Chapter 37 – Indemnification Arrangements in Business Combinations

Publication Info Title: International Business Transactions

Author Name: Byron F. Egan

Publication Info Editor Name: Dennis Campbell

Publication Date: 19890600

Updated Date: 20181200

Publisher Name: Kluwer Law International

Isbn: 9789065449818

Edition: Suppl.76

Range First: Chapter 37 – A-3

Range Last: Chapter 37 – B-20

Chapter 37 A. Commentary

Byron F. Egan

Jackson Walker LLP

2323 Ross Avenue, Suite 600

Dallas, Texas 75201

United States

Telephone: +1 (214) 953 5727

Telefax: +1 (214) 661 6627

Email: began@jw.com

Note: The following commentary, forms, and documents are prepared by the above under the laws and practices prevailing as of 1 February 2023. Seldom is a model form or document directly suitable to a transaction without adaptation to the particularities and circumstances of the matter. Readers are invited to contact the contributor regarding any questions concerning the application of the forms and documents.

Introduction

Like most business transactions, business combinations are predicated on expectations. Agreements for asset purchases, stock purchases, and mergers attempt to memorialize those expectations and set forth what will happen if those expectations are not satisfied.

Generally, the buyer of a privately held company in the United States seeks to impose not only on the seller, but also on its shareholders, financial responsibility for breaches of representations and covenants in the acquisition agreement and for other specified matters that may not be the subject of representations. This allocated risk of loss is accomplished through indemnification provisions that provide that if one party suffers specified losses (the indemnified party), the other party (the indemnifying party) will protect or "indemnify" the indemnified party against the specified losses. There are, however, public policy limits on the extent to which a party may shift responsibility for loss to other parties. These limits are expressed in statutes and in judicial decisions. There also is judicial hostility to indemnification provisions that tend to shift risk of loss from a culpable party to innocent parties, particularly provisions seeking what the Court views as extra-ordinary risk shifting. These matters are illustrated in the indemnification provisions and the commentary that follows.

Indemnification provisions are uncommon where the acquired company has equity securities that are publicly traded. The acquisition of a subsidiary or division of a public company, however, typically involves indemnification provisions comparable to those involved in the acquisition of a privately held company.

The indemnification provisions included herein and related commentary originated from a June 2000 draft of the Model Asset Purchase Agreement being prepared by the Asset Acquisition Agreement Task Force of the M&A Committee of the American Bar Association Business Law Section.

The author expresses appreciation to the many members of the Task Force whose contributions have made these materials possible. These materials, however, are solely the responsibility of the author and have not been reviewed or approved by either the M&A Committee or its Asset Acquisition Agreement Task Force.

Business Acquisition Structures

In General

There are three basic forms of business acquisitions, namely:

(1) Statutory business combinations, (e.g., mergers and consolidations);

(2) Purchases of shares; and

(3) Purchases of assets.

Each of these transaction structures exposes the buyer to different risks and, therefore, involves different indemnification considerations.

Mergers and Consolidations

The terms of a merger are memorialized in an agreement and plan of merger that is submitted to a vote of shareholders. After the requisite shareholder approval is obtained, articles of merger are filed with the secretaries of state of the states under whose laws the constituent entities were organized, whereupon the merger is effective and one of the constituent entities has been merged into the surviving entity, which may or may not be the acquiring entity. When the merger becomes effective, all of the assets and liabilities of both of the constituent entities become vested in the surviving corporation by operation of law.

Because the separate existence of the seller entity ceases at the effective time of the merger and it is no longer able to answer to the buyer for its representations, warranties, and pre-merger covenants, the buyer may seek that some or all of the shareholders of the acquired entity agree to indemnify the buyer for breaches of the seller's representations, warranties, and covenants in the merger agreement.

To insulate the assets of the acquiring entity from those of the acquired entity, a "triangular" merger may be used in which a newly formed subsidiary of the acquiring company merges into the target with the result that the target becomes a subsidiary of the acquiring company.

A consolidation is essentially the same as a merger except that the transaction appears as if the constituent entities have combined to become one rather than one that has been acquired by the other.

PURCHASES OF SHARES

The terms of a negotiated stock purchase are set forth in a stock purchase agreement signed by the buyer and all of the selling shareholders. A stock purchase ordinarily does not involve any change in the acquired entity or any vote of shareholders or filing with a secretary of state. The assets and liabilities of the acquired entity are generally unaffected by the stock purchase and remain with the acquired company.

The buyer does not become generally responsible for the obligations of the acquired company. Since an indemnity by the acquired company would be of little benefit to the buyer, the shareholders of the acquired company typically agree in the stock purchase agreement to indemnify the buyer for breaches of their representations, warranties, and covenants in the stock purchase agreement.

ASSET PURCHASES

An asset purchase transaction is memorialized in an asset purchase agreement signed by the buyer and the selling entity that specifies which assets are to be acquired by the buyer and which liabilities are to be assumed by it. It is not necessary for the buyer to acquire all or substantially all of the assets, or assume any of the liabilities, of the selling entity, which may or may not continue to conduct a trade or business after the transaction. Shareholder approval of the transaction is required if the transaction involves the sale of all or substantially all of the seller's assets other than in the usual and regular course of business.

A buyer may propose that the shareholders of the selling entity sign the asset purchase agreement and agree to indemnify the buyer for certain losses, including liabilities that the selling entity agreed to retain and satisfy, particularly if the seller plans to liquidate and distribute its assets to its shareholders after the sale.

An important reason for structuring an acquisition as an asset transaction is the desire on the part of a buyer to limit its responsibility for liabilities of the seller, particularly unknown or contingent liabilities. Unlike a stock purchase or statutory combination, where the acquired entity retains all of its liabilities and obligations, known and unknown, the buyer in an asset purchase has an opportunity to determine which liabilities of the seller it will contractually assume. Accordingly, one of the most important issues to be resolved is what liabilities incurred by the seller prior to the closing are to be assumed by the buyer. It is rare in an asset purchase for the buyer not to assume some of the seller's liabilities relating to the business, e.g., the seller's obligations under contracts for the performance of services or the manufacture and delivery of goods after the closing.

Most of the seller's liabilities will be set forth in the representations and warranties of the seller in the acquisition agreement and in the seller's disclosure letter or schedules, reflected in the seller's financial statements or otherwise disclosed by the seller in the course of the negotiations and due diligence. For these known liabilities, the issue as to which will be assumed by the buyer and which will stay with the seller is reflected in the express terms of the acquisition agreement.

For unknown liabilities or liabilities that are imposed on the buyer as a matter of law, the solution is not so easy, and lawyers spend significant time and effort dealing with the allocation of responsibility and risk in respect of such liabilities. Many acquisition agreements provide that none of the liabilities of the seller, other than those specifically identified, are being assumed by the buyer and then give examples of the types of liabilities not being assumed, e.g., tax, products, and environmental liabilities. There are, however, some recognized exceptions to a buyer's ability to avoid the seller's liabilities by the terms of the acquisition agreement, including the following:

(1) Bulk sales laws in several states permit creditors of a seller to follow the assets of certain types of sellers into the hands of a buyer unless specified procedures are followed.

(2) Under fraudulent conveyance or transfer statutes, the assets acquired by the buyer can be reached by creditors of the seller under certain circumstances. Actual fraud is not required, and a statute may apply merely where the purchase price is not deemed fair consideration for the transfer of assets and the seller is, or is rendered, insolvent.

(3) Liabilities can be assumed by implication, which may be the result of imprecise drafting or third-party beneficiary arguments that can leave a buyer with unintended responsibility for liabilities of the seller.

(4) Some state tax statutes provide that taxing authorities can follow the assets to recover taxes owed by the seller; often the buyer can secure a waiver from the state or other accommodation to eliminate this risk.

(5) Under some environmental statutes and court decisions, the buyer may become subject to remediation obligations with respect to activities of a prior owner of real property.

(6) In some states, courts have held buyers of manufacturing businesses responsible for tort liabilities for defects in products manufactured by a seller while it controlled the business. Similarly, some courts hold that certain environmental liabilities pass to the buyer that acquires substantially all the seller's assets, carries on the business, and benefits from the continuation.

(7) The purchaser of a business may have successor liability for the seller's unfair labor practices, employment discrimination, pension obligations, or other liabilities to employees.

(8) In some jurisdictions, the purchase of an entire business where the shareholders of the seller become shareholders of the buyer can cause a sale of assets to be treated as a *de facto* merger. This theory would result in the buyer being held responsible for all of the seller's liabilities.

None of these exceptions prevents a buyer from attempting to limit the liabilities to be assumed. Thus, either by compliance with a statutory scheme (e.g., the bulk sales laws or state tax lien waiver procedure), or by careful drafting, a conscientious buyer can take comfort in the fact that most contractual provisions of the acquisition agreement should be respected by the courts and should protect the buyer against unforeseen liabilities of the seller, which can make an asset purchase agreement lengthy.

It is important to recognize that, in a sale of assets, the seller retains primary responsibility for satisfying all its liabilities, whether or not assumed by the buyer. Unlike a sale of stock or a statutory combination, where the shareholders may only be liable to the buyer through the indemnification provisions of the acquisition agreement, a creditor still can proceed directly against the seller after an asset sale.

If the seller is liquidated, its shareholders may remain subject to claims of the seller's creditors under statutory or common law principles, although this might be limited to the proceeds received on liquidation and expire after a period. Under state corporate law statutes, a seller's directors may become personally liable to its creditors if the seller distributes the proceeds of a sale of assets to its shareholders without making adequate provision for its liabilities.

A buyer may be concerned about successor liability exposure and not feel secure in relying on the indemnification obligations of the seller and its shareholders to make it whole. Under these circumstances, the buyer might also require that the seller maintain in effect its insurance coverage or seek extended coverage for pre-closing occurrences which could support these indemnity obligations for the benefit of the buyer.

Drafting Considerations Concerning Sales of Businesses

The actual form of the sale of a business can involve many variations. Nonetheless, there are many common threads involved for the drafter for the transaction. The principal sections of a typical acquisition agreement include:

(1) Introductory material (i.e., opening paragraph and recitals), and definitions of key terms;

(2) Price and mechanics of the acquisition (this part of the agreement would detail the differing structures by which ownership of the entity would pass to the buyer and the purchase price would reach the seller);

(3) Representations and warranties of the seller;

(4) Representations and warranties of the buyer;

(5) Covenants of the seller prior to closing;

(6) Covenants of the buyer prior to closing;

(7) Conditions precedent to buyer's obligation to close;

(8) Conditions precedent to seller's obligation to close;

(9) Termination;

(10) Additional covenants of the parties;

(11) Indemnification; and

(12) Miscellaneous (boilerplate) clauses.

