

SUMMARY

CLAIMS 'IF TRUE': DRAFTING

Drafting Claims 'If True' Language

- The 'if true' concept can appear in various places in a purchase agreement and can be drafted in different ways.
- The main places the concept can be found are in:
 - The list of bases for indemnification;
 - Certain defined terms; and
 - Provisions addressing procedures for third-party claims.

The Bases for Indemnification

- 'If true' language is often found in the indemnification section, whether in:
 - The basis for breaches of representations and warranties; or
 - A stand-alone basis for indemnification generally.
- Below are some examples of different formulations that may be found in a list of bases for indemnification. Note:
 - There's no one way to word this concept.
 - Each of the following is only an 'if true' example if the definition of "Damages" or "Losses" (or similar terms) arising under these bases for indemnification includes buyer's costs and expenses.
- Examples:

"any breach, or any claim by parties other than Buyer that, if true, would constitute a breach, of any Company representation or warranty in Article III"

- This formulation uses the 'if true' language.
- It ties it to breach of reps and warranties language.

"any third-party claim resulting from any alleged breach of this Agreement"

- This example includes the 'if true' concept as a stand-alone basis for indemnification.
- It's not limited to breaches of reps and warranties.

"any Proceedings arising from or relating to the subject of the matters set forth in the foregoing clauses"

- This example is another version of including the 'if true' concept as a stand-alone basis for indemnification.
- Whether this is tied to just breaches of reps and warranties depends upon the subject matter of the clauses that come before it.

“any third-party claims that relate to the pre-Closing period”

- This example doesn't expressly mention breaches or inaccuracies.
- It isn't specific as to the *type* of claim – it could relate to anything having to do with the business before the closing.

“use of the Assets pre-Closing”

- Like the example above, this formulation doesn't expressly call out claims or breaches or inaccuracies.
 - It's also not limited to third-party claims.
- Some versions of 'if true' language can suggest that the third-party claim would have to allege that the seller breached its representations in the agreement with the buyer.
 - A provision like that might say:

"(i) any breach of any Company Representation, *including any breach of any such representation or warranty alleged by a third party;*"

- However, typically, third parties wouldn't even know what the representations are.
 - While the parties' intent on this issue should control, buyer's counsel will want to be sure that any claims 'if true' language in the purchase agreement does not require the third party to specifically allege a breach of the representations and warranties.
 - In the example above, the buyer would likely mark up the provision by:
 - Adding the 'if true' language; and
 - Striking out the language saying that the third party must be alleging a breach of a rep or warranty:

"(i) any breach of any Company Representation, *including any third-party claim alleging facts that, if true, would constitute a breach of any such representation or warranty ~~alleged by a third party;~~*"

Defined Terms

- The claims 'if true' concept can also be found in the following commonly used definitions in purchase agreements.
 - “Losses,” “Damages,” “Indemnifiable Amounts,” and similar terms
 - Definitions such as “Losses,” “Damages” and similar terms provide the scope of what's recoverable under each of the bases for indemnification but can be broad enough to cover claims 'if true.'
 - The buyer might include in this definition the costs and expenses incurred in connection with defense, settlement, or resolution of a third-party claim. This can be argued to make the seller responsible

for the costs associated with claims without regard to whether there's an actual breach.

- "Excluded Liabilities"
 - In deals in which the buyer is indemnified for certain identified liabilities, the buyer might include in the definition of these excluded liabilities "claims arising from the pre-Closing period" or similar language.
 - This is to make the seller responsible for the cost associated with claims, not just actual breaches and not just amounts awarded to a claimant.

Provisions Addressing Procedures for Third-Party Claims

- Purchase agreements usually include provisions regarding the procedural handling of third-party claims.
- These procedural provisions may include language giving the buyer the right to recover for its costs and expenses in defending against a third-party claim without regard to whether a seller breach has been found to have occurred.
 - For example, the provisions could say that damages include reasonable costs and expenses connected to a defense of a third-party claim, "whether or not it is ultimately determined that the third-party claim is indemnifiable."
 - In other words, the seller is responsible for those costs and expenses, whether or not the seller is responsible for any underlying breach of a 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.