

SUMMARY

CLAIMS 'IF TRUE'

Explaining Claims 'If True'

- An essential part of a private purchase agreement is that the buyer can seek indemnification from the seller for breaches of the seller's reps and warranties and other negotiated indemnification rights.
 - That's why the parties spend so much time negotiating:
 - The scope of the reps and warranties; and
 - The amount and type of damages that can be sought if there's a breach or other indemnity claim.
- Buyers want the seller's indemnification obligation to be as broad as possible.
 - They want sellers to be responsible for anything that relates to the pre-closing period.
 - They want to be made whole for **all** of their costs related to any third-party claims, including the costs of **defending** claims whether or not those claims later turn out to be true.
 - That's why buyers often want to include an indemnification right based on the 'if true' concept for third-party claims.
- The 'if true' concept is commonly referred to as "claims if true" or "facts if true."
- It means that the seller has to indemnify the buyer for costs the seller would be responsible for if the facts alleged in the third-party claim were true.
 - This issue typically relates to indemnification for breaches of reps and warranties.
 - But it can relate to other indemnified areas as well.

Impact on the Parties

- To illustrate the impact this issue has on the parties, let's look at what can happen if, after closing, there's a third-party claim against the buyer for a matter that's covered by a seller representation.
- If the **third party prevails**, the 'if true' issue is moot.
 - This is because under most purchase agreements, the buyer's costs and expenses in defending against third-party claims are indemnifiable under the purchase agreement because there has been a breach of a seller representation.
- If the **buyer prevails** (because it won the case) or **neither party prevails** (because the case was settled or the claim is never finally determined), the 'if true' issue comes into play.
 - In these cases, the buyer can't show a breach of the related seller representation, so the 'if true' concept becomes important.
 - If the purchase agreement **does not** contain the 'if true' concept, the buyer is responsible for the costs and expenses of defending against the claim and cannot recover those amounts from the seller.

- Unless the buyer is able to prove in the indemnification claim against the seller that the underlying facts of the claim are true.
- It's hard for a buyer to do this, as they have already defended the claim from the third party by taking the position that the facts underlying the claim were **not** true.
- If the agreement **does** include claims 'if true' language, the buyer **can** recover its costs and expenses of defending the claim.
 - The buyer is covered whether or not the third-party claim demonstrates a breach of the related seller representation.

The rest of the video includes interviews with ABA M&A Committee members Joanna Lin from McDermott Will & Emery and Jessica Pearlman from K&L Gates.