There are many basic legal and business considerations for the drafter involved in the preparation of agreements for the sale of a business. These include federal income taxes; state sales, use, and transfer taxes; federal and state environmental laws; federal and state securities laws; the accounting treatment (pooling or purchase); state takeover laws; problems involving minority shareholders; the purchaser's liability for the seller's debts and contingent liabilities; insolvency and creditors' rights laws; problems in transferring assets (mechanical and otherwise); state corporation laws; stock exchange rules; pension, profit-sharing, and other employee benefit plans; antitrust laws; foreign laws; employment, consulting, and non-compete agreements; union contacts and other labor considerations; the purchaser's security for breach of representations and warranties; insurance; and a myriad of other considerations.

Indemnification Issues In Business Acquisition Agreements

In General

There is no such thing as a set of "standard" indemnification provisions. The conflict between the buyer's desire for protection and the shareholders' desire not to have continuing responsibility for a business that they no longer own often results in intense negotiations. There is, however, a standard set of issues to be dealt with in the indemnification provisions of an acquisition agreement.

The following sample indemnification section (section 11) addresses these issues in a way that favors the buyer. The commentary identifies areas in which the seller may propose a different resolution.

Set forth below is a section-by-section commentary on the form of indemnification provisions for an agreement for the acquisition of a business.

Introductory Comment to Article 11

The following form of Article 11 for an asset purchase, stock purchase, or merger agreement (the "Agreement") provides for indemnification and other remedies. Generally, the buyer of a privately-held company seeks to impose not only on the seller, but also on its shareholders, financial responsibility for breaches of representations and covenants in the acquisition agreement and for other specified matters that may not be the subject of representations.

The conflict between the buyer's desire for that protection and the shareholders' desire not to have continuing responsibility for a business that they no longer own often results in intense negotiations. As a result, there is no such thing as a set of "standard" indemnification provisions. There is, however, a typical set of issues to be dealt with in the indemnification provisions of an acquisition agreement. Article 11 of the Agreement addresses these issues in a way that favors the buyer. The comments identify areas in which the seller may propose a different resolution.

The organization of Article 11 of the Agreement is as follows. Section 11.1 provides that the parties' representations survive the closing and are thus available as the basis for post-closing monetary remedies. It also attempts to negate defenses based on knowledge and implied waiver. Section 11.2 defines the matters for which the seller and the shareholders will have post-closing monetary liability. It is not limited to matters arising from inaccuracies in the seller's representations.

Section 11.3 provides a specific monetary remedy for environmental matters. It is included as an example of a provision that deals specifically with contingencies that may not be adequately covered by the more general indemnification provisions. The types of contingencies that may be covered in this manner vary from transaction to transaction. Section 11.4 defines the matters for which the buyer will have post-closing monetary liability.

Sections 11.5 and 11.6 set forth levels of damage for which post-closing monetary remedies are not available. Section 11.7 specifies the times during which post-closing monetary remedies may be sought. Section 11.8 provides additional avenues for the buyer's collection on its indemnification rights:

(1) An escrow of part of the purchase price with an independent escrow agent to provide funds for the satisfaction of buyer indemnification claims; and

(2) Set-off rights against the promissory note delivered as part of the purchase price as an alternative to claims under the escrow.

Section 11.9 provides procedures to be followed for, and in the defense of, third-party claims. Section 11.10 provides the procedure for matters not involving third-party claims. Section 11.11 provides that the indemnification provided for in Article 11 is applicable notwithstanding the negligence of the indemnitee.

Comment to Section 11.1 — Survival of Representations, Warranties, and Covenants

The representations and warranties made by the seller and its shareholders in acquisitions of private companies are typically, although not universally, intended to provide a basis for post-closing seller liability if they prove to be inaccurate. In acquisitions of public companies without controlling shareholders, the seller's representations typically terminate at the closing and thus serve principally as information-gathering mechanisms, closing conditions, and a basis for liability if the closing does not occur.

If the shareholders of a private company selling its assets are numerous and include investors who have not actively participated in the business (such as venture capital investors in a development stage company), they may analogize their situation to that of the shareholders of a public company and argue that their representations should not survive the closing. However, it would be unusual for the shareholders' representations to terminate at the closing in a private sale. If the shareholders are numerous, they can sign a joinder agreement, which avoids having each of them sign the acquisition agreement.

If the seller's representations are intended to provide a basis for post-closing liability, it is common for the acquisition agreement to include an express survival clause (as set forth in Section 11.1) to avoid the possibility that a court might import the real property law principle that obligations merge in the delivery of a deed and hold that the representations merge with the sale of the assets and thus cannot form the basis of a remedy after the closing. Although no such case is known, the custom of explicitly providing for survival of representations in business acquisitions is well established.

Even in the relatively rare cases in which the shareholders of a private company are able to negotiate the absence of contractual post-closing remedies based on their representations, they may still be subject to post-closing liability based on those representations under principles of common law fraud and securities law fraud.

Section 11.1 provides that knowledge of an inaccuracy by the indemnified party is not a defense to the claim for indemnity, which permits the buyer to assert an indemnification claim not only for inaccuracies first discovered after the closing, but also for inaccuracies disclosed or discovered before the closing. This approach is often the subject of considerable debate. A seller may argue that the buyer should be required to disclose a known breach of the seller's representations before the closing, and waive it, renegotiate the purchase price, or refuse to close. The buyer may respond that it is entitled to rely on the representations made when the acquisition agreement was signed—which presumably entered into the buyer's determination of the price that it is willing to pay—and that the seller should not be able to limit the buyer's options to waiving the breach or terminating the acquisition.

The buyer can argue that it has purchased the representations and the related right to indemnification and is entitled to a purchase price adjustment for an inaccuracy in those representations, regardless of the buyer's knowledge. In addition, the buyer can argue that any recognition of a defense based on the buyer's knowledge could convert each claim for indemnification into an extensive discovery inquiry into the state of the buyer's knowledge.

If the buyer is willing to accept some limitation on its entitlement to indemnification based on its knowledge, it should carefully define the circumstances in which knowledge is to have this effect. For example, the acquisition agreement could distinguish between knowledge that the buyer had before signing the acquisition agreement, knowledge acquired through the buyer's pre-closing investigation, and knowledge resulting from the seller's pre-closing disclosures.

It also could limit the class of persons within the buyer's organization whose knowledge is relevant, e.g., the actual personal knowledge of named officers. An aggressive seller may request a contractual provision requiring that the buyer disclose its discovery of an inaccuracy immediately and elect at that time to waive the inaccuracy or terminate the acquisition agreement, or an "anti-sandbagging" provision precluding an indemnity claim for breaches known to the buyer before closing. An example of such a provision follows:

> "[Except as set forth in a certificate to be delivered by Buyer at the Closing,] to the knowledge of Buyer, Buyer is not aware of any facts or circumstances that would serve as the basis for a claim by Buyer against Seller or any Shareholder based on a breach of any of the representations and warranties of seller and Shareholders contained in this Agreement [or breach of any of Seller's or any Shareholders' covenants or agreements to be performed by any of them at or prior to closing]. Buyer shall be deemed to have waived in full any breach of any of Seller's and Shareholders' representations and warranties [and any such covenants and agreements] of which Buyer has such awareness [to its knowledge] at the Closing."

A buyer should be wary of such a provision, which may prevent it from making its decision based on the cumulative effect of all inaccuracies discovered before the closing.

The buyer's ability to assert a fraud claim after the closing may be adversely affected if the buyer discovers an inaccuracy before the closing but fails to disclose the inaccuracy to the seller until after the closing. In such a case, the seller may assert that the buyer did not rely on the representation, or that its claim is barred by waiver or estoppel.

The doctrine of substituted performance can come into play when both parties recognize before the closing that the seller and the shareholders cannot fully perform their obligations. If the seller and the shareholders offer to perform, albeit imperfectly, can the buyer accept without waiving its right to sue on the breach?

The common law has long been that if a breaching party expressly conditions its substitute performance on such a waiver, the non-breaching party may not accept the substitute performance, even with an express reservation of rights, and retain its right to sue under the original contract.[3] Thus, if the seller offers to close on the condition that the buyer waive its right to sue on the breach, under the common law the buyer must choose whether to close or to sue, but cannot close and sue. Although the acquisition agreement may contain an express reservation of the buyer's right to close and sue, it is unclear whether courts will respect such a provision and allow the buyer to close and sue for indemnification.

The survival of an indemnification claim after the buyer's discovery during pre-closing investigations of a possible inaccuracy in the seller's representations was the issue in *CBS, Inc*. vs. *Ziff-Davis Publishing Co*.[4] The buyer of a business advised the seller before the closing of facts that had come to the buyer's attention and, in the buyer's judgment, constituted a breach of a warranty. The seller denied the existence of a breach and insisted on closing. The buyer asserted that closing on its part with this knowledge would not constitute a waiver of its rights.

After the closing, the buyer sued the seller on the alleged breach of warranty. The New York Court of Appeals held that, in contrast to a tort action based on fraud or misrepresentation, which requires the plaintiff's belief in the truth of the information warranted, the critical question in a contractual claim based on an express warranty is "whether [the buyer] believed [it] was purchasing the [seller's] promise as to its truth". The court stated:

> "The express warranty is as much a part of the contract as any other term. Once the express warranty is shown to have been relied on as part of the contract, the right to be indemnified in damages for its breach does not depend on proof that the buyer thereafter

[3] *United States* vs. *Lamont*, 155 US 303, 309-10 (1894); Restatement, (Second) of Contracts Section 278, comment a.

[4] *CBS, Inc*. vs. *Ziff-Davis Publishing Co*., 553 NE2d 997 (NY 1990).

> believed that the assurances of fact made in the warranty would be fulfilled. The right to indemnification depends only on establishing that the warranty was breached."[5]

Although the *Ziff-Davis* opinion was unequivocal, the unusual facts of this case (a pre-closing assertion of a breach of warranty by the buyer and the seller's threat to litigate if the buyer refused to close), the contrary views of the lower courts, and a vigorous dissent in the Court of Appeals all suggest that the issue should not be regarded as completely settled. A decision of the United States Court of Appeals for the Second Circuit (applying New York law) has increased the uncertainty by construing *Ziff-Davis* as limited to cases in which the seller does not acknowledge any breach at the closing and thus as inapplicable to situations in which the sellers disclose an inaccuracy in a representation before the closing. In *Galli* vs. *Metz*, the court explained;[6]

> "In Ziff-Davis, there was a dispute at the time of closing as to the accuracy of particular warranties. Ziff-Davis has far less force where the parties agree at closing that certain warranties are not accurate. Where a buyer closes on a contract in the full knowledge and acceptance of facts disclosed by the seller that would constitute a breach of warranty under the terms of the contract, the buyer should be foreclosed from later asserting the breach. In that situation, unless the buyer expressly preserves his rights (as CBS did in Ziff-Davis), we think the buyer has waived the breach."

