



MANAGING RISK IN THE PURCHASE AGREEMENT: THINKING "INSIDE THE [RISK] BOX"

1. **Vendor's Representations & Warranties**
 - tailor R&W scope to nature of transaction (fully valued deal or "fire-sale"?; is the buyer a stranger or an employee/existing shareholder?; asset vs. share deal?)
 - joint and several liability of all vendors or only certain vendors?
 - limit scope by using qualifiers/"fabric softeners" – e.g., materiality, knowledge, etc.
2. **Survival of Representations & Warranties**
 - distinguish between "business reps" and "non-business reps"
 - survival periods should balance vendor's need to "sleep at night" vs. purchaser's need to have adequate time to "sweep the closet"
 - typical to have different reps survive for different periods
3. **Vendor's Schedules**
 - insurance policy
 - disclosure of risk may not necessarily result in risk allocation to purchaser
4. **Conditions**
 - consider what critical events must occur or not occur for parties to want to close
 - conditions should be as specific as possible
5. **Indemnification**
 - provides certainty of "monetary" remedy
 - need to specify what is being indemnified – both purchaser and vendor (e.g., breach of rep/warranty, breach of covenant, failure to satisfy assumed liabilities, etc.)
 - indemnification obligations must be tailored to risks
 - consider financial cap on indemnity obligations – consider economics of deal
 - consider basket "de minimus" clauses (are they a "free zone" or apply from 1st dollar?)
 - "de minimus" clauses are form of materiality qualifier and must be considered in light of rep & warranty patterns
 - exclusions for losses resulting from a party's own fraud, negligence, bad faith, etc.
 - exclusions for special, indirect and consequential losses (e.g., loss of profits)
 - indemnity sole "recovery" regime
6. **Indemnification Procedures**
 - provide vendor with sufficient control over 3rd party litigation where vendor is ultimate insurer of purchaser's losses
7. **Escrow/Holdback/Set-Off re Purchase Price Consideration**
 - consider if a portion of the deal price to be subject to a holdback or escrowed in a trust account to satisfy indemnity obligations
 - purchaser may consider set-off against promissory note
 - purchaser has desire to ensure sufficient portion of the price paid on a lengthy deferred basis as protection for post-closing problems and to ensure vendor "behaves"
8. **Post-Closing Vendor Reorganization**
 - consider tax issues; consider *bona fides*; may/may not be effective but creates negotiating leverage
 - purchaser either not aware or unable to control vendor post closing