the ability to recover for the potential liabilities resulting from the transaction, and the agreement should also clearly indicate what is specifically not excluded as well. Sellers should be careful to craft damage exclusion provisions that clearly limit damages to those negotiated by the parties.

► **Fraud.** Fraud is typically an unconditional exception to any negotiated limits on liability, and many acquisition agreements simply rely on the concept of common law fraud as an exception. Buyers and sellers should consider whose fraud is subject to indemnification, the remedies of the buyer if fraud is committed by someone other than the seller or certain named individual representatives of the seller, the level of knowledge and intent on the part of a party necessary to constitute fraud and whether or not the buyer was required to rely upon the fraudulent action.

Indemnification provisions with respect to acquisition agreements are extensive, and the issues discussed above are only a few of the many issues that are typically negotiated. Buyers and sellers must retain experienced legal counsel that can ensure their respective interests are effectively protected.

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