It is not apparent from the *Galli* opinion whether the agreement in question contained a provision similar to Section 11.1 purporting to avoid such a waiver; under an agreement containing such a provision, the buyer could attempt to distinguish *Galli* on that basis. It also is unclear whether *Galli* would apply to a situation in which the disclosed inaccuracy was not (or was not agreed to be) sufficiently material to excuse the buyer from completing the acquisition.

The Eighth Circuit appears to agree with the dissent in *Ziff-Davis* and has held, in essence, that if the buyer acquires knowledge of a breach from any source (not just the sellers acknowledgment of the breach) before the closing, the buyer waives its right to sue.[7]

The conflict between the *Ziff-Davis* approach and the *Hendricks* approach has been resolved under Connecticut and Pennsylvania law in favor of the concept that an express warranty in an acquisition agreement is now grounded in contract, rather than in tort, and that the parties should be entitled to the benefit of their bargain expressed in the purchase agreement.

---

[5] *CBS, Inc*. vs. *Ziff-Davis Publishing Co*., 553 NE2d 997 (NY 1990), at p. 1001.

[6] *Galli* vs. *Metz*, 973 F2d 145, 150-51 (2d Cir. 1992).

[7] *Hendricks* vs. *Callahan*, 972 F2d 190, 195-96 (8th Cir. 1992) (applying Minnesota law and holding that a buyer's personal knowledge of an outstanding lien defeats a claim under either a property title warranty or a financial statement warranty even though the lien was not specifically disclosed or otherwise exempted).

In *Pegasus Management Co*., *Inc*. vs. *Lyssa, Inc*.,[8] the court followed *Ziff-Davis* and held that Connecticut law does not require a claimant to demonstrate reliance on express warranties in a purchase agreement in order to recover on its warranty indemnity claims, commenting that, under Connecticut law, indemnity clauses are given their plain meaning, even if the meaning is very broad. The court further held that the claimant did not waive its rights to the benefits of the express warranties where the purchase agreement provided that:

> "Every …warranty … set forth in this Agreement and … the rights and remedies … for any one or more breaches of this Agreement by the sellers shall … not be deemed waived by the Closing and shall be effective regardless of … any prior knowledge by or on the part of the Purchaser."[9]

Similarly, in *American Family Brands, Inc*. vs. *Giuffrida Enterprises, Inc*.,[10] the court, following Pennsylvania law and asset purchase agreement sections providing that

> "… all of the representations …shall survive the execution and delivery of this Agreement and the consummation of the transactions contemplated hereunder and no waiver of the provisions hereof shall be effective unless in writing and signed by the party to be charged with such waiver …"

sustained a claim for breach of a seller's representation that there had been no material adverse change in the seller's earnings, even though the seller had delivered to the buyer interim financial statements showing a significant drop in earnings.[11]

Given the holdings of *Galli* and *Hendricks*, the effect of the survival and non-waiver language in Section 11.1 is uncertain. Section 11.1 protects the buyer if, in the face of a known dispute, the seller and the shareholders close believing or asserting that they are offering full performance under the acquisition agreement when, as adjudged later, they have not. However, reliance on Section 11.1 may be risky in cases in which there is no dispute over the inaccuracy of a representation and a buyer that proceeds with the closing and later sues for indemnification can expect to be met with a defense based on waiver and non-reliance with an uncertain outcome.

There does not appear to be any legitimate policy served by refusing to give effect to an acquisition agreement provision that the buyer is entitled to rely on its right to indemnification and reimbursement based on the seller's representations even if the buyer learns that they are inaccurate before the closing. Representations are often viewed by the parties as a risk allocation and price adjustment mechanism, not necessarily as assurances regarding the accuracy of the facts that they state, and should

[8] *Pegasus Management Co., Inc*. vs. *Lyssa, Inc*., 995 F. Supp. 43 (D. Mass. 1998).

[9] *Pegasus Management Co., Inc*. vs. *Lyssa, Inc*., 995 F. Supp. 43 (D. Mass. 1998).

[10] *American Family Brands, Inc.* vs. *Giuffrida Enterprises, Inc*., Number 96- 7062 1998 WI. 196402 (ED. Pa. 23 April 1998).

[11] *American Family Brands, Inc.* vs. *Giuffrida Enterprises, Inc*., Number 96- 7062 1998 WI. 196402 (ED. Pa. 23 April 1998), at p. 6.

be given effect as such. *Galli* should be limited to situations in which the agreement is ambiguous with respect to the effect of the buyer's knowledge.

COMMENT TO SECTION 11.2 — INDEMNIFICATION AND REIMBURSEMENT BY SELLER AND SHAREHOLDERS

Although the inaccuracy of a representation that survives the closing may give rise to a claim for damages for breach of the acquisition agreement without any express indemnification provision, it is customary in the acquisition of a privately held company for the buyer to be given a clearly specified right of indemnification for breaches of representations, warranties, covenants, and obligations, and for certain other liabilities. Although customary in concept, the scope and details of the indemnification provisions are often the subject of intense negotiation.

Indemnification provisions need to be carefully tailored to the type and structure of the acquisition, the identity of the parties, and the specific business risks associated with the seller. Indemnification provisions differ for mergers, stock purchases, and asset purchases, because the transfer of liabilities by operation of law in each case is different. In the case of mergers and stock purchases, all of the liabilities of the seller company go with the business, and the indemnification typically relates only to matters involving breaches of representations and covenants, plus certain risks as to which the seller will not make representations but will provide indemnification (see Section 11.2(a),(d) of the form of indemnification provision which follows). One of the key elements of an asset purchase is that the buyer usually does not contractually assume all of the liabilities of the seller's business and, consequently, asset purchase agreements contain special provisions regarding the seller's obligation to indemnify the buyer against liabilities that follow the assets as a matter of law but are not contractually assumed by the buyer (see Sections 11.2(e)–(j)).

Other adjustments may be required for a purchase from a consolidated group of companies, a foreign corporation, or a joint venture, because in each case there may be different risks and difficulties in obtaining indemnification. Still other adjustments will be required to address risks associated with the nature of the seller's business and its past manner of operation.

Certain business risks and liabilities may not be covered by traditional representations and may be covered by specific indemnification provisions (e.g., Section 11.2(c)–(i)). Similar provision also may be made for liability resulting from a pending and disclosed lawsuit against the seller that is not an assumed liability.

In the absence of explicit provision to the contrary, the buyer's remedies for inaccuracies in the seller's and the shareholders' representations may not be limited to those provided by the indemnification provisions. The buyer also may have causes of action based on breach of contract, fraud, and misrepresentation, and other federal and state statutory claims, until the expiration of the applicable statute of limitations. The seller, therefore, may want to add a clause providing that the indemnification provisions are the sole remedy for any claims relating to the transaction. This clause could also limit the parties' rights to monetary damages only, at least after the closing.

In some cases, the seller may prefer not to raise the issue and instead to rely on the limitations on when claims may be asserted (Section 11.7) and the deductible or "basket" provisions (Sections 11.5 and 11.6) as evidence of an intention to make the indemnification provisions the parties' exclusive remedy. The Agreement does not state that indemnification is the exclusive remedy, and these limitations expressly apply to liability "for indemnification or otherwise", indicating a contrary intention of the parties.

Liabilities arising under the United States securities laws cannot be waived in advance by a provision in an agreement that the remedies afforded thereby are a party's exclusive remedy.[12] Other claims, including those based on common law fraud, also may survive an exclusivity clause under applicable state law.

The scope of the indemnification provisions is important. A buyer generally will want the indemnification provisions to cover breaches of representations in the disclosure letter, any supplements to the disclosure letter, and any other certificates delivered pursuant to the acquisition agreement, but may not want the indemnification provisions to cover breaches of non-competition agreements, ancillary service agreements, and similar agreements related to the acquisition, for which there would normally be separate breach of contract remedies, separate limitations (if any) regarding timing and amounts of any claims for damages, and perhaps equitable remedies.

Section 11.2(a)(i) provides for indemnification for any breach of the seller's and the shareholders' representations in the acquisition agreement and the disclosure letter as of the date of signing. A seller may seek to exclude from the indemnity a breach of the representations in the original acquisition agreement if the breach is disclosed by amendments to the disclosure letter before the closing. This provides an incentive for the seller to update the disclosure letter carefully, although it also limits the buyer's remedy to refusing to complete the acquisition if a material breach of the original representations is discovered and disclosed by the seller. For a discussion of related issues, see the Comment to Section 11.1.

Section 11.2(a)(iv) also provides for indemnification for an undisclosed breach of the seller's representations as of the closing date through the reference in subsection (a) to the closing certificate required by the Agreement. This represents customary practice. However, the Agreement departs from customary practice by providing that, if a certificate delivered at closing by the seller or a shareholder discloses inaccuracies in the seller's representations as of the closing date, this disclosure will be disregarded for purposes of an indemnification claim under Section 11.2(a)(iv) (i.e., the seller and the shareholders will still be subject to indemnification liability for such inaccuracies) unless the seller states in the certificates delivered pursuant to the Agreement that these inaccuracies resulted in failure of the condition to closing set forth in the Agreement, thus permitting the buyer to elect not to close.

Although unusual, this structure is designed to protect the buyer from changes that occur after the execution of the acquisition agreement and before the closing that are disclosed before the closing. The provision places an additional burden on the seller to expressly state in writing that, due to inaccuracies in its representations and warranties as of the closing date, the buyer has no obligation to close the

[12] Securities Act 1933, section 14, as amended; 15 United States Code, section 77n (2022); Securities Exchange Act 1934, section 29, as amended; and 15 United States Code, section 78cc (2022).

transaction. Only if the buyer elects to close after such statement is made in the certificate will the buyer lose its right to indemnification for damages resulting from such inaccuracies. Such disclosure, however, would not affect the buyer's indemnification rights to the extent that the representations and warranties were also breached as of the signing date.

The Agreement provides for indemnification for any inaccuracy in the documents delivered pursuant to the acquisition agreement. Broadly interpreted, this could apply to any documents reviewed by the buyer during its due diligence investigation. The buyer may believe that it is entitled to this degree of protection, but the seller can argue that, if the buyer wants to be assured of a given fact, that fact should be included in the representations in the acquisition agreement. The buyer may demand that all documents provided by the seller be factually accurate, or require the seller to correct inaccuracies in them, which places unrealistic demands on the seller and would needlessly hamper the due diligence process.

As an alternative, the seller and its shareholders may represent that they are not aware of any material inaccuracies or omissions in certain specified documents reviewed by the buyer during the due diligence process.

Section 11.2 provides for joint and several liability of the selling company and its shareholders, which the buyer will typically request and the seller, seeking to limit the exposure of its shareholders to several liability (usually in proportion to each shareholder's percentage ownership), may oppose.

