

Good Deals Gone Bad

Most Frequently Litigated Contractual Provisions

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Today's Speakers



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Objectives

- Why Disputes, or Worse, Litigation is So Harmful
- The Circumstances Which Give Rise to Disputes
- Specific Contractual Provisions that Give Rise to Disputes
- How to Mitigate the Harm When a Dispute Arises

The Costs of Litigating Contract Provisions

- The longer litigation lingers, the more it costs.
- Business disruption
- What makes contract dispute litigation protracted?
 - Inability to stop litigation at the motion to dismiss or summary judgment stages

How to Avoid Litigation or Minimize the Effects

Careful drafting that:

1. anticipates and addresses worst case scenarios;
2. leaves nothing to chance by avoiding subjective terms and defining as many terms and procedures as possible in the agreement;
3. provides incentives to resolve disputes short of full blown litigation; and failing that
4. limits the advantages of litigation by, for example, capping damages.

*What are the
Circumstances that
Give Rise to Conflict and
Potential Litigation?*

What Are The Circumstances that Give Rise to Conflict and Potential Litigation?

- **Friendly Parties Syndrome**
- **Rush to close** – How do you balance the inevitable pressures to get a deal done quickly or to not “over-lawyer” a deal with the need to properly negotiate all important terms?
- **Subjective/undefined performance terms** – fact inquiries mean that it is virtually impossible to stop a claim at the motion to dismiss or the summary judgment stage
 - Examples:
 - “best” or “reasonable” efforts
 - “materiality”
 - Is there really a meeting of the minds and/or a common understanding of these terms?
- **Post closing adjustments** – future obligations which give rise to a dispute as to whether they are met

Specific Contractual Provisions

Specific Contractual Provisions

- **Indemnification**

- need to expressly define what liabilities are covered and by design, what liabilities do not fall within the scope of the clause
- Trigger(s) for indemnification liability
- What benefits flow to the indemnitee? Damages, attorney's fees, litigation expenses

- **Standards of Care**

- Gross negligence v. simple negligence
- Fraud or bad faith
- Willful misconduct

Specific Contractual Provisions

- **Limitations on Injunctive Relief**

- Why do you want to limit this avenue of relief?
- How do you limit or eliminate injunctive actions?

- **Earnouts**

- Designed to provide additional consideration to the seller reflecting post-closing financial performance
- Used to address concerns about the value of asset being sold
- Can take many forms
- Need to carefully consider how amounts to be paid will be calculated and how the calculation will be monitored

Specific Contractual Provisions

- **Escrow arrangements or other purchase price adjustments**
 - Designed to delay the deliver of certain amounts of consideration pending the satisfaction of identified contingencies, such as litigation
 - Not common in public transactions
- **Integration Clauses**
 - What about side letters?

Specific Contractual Provisions

- **Representations and warranties**
 - Designed for the seller to provide detailed information concerning the operations of the business being sold
 - In part, an allocation of risk between seller and buyer
 - Need to pay attention to the specific words being used
 - When considering potential remedies for breaches, remember to think about how long it might take for a breach to surface
- **No adverse inferences from drafting**

Specific Contractual Provisions

- **Deal termination conditions and fees**
 - Undue reliance often placed on a “material adverse change” clause
 - Compensatory arrangements are not within acceptable norms
 - Important to make sure that differing provisions within an agreement are not in conflict with one another

*When a Breach
Happens, How Do You
Avoid Litigation?*

When a Breach Happens, How Do You Avoid Litigation?

- Dispute resolution provisions
 - Can resolve disagreements at a lower cost than engaging in litigation
 - Important to agree and spell out in agreement the provisions that will be used and how they will operate

*What Can You Do to
Avoid Being a
Cautionary Tale?*

What Can You Do to Avoid Being a Cautionary Tale?

- Rushing to sign a deal can create headaches later on – make sure the agreement is what you want it to be
- Courts will generally find in favor of the clear meaning of words in an agreement – even if that is not what was intended by both parties
- If there is a concern about the ability of a party to consummate a transaction, make sure that is addressed in the document
- Make sure that the various provisions in the agreement are not internally inconsistent

What Can You Do to Avoid Being a Cautionary Tale?

- Draft dispute resolution mechanisms with specificity to avoid going to a court for advice and interpretation
- When drafting earn-out or purchase price adjustment provisions, be specific – including how the targets are to be calculated, what accounting standards are to be used, forms to be used for reporting, access to verify information, dispute resolution, etc.
- Engage appropriate subject matter experts to make sure the disclosures are accurately reflected and you understand what is being agreed to

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Questions?

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