Occasionally, different liability will be imposed on different shareholders, depending on the representations at issue, and the seller itself will usually be jointly and severally liable to the buyer without any such limitation. The shareholders may separately agree to allocate responsibility among themselves in a manner different from that provided in the acquisition agreement, e.g., a shareholder who has been active in the business may be willing to accept a greater share of the liability than one who has not.

Factors of creditworthiness may influence the buyer in selecting the persons from whom to seek indemnity. If the seller is part of a consolidated group of companies, it may request that the indemnity be limited to, and the buyer may be satisfied with an indemnity from, a single member of the seller's consolidated group (often the ultimate parent), as long as the buyer is reasonably comfortable with the credit of the indemnitor. In other circumstances, the buyer may seek an indemnity (or guaranty of an indemnity) from an affiliate, e.g., an individual who is the sole shareholder of a thinly capitalized holding company. For other ways of dealing with an indemnitor whose credit is questionable, see the Comment to Section 11.8.

The persons indemnified may include virtually everyone on the buyer's side of the acquisition, including directors, officers, and shareholders who may become defendants in litigation involving the acquired business or the assets or who may suffer a loss resulting from their association with problems at the acquired business.

It may be appropriate to include fiduciaries of the buyer's employee benefit plans if such plans have played a role in the acquisition, such as when an employee stock ownership plan participates in a leveraged buyout. These persons are not, however, expressly made third-party beneficiaries of the indemnification provisions, which may therefore be read as giving the buyer a contractual right to cause the seller to indemnify such persons, and other sections of the Agreement would typically provide that no third-party rights be created by the acquisition agreement. Creation of third-party beneficiary status may prevent the buyer from amending the indemnification provisions or compromising claims for indemnification without obtaining the consent of the third-party beneficiaries.

The scope of damage awards is a matter of state law. The definition of "Damages" in Section 11.2 is very broad and includes, among other things, "diminution of value" and other losses unrelated to third-party claims. Moreover, the definition of "Damages" does not exclude incidental, consequential, or punitive damages, thereby reserving to the buyer a claim for these damages in an indemnification dispute. A seller may seek to narrow the definition.

The common law definition of the term "indemnification" describes a cause of action based on restitution, in which a plaintiff sues a defendant for reimbursement of payments made by the plaintiff to a third party. A court may hold, therefore, that a drafter's unadorned use of the term "indemnification" (usually coupled with "and hold harmless") refers only to compensation for losses due to third-party claims.[13] Modern usage and practice have redefined the term "indemnification" in the acquisition context to refer to compensation for all losses and expenses, from any source, caused by a breach of the acquisition agreement (or other specified events).

The courts presumably will respect express contract language that incorporates the broader meaning. In Section 11.2 of the Agreement, the express language that a third-party claim is not required makes the parties' intent unequivocally clear that compensable damages may exist in the absence of a third-party claim and if no payment has been made by the buyer to any person.

The amount to be indemnified is generally the dollar value of the out-of-pocket payment or loss. That amount may not fully compensate the buyer, however, if the loss relates to an item that was the basis of a pricing multiple. For example, if the buyer agreed to pay US $10-million, which represented five times earnings, but it was discovered after the closing that annual earnings were overstated by US $200,000 because inventories were overstated by that amount, indemnification of US $200,000 for the inventory shortage would not reimburse the buyer fully for its US $1-million overpayment. The acquisition agreement could specify the basis for the calculation of the purchase price (which may be hotly

[13] *Pacific Gas Electric Co*. vs. *G. W. Thomas Drayage & Rigging Co*., 442 P2d 641, 646 n. 9 (Cal. 1968) (indemnity clause in a contract ambiguous on the issue; failure to admit extrinsic evidence on the point was error); see also *Mesa Sand & Gravel Co*. vs. *Landfill*, 759 P2d 75 7, 760 (Colo. Ct. App. 1988), rev'd in part on other grounds, 776 P2d 362 (Colo. 1989) (indemnification clause covers only payments made to third parties). However, see *Atari Corp*. vs. *Ernst & Whinney*, 981 F2d 1025, 1031 (9th Cir. 1992) (limiting *Pacific Gas & Electric* and relying on *Black's Law Dictionary*; the term "indemnification" is not limited to repayment of amounts expended on third-party claims); *Edward E. Gillen Co*. vs. *United States*, 825 F2d 1155, 115 7 (7th Cir. 198 7) (same).

contested by the seller) and provide specifically for indemnification for overpayments based on that pricing methodology.

The buyer should proceed cautiously in this area, since the corollary to the argument that it is entitled to indemnification based on a multiple of earnings is that any matter that affects the balance sheet but not the earnings statement, e.g., fixed asset valuation, should not be indemnified at all. Furthermore, raising the subject in negotiations may lead to an express provision excluding the possibility of determining damages on this basis. The inclusion of diminution of value as an element of damages gives the buyer flexibility to seek recovery on this basis without an express statement of its pricing methodology.

The seller often argues that the appropriate measure of damages is the amount of the buyer's out-of-pocket payment, less any tax benefit that the buyer receives because of the loss, liability, or expense. If this approach is accepted, the logical extension is to include in the measure of damages the tax cost to the buyer of receiving the indemnification payment (including tax costs resulting from a reduction in basis, and the resulting reduction in depreciation and amortization or increase in gain recognized on a sale, if the indemnification payment is treated as an adjustment of purchase price).

The resulting provisions, and the impact on the buyer's administration of its tax affairs, are highly complex, and the entire issue of adjustment for tax benefits and costs is often omitted to avoid this complexity. The seller also may insist that the acquisition agreement explicitly state that damages will be net of any insurance proceeds or payments from any other responsible parties. If the buyer is willing to accept such a limitation, it should be careful to ensure that it is compensated for any cost it incurs due to insurance or other third-party recoveries, including those that may result from retrospective premium adjustments, experience-based premium adjustments, and indemnification obligations.

An aggressive seller also may seek to reduce the damages to which the buyer is entitled by any so-called "found assets" (assets of the seller not reflected on its financial statements). The problems inherent in valuing such assets, and in determining whether they add to the value to the seller in a way not already taken into account in the purchase price, lead most buyers to reject any such proposal.

Occasionally, a buyer insists that damages include interest from the date on which the buyer is first required to pay any expense through the date on which the indemnification payment is received. Such a provision may be appropriate if the buyer expects to incur substantial expenses before the buyer's right to indemnification has been established, and lessens the seller's incentive to dispute the claim for purposes of delay.

If the acquisition agreement contains post-closing adjustment mechanisms, the seller should ensure that the indemnification provisions do not require the seller and the shareholders to compensate the buyer for matters already rectified in the post-closing adjustment process. This can be done by providing that the damages subject to indemnification shall be reduced by the amount of any corresponding post-closing purchase price reduction.

Generally, indemnification is not available for claims made that later prove to be groundless. Thus, the buyer could incur substantial expenses in investigating and litigating a claim without being able to obtain indemnification. In this respect, the indemnification provisions of the Agreement, and most acquisition agreements, provide less protection than indemnities given in other situations, such as securities underwriting agreements.

One method of providing additional, if desired, protection for the buyer would be to insert "defend" immediately before "indemnify" in the first line of Section 11.2. Some attorneys would also include any allegation, e.g., a breach of a representation, as a basis for invoking the seller's indemnification obligations. Note the use of "alleged" in Section 11.2(c). "Defend" has not been included in the first line of Section 11.2 for several reasons:

(1) Sections 11.2, 11.3, and 11.4 address the monetary allocation of risk;

(2) Section 11.9 deals specifically with the procedures for handling the defense of third-party claims; and

(3) Perhaps most importantly, the buyer does not always want the seller to be responsible for the actual defense of a third-party claim, as distinguished from the issue of who bears the cost of defense.

Note that Section 11.10 provides that a claim for indemnification not involving a third-party claim must be paid promptly by the party from whom indemnification is sought.

Comment to Section 11.3 — Indemnification and Reimbursement by Seller — Environmental Matters

Acquisition agreements often contain indemnities for specific matters that are disclosed by the seller and, therefore, would not be covered by an indemnification limited to breaches of representations (such as a disclosed pending litigation) or that represent an allocation of risks for matters not known to either party.

The Section 11.3 provision for indemnification for environmental matters is an example of this type of indemnity, and supplements and overlaps the indemnification provided in Section 11.2(a), which addresses inaccuracies in or inconsistencies with the seller's representations (including those pertaining to the environment).

There are several reasons why a buyer may seek to include separate indemnification for environmental matters instead of relying on the general indemnification based on the seller's representations. Environmental matters are often the subject of a risk allocation agreement with respect to unknown and unknowable liabilities, and sellers who are willing to assume those risks may nevertheless be reluctant to make representations concerning factual matters of which they cannot possibly have knowledge.

An indemnification obligation that goes beyond the scope of the representation implements such an agreement. In addition, the nature of, and the potential for disruption arising from, environmental clean-up activities often leads the buyer to seek different procedures for handling claims with respect to environmental matters. A buyer will often feel a greater need to control the cleanup and related proceedings than it will to control other types of litigation. Finally, whereas indemnification with respect to representations regarding compliance with laws typically relates to laws in effect as of the closing, environmental indemnification provisions such as that in Section 11.3 impose an indemnification obligation with respect to not only existing, but also future, environmental laws.

The seller may object to indemnification obligations regarding future environmental laws and concomitant liabilities arising from common law decisions interpreting such laws. From the buyer's perspective, however, such indemnification is needed to account for strict liability statutes that impose liability retroactively. The seller may insist that the indemnification clearly be limited to existing or prior laws.

The effectiveness of contractual provisions such as indemnification in protecting the buyer against environmental liabilities is difficult to evaluate. Such liabilities may be discovered at any time in the future and are not cut off by any statute of limitations that refers to the date of release of hazardous materials. In contrast, a contractual provision may have an express temporal limitation, and in any event should be expected to decrease in usefulness over time as parties go out of existence or become difficult to locate (especially when the shareholders are individuals).

The buyer may be reluctant to assume that the shareholders will be available and have adequate resources to meet an obligation that matures several years after the acquisition. In addition, environmental liabilities may be asserted by governmental agencies and third parties, which are not bound by the acquisition agreement and are not bound to pursue only the indemnitor.

It is often difficult to assess the economic adequacy of an environmental indemnity. Even with an environmental audit, estimates of the cost of remediation or compliance may prove to be considerably understated years later when the process is completed, and the shareholders' financial ability to meet that obligation at that time cannot be assured. These limitations on the usefulness of indemnification provisions may lead, as a practical matter, to the negotiation of a price reduction, environmental insurance, an increased escrow of funds, or a letter of credit to meet indemnification obligations, in conjunction with some limitation on the breadth of the provisions themselves. Often, the amount of monies saved by the buyer at the time of the closing will be far more certain than the amount it may receive years later under an indemnification provision.

Despite some authority to the effect that indemnity agreements between potentially responsible parties under environmental statutes are unenforceable,[14] it seems settled that section 107(e)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act 1980[15] (CERCLA) expressly allows the contractual allocation of environmental liabilities between potentially responsible parties, and such an indemnification provision would thus be enforceable between the buyer and the seller.[16]

---

[14] *CPC Int'l, Inc.* vs. *Aerojet-General Corp*., 759 F. Supp. 1269 (WD. Mich. 1991); *AMInt'l Inc*. vs. *International Forging Equip*., 743 F. Supp. 525 (ND. Ohio 1990).

[15] 42 United States Code, section 960 (e)(1).

[16] *Smith Land & Improvement Corp*. vs. *Celotex Corp*., 851 F2d 86 (3rd Cir. 1988), cert. denied, 488 US 1029 (1989); *Mardan Corp*. vs. *CGC Music, Ltd*., 804 F2d 1454 (9th Cir. 1986); Parker and Savich, "Contractual Efforts to Allocate the Risk of Environmental

Section 10 7(e)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act 1980, however, bars such a contractual allocation between parties from limiting the rights of the government or any third parties to seek redress from either of the contracting parties.

One consequence of treating an unknown risk through an indemnity instead of a representation is that the buyer may be required to proceed with the acquisition even if a basis for the liability in question is discovered prior to the closing, because the existence of a liability subject to indemnification will not by itself cause a failure of the condition specified in the section of the acquisition agreement requiring their representations to be correct as of the time of closing. The representations in the acquisition agreement substantially overlap this indemnity to avoid that consequence.

The issue of control of cleanup and other environmental matters is often controversial. The buyer may argue for control based on the unusually great potential that these matters have for interference with business operations. The seller may argue for control based on its financial responsibility under the indemnification provision.

If the seller and the shareholders are unwilling to commit to such broad indemnification provisions, or if the buyer is not satisfied with such provisions because of specific environmental risks that are disclosed or become known through the due diligence process or are to be anticipated from the nature of the seller's business, several alternatives exist for resolving the risk allocation problems that may arise. For example, the seller may ultimately agree to a reduction in the purchase price in return for deletion or limitation of its indemnification obligations.

The seller and the shareholders are likely to have several concerns with the indemnification provisions in Section 11.3, such as the indemnification for third-party actions and with respect to substances that may be considered hazardous in the future or with respect to future environmental laws. The seller and the shareholders may also be interested in having the buyer indemnify them for liabilities arising from the operation of the seller's business after the closing, although they may find it difficult to articulate the basis on which they may have liability for these matters.

Although representations and indemnification provisions address many environmental issues, it is typical for the buyer to undertake an environmental due diligence process prior to acquiring any interest from the seller.

Comment to Section 11.4 — Indemnification and Reimbursement by Buyer

In general, the indemnification by the buyer is similar to that by the seller. The significance of the buyer's indemnity will depend largely on the type of consideration being paid and, as a result, on the breadth of the buyer's representations. If the consideration paid to a seller is equity securities of the buyer, the seller may seek broad representations and indemnification comparable to that given by the seller, including indemnification that covers specific known problems. In all cash transactions, however,

Liability: Is There a Way to Make Indemnities Worth More Than the Paper They Are Written On?", 44 *Sw. Law Journal* (1991), at p. 1349.

the buyer's representations are usually minimal and the buyer generally runs little risk of liability for post-closing indemnification. It is not unusual for the buyer's first draft to omit this provision entirely.

A seller might request that an asset purchase agreement contain an analogue to Section 11.2(c) to allocate the risk of post-closing operations more clearly to the buyer. Such a provision could read as follows:

> "(c) Any liability arising out of the ownership or operation of the acquired business or assets after the closing date other than those Liabilities which the Agreement provides are to be satisfied by Seller."

COMMENT TO SECTION 11.5 — LIMITATIONS ON AMOUNT — SELLER AND SHAREHOLDERS

Section 11.5 provides the seller and the shareholders with a safety net, or "basket", with respect to specified categories of indemnification but does not establish a ceiling, or "cap". The basket is a minimum amount that must be exceeded before any indemnification is owed. In effect, it is a deductible. A more aggressive buyer may wish to provide for a "threshold" deductible that, once crossed, entitles the indemnified party to recover all damages, rather than merely the excess over the basket. The purpose of the basket or deductible is to recognize that representations concerning an ongoing business are unlikely to be perfectly accurate and to avoid disputes over insignificant amounts. In addition, the buyer can point to the basket as a reason why specific representations do not need materiality qualifications.

In many acquisition agreements, the seller's and shareholders' representations are generally not subject to materiality qualifications, and the full dollar amount of damages caused by a breach must be indemnified, subject to the effect of the basket established by provisions such as Section 11.5. This framework avoids "double- dipping", i.e., the situation in which a seller contends that the breach exists only to the extent that it is material, and then the material breach is subjected to the deduction of the basket.

If the acquisition agreement contains materiality qualifications to the seller's representations, the buyer should consider a provision to the effect that such a materiality qualification will not be taken into account in determining the magnitude of the damages occasioned by the breach for purposes of calculating whether they are applied to the basket; otherwise, the immaterial items may be material in the aggregate, but not applied to the basket. Another approach would involve the use of a provision such as the following:

> "If Buyer would have a claim for indemnification under Sections 11.2(a) [and others] if the representation and warranty [and others] to which the claim relates did not include a materiality qualification and the aggregate amount of all such claims exceeds $X, then the buyer shall be entitled to indemnification for the amount of such claims in excess of $X in the aggregate (subject to the limitations on amount in Section 11.5) notwithstanding the inclusion of a materiality qualification in the relevant provisions of this Agreement."

A buyer will usually want the indemnity obligations for certain matters, such as the retained liabilities, to be absolute or "first dollar" and not subject to the basket. For example, the buyer may insist that the seller pay all tax liabilities from a pre-closing period or the damages resulting from a disclosed lawsuit without regard to the basket. Section 11.5 lists a number of sections to which the basket would not apply, including title, labor, and environmental matters. The parties also may negotiate different baskets for different types of liabilities; the buyer should consider the aggregate effect of those baskets.

The seller or its shareholders also may seek to provide for a maximum indemnifiable amount. The shareholders' argument for such a provision is that they had limited liability as shareholders and should be in no worse position with the seller having closed the transaction than they were in before the transaction. This argument may not be persuasive to a buyer that views the acquisition as a component of its overall business strategy or intends to invest additional capital. If a maximum amount is established, it usually does not apply to liabilities for taxes, environmental matters, retirement plan matters —for which the buyer may have liability under applicable law — or defects in the ownership of the securities that the buyer is purchasing, or ownership defects in the assets that the buyer is to acquire on consummation of the transactions contemplated by the Agreement. The parties also may negotiate separate limits for different kinds of liabilities.

Often, baskets and thresholds do not apply to breaches of representations of which the seller had knowledge or a willful failure by the seller to comply with a covenant or obligation —the rationale is that the seller should not be allowed to reduce the purchase price or the amount of the basket or threshold by behavior that is less than forthright. Similarly, the buyer will argue that any limitation as to the maximum amount should not apply to a seller that engages in intentional wrongdoing.

The basket in Section 11.5 only applies to claims under Section 11.2(a), which provides for indemnification for breaches of representations and warranties. The basket does not apply to any other indemnification provided in Section 11.2, e.g., breaches of covenants, or 11.3 (environmental matters). This distinction is necessary to protect the buyer from asset shortfalls that would otherwise preclude the buyer from receiving the assets for which it bargained. The rationale is that the seller should not be able to increase the purchase price by behavior that is less than forthright.

Comment to Section 11.6 — Limitations on Amount — Buyer

In its first draft, the buyer will usually suggest a basket below which it is not required to respond in damages for breaches of its representations, typically the same dollar amount as that used for the seller's basket.

Comment to Section 11.7 — Time Limitations

It is common for an acquisition agreement to specify the time within which a claim for indemnification must be made. The seller and its shareholders want to have uncertainty eliminated after a period, and the buyer wants to have a reasonable opportunity to discover any basis for indemnification.

The time period will vary depending on factors such as the type of business, the adequacy of financial statements, the buyer's plans for retaining existing management, the buyer's ability to perform a thorough investigation prior to the acquisition, the method of determination of the purchase price, and the relative bargaining strength of the parties. A two-year period may be sufficient for most liabilities because it will permit at least one post-closing annual audit and because, as a practical matter, many hidden liabilities will be uncovered within those two years. However, an extended or unlimited time for title to assets, products liability, taxes, employment issues, and environmental issues is not unusual.

Section 11.7 provides that claims generally with respect to representations or covenants must be asserted by the buyer within a specified time period known as a "survival" period, except with respect to identified representations or covenants as to which a claim may be made at any time. It also is possible to provide that a different (than the general) survival period will apply to other identified representations or covenants. Some attorneys request that representations that are fraudulently made survive indefinitely. It also is important to differentiate between covenants to be performed or complied with before and after closing.

The appropriate standard for some types of liabilities may be the period of time during which a private or governmental plaintiff could bring a claim for actions taken or circumstances existing prior to the closing. For example, indemnification for tax liabilities often extends for as long as the relevant statute of limitations for collection of the tax. If this approach is taken, the limitation should be drafted to include extensions of the statute of limitations (which are frequently granted in tax audits), situations in which there is no statute of limitations (such as those referred to in Section 6501(c) of the Internal Revenue Code), and a brief period after expiration of the statute of limitations to permit a claim for indemnification to be made if the tax authorities act on the last possible day.

The seller's obligations in an asset purchase, with respect to liabilities that the asset purchase agreement provides are to be retained by the seller, should not be affected by any limitations on the time or amount of general indemnification payments.

The buyer should consider the relationship between the periods within which a claim for indemnification may be made and the times for other post-closing transactions. For example, if there is an escrow, the buyer will want to have the escrow last until any significant claims for indemnification have been paid or finally adjudicated. Similarly, if part of the purchase price is to be paid by promissory note, or if there is to be an "earn-out" pursuant to which part of the consideration for the assets is based on future performance, the buyer will want to be able to offset claims for indemnification against any payments that it owes on the promissory note or earn-out (see Section 11.8).

In drafting time limitations, the buyer's counsel should consider whether they should apply only to claims for indemnification (see the Comment to Section 11.2).

Comment to Section 11.8 — Right of Set-Off; Escrow

Regardless of the clarity of the acquisition agreement on the allocation of risk and the buyer's right of indemnification, the buyer may have difficulty enforcing the indemnity —especially against shareholders who are individuals —unless it places a portion of the purchase price in escrow, holds back a portion of the purchase price (often in the form of a promissory note, an earn-out, or payments under consulting or non-competition agreements) with a right of set-off, or obtains other security (such as a letter of credit) to secure performance of the seller's and the shareholders' indemnification obligations. These techniques shift bargaining power in post-closing disputes from the seller and the shareholders to the buyer and usually will be resisted by the seller.

An escrow provision may give the buyer the desired security, especially when there are several shareholders and the buyer will have difficulty in obtaining jurisdiction over the shareholders or in collecting on the indemnity without an escrow. Shareholders who are jointly and severally liable also may favor an escrow to ensure that other shareholders share in any indemnity payment. The amount and duration of the escrow will be determined by negotiation, based on the parties' analyses of the magnitude and probability of potential claims and the period of time during which they may be brought. The seller may insist that the size of the required escrow diminish in stages over time and request that claims against the escrow be the buyer's exclusive remedy.

The buyer also may seek an express right of set-off against sums otherwise payable to the seller or the shareholders. The buyer obtains more protection from an express right of set-off against deferred purchase price payments due under a promissory note than from a deposit of the same amounts in an escrow because the former leaves the buyer in control of the funds, thus giving the buyer more leverage in resolving disputes with the seller. The buyer may also want to apply the set-off against payments under employment, consulting, or non-competition agreements (although state law may prohibit set-offs against payments due under employment agreements).

The comfort received by the buyer from an express right of set-off depends on the schedule of the payments against which it can withhold. Even if the seller agrees to express set-off rights, the seller may attempt to prohibit set-offs prior to definitive resolution of a dispute and to preserve customary provisions that call for acceleration of any payments due by the buyer if the buyer wrongfully attempts set-off.

In addition, the seller may seek to require that the buyer exercise its set-off rights on a pro rata basis in proportion to the amounts due to each shareholder. If the promissory note is to be pledged to a bank, the bank as pledgee will likely resist set-off rights (especially because the inclusion of express set-off rights will make the promissory note non-negotiable). As in the case of an escrow, the suggestion of an express right of set-off often leads to discussions of exclusive remedies.

Instead of relying on the common law of set-off, the buyer may wish to expressly provide that the set-off applies to the amounts (principal and interest) first coming due under the promissory note. This is obviously more advantageous to the buyer from a cash flow standpoint. The seller will prefer that the set-off apply to the principal of the promissory note in the inverse order of maturity. This also raises the question of whether the seller is entitled to interest on the amount of set-off or, in the case of an escrow, the disputed amount.

The buyer's position will be that this constitutes a reduction in the purchase price and, therefore, the seller should not be entitled to interest on the amount of the reduction. The seller may argue that it should be entitled to interest, at least up to the time the buyer is required to make payment to a third party of the amount claimed. It may be difficult, however, for the seller to justify receiving interest when the set-off relates to a diminution in value of the assets acquired.

Rather than inviting counterproposals from the seller by including an express right of set-off in the acquisition agreement, the buyer's counsel may decide to omit such a provision and instead rely on the buyer's common law right of counterclaim and set-off. Even without an express right of set-off in the acquisition agreement or related documents, such as a promissory note or an employment, consulting, or non-competition agreement, the buyer can, as a practical matter, withhold amounts from payments due to the seller and the shareholders under the acquisition agreement or the related documents on the ground that the buyer is entitled to indemnification for these amounts under the acquisition agreement. The question then is whether, if the seller and the shareholders sue the buyer for its failure to make full payment, the buyer will be able to counterclaim that it is entitled to set off the amounts for which it believes it is entitled to indemnification.

The common law of counterclaim and set-off varies from state to state and, when deciding whether to include or forgo an express right of set-off in the acquisition agreement, the buyer's counsel should examine the law governing the acquisition agreement. The buyer's counsel should determine whether the applicable law contains requirements such as a common transaction, mutuality of parties, and a liquidated amount and, if so, whether those requirements would be met in the context of a dispute under the acquisition agreement and related documents. Generally, counterclaim is mandatory when both the payment due to the plaintiff and the amount set off by the defendant relate to the same transaction.[17]

Although a promissory note representing deferred purchase price payments would almost certainly be considered part of the same transaction as the acquisition, it is less certain that the execution of an employment, consulting, or non-competition agreement, even if a condition to the closing of the acquisition, and its subsequent performance, would be deemed part of the same transaction as the acquisition. In addition, a counterclaim might not be possible if the parties obligated to make and entitled to receive the various payments are different, i.e., if there is not "mutuality of parties".

Under the *D'Oench, Duhme* doctrine, which arose from a United States Supreme Court decision in 1942 and has since been expanded by various statutes and judicial decisions, defenses such as set-off rights under an acquisition agreement generally are not effective against the Federal Deposit Insurance Corporation (FDIC), the Resolution Trust Corporation (RTC), and subsequent assignees or holders in due course of a note that once was in the possession of the FDIC or the RTC.[18] An exception to the *D'Oench,*

[17] *United States* vs. *Southern California Edison Co*., 229 F. Supp. 268, 270 (SD. Cal. 1964); when different transactions are involved, the court may, in its discretion, permit a counterclaim; see *Rochester Genesee Regional Transp. Dist., Inc.* vs. *Trans World Airlines, Inc*., 383 NYS2d 856, 85 7 (1976), but is not obligated to do so; see *Columbia Gas Transmission Corp*. vs. *Larry H. Wright, Inc*., 443 F. Supp. 14 (SD. Ohio 1977); *Townsend* vs. *Bentley*, 292 SE2d 19 (NC. Ct. App. 1982).

[18] *D'Oench, Duhme & Co*. vs. *FDIC*, 315 US 44 7 (1942); see also 12 United States Code, section 1823(e); *Porras* vs. *Petroplex Say. Ass'n*, 903 F2d 379 (5th. Cir. 1990); *Bell &Murphy & Assoc., Inc*. vs. *Inter First Bank Gateway*, NA, 894 F2d 750 (5th. Cir. 1990), cert. denied, 498 US 895 (1990); *FSLIC* vs. *Murray*, 853 F2d 1251 (5th. Cir. 1988).

Duhme doctrine exists when the asserted defense arises from an agreement reflected in the failed bank's records.[19]

Therefore, if a buyer gives a seller a negotiable promissory note and that note ever comes into the possession of a bank that later fails, the buyer could lose its set-off rights under the acquisition agreement unless the failed bank had reflected in its records the acquisition agreement and the buyer's set-off rights. As an alternative to non-negotiable notes, a buyer could issue notes that can be transferred only to persons who agree in writing to recognize in their official records both the acquisition and the buyer's set-off rights.

An express right of set-off addresses the possible consequences of an unjustified set-off. Section 11.8 allows the buyer to set off amounts for which the buyer in good faith believes that it is entitled to indemnification from the seller and the shareholders against payments due to them under the promissory note without bearing the risk that, if the seller and the shareholders ultimately prevail on the indemnification claim, they will be able to accelerate the promissory note or obtain damages or injunctive relief.

Such a provision gives the buyer considerable leverage and will be resisted by the seller. To lessen the leverage that the buyer has from simply withholding payment, the seller might require that an amount equal to the set-off be paid by the buyer into an escrow with payment of fees and costs going to the prevailing party.

Comment to Section 11.9 — Procedure for Indemnification — Third-Party Claims

It is common to permit an indemnifying party to have some role in the defense of the claim. There is considerable room for negotiation of the manner in which that role is implemented. Because the buyer is more likely to be an indemnified party than an indemnifying party, the acquisition agreement typically provides procedures that are favorable to the indemnified party.

The indemnified party normally will be required to give the indemnifying party notice of third-party claims for which indemnity is sought. An acquisition agreement typically requires such notice only after a proceeding is commenced, and provides that the indemnified party's failure to give notice does not affect the indemnifying party's obligations unless the failure to give notice results in prejudice to the defense of the proceeding.

A seller may want to require notice of threatened proceedings and of claims that do not yet involve proceedings and to provide that prompt notice is a condition to indemnification; the buyer likely will be very reluctant to introduce the risk and uncertainty inherent in a notice requirement based on any event other than the initiation of formal proceedings.

An acquisition agreement typically permits the indemnifying party to participate in and assume the defense of proceedings for which indemnification is sought, but imposes significant limitations on its

[19] *FDIC* vs. *Plato*, 981 F2d 852 (5th. Cir. 1993); *FTC* vs. *Oaks Apartments Joint Penture*, 966 F2d 995 (5th. Cir. 1992).

right to do so. In Section 11.9, the indemnifying party's right to assume the defense of other proceedings is subject to:

(1) A conflict of interest test if the claim also is made against the indemnifying party;

(2) A requirement that the indemnifying party demonstrate its financial capacity to conduct the defense and provide indemnification if it is unsuccessful; and

(3) A requirement that the defense be conducted with counsel satisfactory to the indemnified party. The seller will often resist the financial capacity requirement and seek either to modify the requirement that counsel be satisfactory with a reasonableness qualification or to identify satisfactory counsel in the acquisition agreement (the seller's counsel should carefully consider in whose interest they are acting if they specify themselves). The seller may also seek to require that, in cases in which it does not assume the defense, all indemnified parties be represented by the same counsel (subject to conflict of interest concerns).

The seller may seek to modify the provision that the indemnifying party is bound by the indemnified party's defense or settlement of a proceeding if the indemnifying party does not assume the defense of that proceeding within 10 days after notice of the proceeding. The seller may request a right to assume the defense of the proceeding at a later date and a requirement for advance notice of a proposed settlement.

An indemnified party usually will be reluctant to permit an indemnifying party to assume the defense of a proceeding while reserving the right to argue that the claims made in that proceeding are not subject to indemnification. Accordingly, Section 11.9 excludes that possibility. However, the seller may object that the nature of the claims could be unclear at the start of a proceeding and may seek the right to reserve its rights in a manner similar to that often permitted to liability insurers.

An indemnifying party that has assumed the defense of a proceeding will seek the broadest possible right to settle the matter. Section 11.9 imposes strict limits on that right; the conditions relating to the effect on other claims and the admission of violations of legal requirements are often the subject of negotiation.

Section 11.9(c) permits the indemnified party to retain control of a proceeding that presents a significant risk of injury beyond monetary damages that would be borne by the indemnifying party, but the price of that retained control is that the indemnifying party will not be bound by determinations made in that proceeding. The buyer may want to maintain control of a proceeding seeking equitable relief that could have an impact on its business that would be difficult to measure as a monetary loss, or a proceeding involving product liability claims that extend beyond the seller's businesses, e.g., a tobacco company that acquires another tobacco company is unlikely to be willing to surrender control of any of its product liability cases.

Section 11.9(d) permits the buyer to minimize the risk of inconsistent determinations by asserting its claim for indemnification in the same proceeding as the claims against the buyer.

Environmental indemnification often presents special procedural issues because of the wide range of remediation techniques that may be available and the potential for disruption of the seller's businesses. These matters are often dealt with in separate provisions (see Section 11.3).

COMMENT TO SECTION 11.10 — OTHER CLAIMS

Section 11.10 emphasizes the parties' intention that indemnification remedies provided in the acquisition agreement are not limited to third-party claims. Some courts have implied such a limitation in the absence of clear contractual language to the contrary (see the Comment to Section 11.2).

COMMENT TO SECTION 11.11 — INDEMNIFICATION IN CASE OF STRICT LIABILITY OR INDEMNITEE NEGLIGENCE

Purpose of Section

The need for Section 11.11 is illustrated in *Fina, Inc*. vs. *ARCO*,[20] in which the United States Court of Appeals for the Fifth Circuit invalidated an asset purchase agreement indemnification provision in the context of environmental liabilities. In the *Fina* case, the liabilities arose from actions of three different owners over a 30-year period during which both seller and buyer owned and operated it and contributed to the environmental condition. The asset purchase agreement indemnification provision provided that the indemnitor:

> "…shall indemnify, defend and hold harmless [the indemnitee] .. . against all claims, actions, demands, losses, or liabilities arising from the use or operation of the assets … and accruing from and after closing."

The Fifth Circuit, applying Delaware law pursuant to the agreement's choice of law provision, held that the indemnification provision did not satisfy the Delaware requirement that indemnification provisions that require payment for liabilities imposed on the indemnitee for the indemnitee's own negligence or pursuant to strict liability statutes, such as the Comprehensive Environmental Response, Compensation, and Liability Act 1980, must be clear and unequivocal. The court explained that the risk shifting in such a situation is so extraordinary that to be enforceable the provision must state with specificity the types of risks that it is transferring to the indemnitor.

There are other situations where the acquisition agreement may allocate the liability to the seller while the buyer's action or failure to act (perhaps negligently) may contribute to the loss. For example, a defective product may be shipped prior to closing, but the buyer may fail to effect a timely recall which could have prevented the liability, or an account receivable may prove uncollectable because of the buyer's failure to diligently pursue its collection or otherwise satisfy the customer's requirements.

Section 11.11 is intended to prevent the allocation of risks elsewhere in Article 11 from being frustrated by court holdings, such as the *Fina* case, that indemnification provisions are ambiguous and unenforceable because they do not contain specific words that certain kinds of risks are intended to be shifted by the agreement. As discussed below, the majority rule appears to be that agreements that

---

[20] *Fina, Inc*. vs. *ARCO*, 200 F3rd 266 (Sth Cir. 2000).

have the effect of shifting liability for a person's own negligence, or for strict liability imposed on the person, must at a minimum be clear and unequivocal, and in some jurisdictions must be expressly stated in so many words. A minority of jurisdictions requires that the risk shifting provision be conspicuously presented, so it often appears in bold typeface as in Section 11.11.

Indemnification for Indemnitee's Own Negligence

Indemnities, releases, and other exculpatory provisions are generally enforceable as between the parties absent statutory exceptions for certain kinds of liabilities[21] and judicially created exceptions, e.g., some courts as a matter of public policy will not allow a party to shift responsibility for its own gross negligence or intentional misconduct.[22] Because of these public policy concerns or sellers' negotiations, some counsel add an exception for liabilities arising from an indemnitee's gross negligence or willful misconduct.

Assuming none of these exceptions is applicable, the judicial focus turns to whether the words of the contract are sufficient to shift responsibility for the particular liability. A minority of courts have adopted the "literal enforcement approach" under which a broadly worded indemnity for any claims is held to encompass claims from unforeseen events, including the indemnitee's own negligence. The majority of courts closely scrutinize, and are reluctant to enforce, indemnification or other exculpatory arrangements that shift liability away from the culpable party and require that provisions having such an effect be "clear and unequivocal" in stating the risks that are being transferred to the indemnitor.[23] If an indemnity provision is not sufficiently specific, a court may refuse to enforce the purported imposition on the indemnitor of liability for the indemnitee's own negligence or strict liability.[24]

The actual application of the "clear and unequivocal" standard varies from state to state and from situation to situation. Jurisdictions such as Florida, New Hampshire, Wyoming, and Illinois do not mandate that any specific wording or magic language be used in order for an indemnity to be enforceable to transfer responsibility for the indemnitee's negligence.[25] Jurisdictions such as New York, Minnesota, Missouri, Maine, North Dakota, and Delaware require also that reference to the negligence or fault of the indemnitee be set forth within the contract.[26] Under the "express negligence" doctrine

---

[21] Securities Act 1933, section 14, as amended, and Securities Exchange Act 1934, section 29, as amended.

[22] Restatement (Second) of Contracts, section 195, comment b (1981), which states that, "Language inserted by a party in an agreement for the purpose of exempting [it] from liability for negligent conduct is scrutinized with particular care and a court may require specific and conspicuous reference to negligence … . Furthermore, a party's attempt to exempt [itself) from liability for negligent conduct may fail as unconscionable".

[23] Conwell, "Recent Decisions: The Maryland Court of Appeals", 57 *Md. Law Review* (1998), at p. 706.

[24] *Fina, Inc*. vs. *ARCO*, 200 F3d 266 (5th Cir. 2000).

[25] *Hardage Enterprises* vs. *Fidesys Corp*., 570 SO2d 436, 437 (Fla. App. 1990); *Audley* vs. *Melton*, 640 A 2d 777 (1994); *Boehm* vs. *Cody Country Chamber of Commerce*, 748 P2d 704 (Wyo.1987); *Neumann* vs. *Gloria Marshall Figure Salon*, 500 NE 2d 1011, 1014 (Ill. 1986).

[26] *Gross* vs. *Sweet*, 458 NYS2d 162 (1983) (holding that the language of the indemnity must plainly and precisely indicate that the limitation of liability extends to negligence or fault of the indemnitee); *Schlobohn* vs*. Spa Petite, Inc*. 326 NW2d 920, 923 (Minn.

followed by Texas courts, an indemnification agreement is not enforceable to indemnify a party from the consequences of its own negligence unless such intent is specifically and conspicuously stated within the four corners of the agreement.[27]

Indemnification for Strict Liability

Concluding that the transfer of a liability based on strict liability involves an extraordinary shifting of risk analogous to the shifting of responsibility for an indemnitee's own negligence, some courts have held that the clear and unequivocal rule is equally applicable to indemnification for strict liability claims.[28] The court concluded that this broad clause in the *Fina* asset purchase agreement did not satisfy the clear and unequivocal test in respect of strict liability claims since there was no specific reference to claims based on strict liability.

In view of the judicial hostility to the contractual shifting of liability for strict liability risks, counsel may wish to include in the asset purchase agreement references to additional kinds of strict liability claims for which indemnification is intended.

Conspicuousness

In addition to requiring that the exculpatory provision be explicit, some courts require that its presentation be conspicuous.[29] While most courts appear not to have imposed a comparable "conspicuousness" requirement to date, some lawyers feel it prudent to put their express negligence words in bold face or other conspicuous type.

1982) (holding that indemnity is enforceable where "negligence" is expressly stated); *Alack* vs. *Yic Tanny Intern*, 923 SW2d 330 (Mo. 1996) (holding that a bright-line test is established requiring that the words "negligence" or "fault" be used conspicuously); *Doyle* vs. *Bowdoin College*, 43 A2d 1206,1208 (Me. 1979) (holding that there must be an express reference to liability for negligence); *Blum* vs. *Kauffman* 297 A2d 48,49 (Del. 1972) (holding that a release did not "clearly and unequivocally" express the intent of the parties without the word "negligence"); *Fina* vs. *Arco*, 200 F3d 266, 270 (5th Cir. 2000) (applying Delaware law and explaining that no Delaware case has allowed indemnification of a party for its own negligence without making specific reference to the negligence of the indemnified party and requiring at a minimum that indemnity provisions demonstrate that "the subject of negligence of the indemnitee was expressly considered by the parties drafting the agreement").

[27] *Ethyl Corporation* vs. *Daniel Construction Company*, 725 SW2d 705, 708 (Tex. 1987); *Atlantic Richfield Co*. vs. *Petroleum Personnel, Inc*., 768 SW2d 724 (Tex. 1989).

[28] *Fina, Inc*. vs. *ARCO*, 200 F2d 300 (5th Cir. 2000); *Purolator Products* vs. *Allied Signal, Inc*., 772 F. Supp. 124, 131 n. 3 (WDNY 1991; and *Houston Lighting & Power Co*. vs. *Atchison, Topeka & Santa Fe Ry*., 890 SW2d 455, 458 (Tex. 1994); see also Parker and Savich, "Contractual Efforts to Allocate the Risk of Environmental Liability: Is There a Way to Make Indemnities Worth More Than the Paper They Are Written On?", 44 *Sw. Law Journal* (1991), at p. 1349.

[29] *Dresser Industries* vs. *Page Petroleum, Inc*., 853 SW2d 505 (Tex. 1993) ("Because indemnification of a party for its own negligence is an extraordinary shifting of risk, this Court has developed fair notice requirements which …include the express negligence doctrine and the conspicuousness requirements. The express negligence doctrine states that a party seeking indemnity from the consequences of that party's own negligence must express that intent in specific terms within the four corners of the contract. The conspicuous requirement mandates that something must appear on the face of the [contract] to attract the attention of a reasonable person when he looks at it.'); *Alack* vs. *Vic Tanny Intern. of Missouri, Inc*., 923 SW2d 330,337 (Mo. Banc 1996).

Chapter 37 B. Forms and Documents

1. Indemnification Arrangements in Business Combinations

Byron F. Egan

Jackson Walker LLP

2323 Ross Avenue, Suite 600

Dallas, Texas 75201

United States

Telephone: +1 (214) 953 5727

Telefax: +1 (214) 661 6627

Email: began@jw.com

Note: The following commentary, forms, and documents are prepared by the above under the laws and practice prevailing as of 1 October 2018. Seldom is a model form or document directly suitable to a transaction without adaptation to the particularities and circumstances of the matter. Readers are invited to contact the contributor regarding any questions concerning the application of the forms and documents.

Article 11. Indemnification; Remedies

Note regarding certain defined terms: A number of the terms used with their initial letters capitalized in the indemnification section of an asset purchase, stock purchase, or merger agreement are defined in other sections of the agreement. As used in the following indemnification provisions, the following capitalized terms have the respective meanings set forth below:

"Assumed Liabilities" means the following Liabilities of Seller:

(a) Any trade account payable reflected on the Interim Balance Sheet (other than a trade account payable to any Shareholder or a Related Person of Seller) which remains unpaid at and is not delinquent as of the Effective Time;

(b) Any trade account payable (other than a trade account payable to any Shareholder or a Related Person of Seller) that is incurred by Seller in the Ordinary Course of Business between the date of the Interim Balance Sheet and the Effective Time at which remains unpaid and is not delinquent as of the Effective Time;

(c) Any Liability to Seller's customers incurred by Seller in the Ordinary Course of Business for non-delinquent orders outstanding as of the Effective Time reflected on Seller's books (other than any Liability arising out of or relating to a Breach which occurred prior to the Effective Time);

(d) Any Liability to Seller's customers under written warranty agreements in the forms disclosed in Part 2.4(a)(iv) given by Seller to its customers in the Ordinary Course of Business prior to the Effective Time (other than any Liability arising out of or relating to a Breach which occurred prior to the Effective Time);

(e) Any Liability arising after the Effective Time under the Seller Contracts described in Part 3.20(a) (other than any Liability arising under the Seller Contracts described on Exhibit 2.4(a)(v) or arising out of or relating to a Breach which occurred prior to the Effective Time);

(f) Any Liability of Seller arising after the Effective Time under any Seller Contract included in the Assets which is entered into by Seller after the date hereof in accordance with the provisions of this Agreement (other than any Liability arising out of or relating to a Breach which occurred prior to the Effective Time); and

(g) Any Liability of Seller described in Part 2.4(a)(vii).

"Breach" means any breach of, or any inaccuracy in, any representation or warranty or any breach of, or failure to perform or comply with, any covenant or obligation, in or of this Agreement or any other Contract, or any event which with the passing of time or the giving of notice, or both, would constitute such a breach, inaccuracy, or failure.

"Contemplated Transactions" means the transactions contemplated by this Agreement.

"Disclosure Letter" means the disclosure letter delivered by Seller and Shareholders to Buyer concurrently with the execution and delivery of this Agreement.

"Effective Time" means the time at which the closing of the Contemplated Transactions is consummated.

"Environment" means soil, land surface or sub-surface strata, surface waters (including navigable waters and ocean waters), groundwaters, drinking water supply, stream sediments, ambient air (including indoor air), plant and animal life, and any other environmental medium or natural resource.

"Environmental, Health and Safety Liabilities" means any cost, damages, expense, liability, obligation, or other responsibility arising from or under any Environmental Law or Occupational Safety and Health Law, including those consisting of or relating to:

(a) Any environmental, health, or safety matter, or condition (including on-site or off-site contamination, occupational safety and health, and regulation of any chemical substance or product);

(b) Any fine, penalty, judgment, award, settlement, legal or administrative proceeding, damages, loss, claim, demand or response, remedial, or inspection cost or expense arising under any Environmental Law or Occupational Safety and Health Law;

(c) Financial responsibility under any Environmental Law or Occupational Safety and Health Law for cleanup costs or corrective action, including any cleanup, removal, containment, or other remediation or response actions ("Cleanup") required by any Environmental Law or Occupational Safety and Health Law (whether or not such Cleanup has been required or requested by any Governmental Body or any other Person) and for any natural resource damages; or

(d) Any other compliance, corrective, or remedial measure required under any Environmental Law or Occupational Safety and Health Law.

The terms "*removal", "remedial",* and "*response action"* include the types of activities covered by the United States Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).

"Environmental Law" means any Legal Requirement that requires or relates to:

(a) Advising appropriate authorities, employees, or the public of intended or actual Releases of pollutants or hazardous substances or materials, violations of discharge limits, or other prohibitions and the commencement of activities, such as resource extraction or construction that could have significant impact on the Environment;

(b) Preventing or reducing to acceptable levels the Release of pollutants or hazardous substances or materials into the Environment;

(c) Reducing the quantities, preventing the Release, or minimizing the hazardous characteristics of wastes that are generated;

(d) Assuring that products are designed, formulated, packaged, and used so that they do not present unreasonable risks to human health or the Environment when used or disposed of;

(e) Protecting resources, species, or ecological amenities;

(f) Reducing to acceptable levels the risks inherent in the transportation of hazardous substances, pollutants, oil, or other potentially harmful substances;

(g) Cleaning up pollutants that have been Released, preventing the threat of Release, or paying the costs of such clean up or prevention; or

(h) Making responsible parties pay private parties, or groups of them, for damages done to their health or the Environment, or permitting self-appointed representatives of the public interest to recover for injuries done to public assets.

"Governmental Body" means any:

(a) Nation, state, county, city, town, borough, village, district, or other jurisdiction;

(b) Federal, state, local, municipal, foreign, or other government;

(c) Governmental or quasi-governmental authority of any nature (including any agency, branch, department, board, commission, court, tribunal, or other entity exercising governmental, or quasi-governmental, powers);

(d) Multi-national organization or body;

(e) Body exercising, entitled, or purporting to exercise, any administrative, executive, judicial, legislative, police, regulatory, or taxing authority or power; or

(f) Official of any of the foregoing.

"Hazardous Activity" means the distribution, generation, handling, importing, management, manufacturing, processing, production, refinement, Release, storage, transfer, transportation, treatment, or use (including any withdrawal or other use of groundwater) of Hazardous Material in, on, under, about, or from any of the Facilities or any part thereof into the Environment, and any other act, business, operation, or thing that increases the danger, or risk of danger, or poses an unreasonable risk of harm to persons or property on or off the Facilities.

"Hazardous Material" means any substance, material, or waste which is or will foreseeably be regulated by any Governmental Body, including any material, substance, or waste which is defined as a "hazardous waste", "hazardous material", "hazardous substance", "extremely hazardous waste", "restricted hazardous waste", "contaminant", "toxic waste", or "toxic substance" under any provision of Environmental Law, and including petroleum, petroleum products, asbestos, presumed asbestos-containing material or asbestos-containing material, urea formaldehyde, and polychlorinated biphenyls.

"Legal Requirement" means any federal, state, local, municipal, foreign, international, multinational, or other constitution, law, ordinance, principle of common law, code, regulation, statute, or treaty.

"Liability" means with respect to any Person, any liability or obligation of such Person of any kind, character, or description, whether known or unknown, absolute or contingent, accrued or unaccrued, disputed or undisputed, liquidated or unliquidated, secured or unsecured, joint or several, due or to become due, vested or unvested, executory, determined, determinable, or otherwise and whether or not the same is required to be accrued on the financial statements of such Person.

"Occupational Safety and Health Law" means any Legal Requirement designed to provide safe and healthful working conditions and to reduce occupational safety and health hazards, including the Occupational Safety and Health Act, and any program, whether governmental or private (such as those promulgated or sponsored by industry associations and insurance companies), designed to provide safe and healthful working conditions.

"Person" means an individual, partnership, corporation, business trust, limited liability company, limited liability partnership, joint stock company, trust, unincorporated association, joint venture or other entity, or a Governmental Body.

"Proceeding" means any action, arbitration, audit, hearing, investigation, litigation, or suit (whether civil, criminal, administrative, judicial, or investigative, whether formal or informal, whether public or private) commenced, brought, conducted, or heard by or before, or otherwise involving, any Governmental Body or arbitrator.

"Related Person" means —With respect to a particular individual:

(a) Each other member of such individual's Family;

(b) Any Person that is directly or indirectly controlled by any one or more members of such individual's Family;

(c) Any Person in which members of such individual's Family hold (individually or in the aggregate) a Material Interest; and

(d) Any Person with respect to which one or more members of such individual's Family serves as a director, officer, partner, executor, or trustee (or in a similar capacity).

With respect to a specified Person other than an individual:

(a) Any Person that directly or indirectly controls, is directly or indirectly controlled by, or is directly or indirectly under common control with, such specified Person;

(b) Any Person that holds a Material Interest in such specified Person;

(c) Each Person that serves as a director, officer, partner, executor, or trustee of such specified Person (or in a similar capacity);

(d) Any Person in which such specified Person holds a Material Interest; and

(e) Any Person with respect to which such specified Person serves as a general partner or a trustee (or in a similar capacity).

For purposes of this definition:

(a) *"Control"* (including "controlling", "controlled by", and "under common control with") means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract or otherwise, and shall be construed as such term is used in the rules promulgated under the Securities Act 1933, as amended;

(b) The *"Family"* of an individual includes:

    (i) the individual;

    (ii) the individual's spouse;

(iii) any other natural person who is related to the individual or the individual's spouse within the second degree;

(iv) any other natural person who resides with such individual; and

(c) *"Material Interest"* means direct or indirect beneficial ownership (as defined in Rule 13d-3 under the Securities Exchange Act of 1934, as amended) of voting securities or other voting interests representing at least 10 per cent of the outstanding voting power of a Person or equity securities or other equity interests representing at least 10 per cent of the outstanding equity securities or equity interests in a Person.

"Release" means any release, spill, emission, leaking, pumping, pouring, dumping, emptying, injection, deposit, disposal, discharge, dispersal, leaching, or migration on or into the Environment or into or out of any property.

"Retained Liabilities" means every Liability of Seller other than the Assumed Liabilities and include:

(a) Any Liability arising out of or relating to products of Seller to the extent manufactured or sold prior to the Effective Time other than to the extent expressly assumed under this Agreement;

(b) Any Liability under any Contract assumed by Buyer pursuant to this Agreement which arises after the Effective Time but which arises out of or relates to any Breach that occurred prior to the Effective Time;

(c) Any Liability for Taxes, including:

(i) any Taxes arising as a result of Seller's operation of its business or ownership of the Assets prior to the Effective Time;

(ii) any Taxes that will arise as a result of the sale of the Assets pursuant to this Agreement; and

(iii) any deferred Taxes of any nature;

(d) Any Liability under any Contract not assumed by Buyer under this Agreement, including any Liability arising out of or relating to Seller's credit facilities or any security interest related thereto;

(e) Any Environmental, Health, and Safety Liabilities arising out of or relating to the operation of Seller's business or Seller's leasing, ownership, or operation of real property;

(f) Any Liability under the Seller's employee benefit plans or relating to payroll, vacation, sick leave, workers' compensation, unemployment benefits, pension benefits, employee stock option or profit-sharing plans, health care plans or benefits, or any other employee plans or benefits of any kind for Seller's employees or former employees, or both;

(g) Any Liability under any employment, severance, retention, or termination agreement with any employee of Seller or any of its Related Persons;

(h) Any Liability arising out of or relating to any employee grievance whether or not the affected employees are hired by Buyer;

(i) Any Liability of Seller to any Shareholder or Related Person of Seller or any Shareholder;

(j) Any Liability to indemnify, reimburse, or advance amounts to any officer, director, employee, or agent of Seller;

(k) Any Liability to distribute to any of Seller's shareholders or otherwise apply all or any part of the consideration received hereunder;

(l) Any Liability arising out of any Proceeding pending as of the Effective Time, whether or not set forth in the Disclosure Letter;

(m) Any Liability arising out of any Proceeding commenced after the Effective Time and arising out of, or relating to, any occurrence or event happening prior to the Effective Time;

(n) Any Liability arising out of or resulting from Seller's compliance or non-compliance with any Legal Requirement or Order of any Governmental Body;

(o) Any Liability of Seller under this Agreement or any other document executed in connection with the Contemplated Transactions; and

(p) Any Liability of Seller based on Seller's acts or omissions occurring after the Effective Time.

"Shareholder" means a shareholder of Seller who is a party to this Agreement.

11.1 Survival

All representations, warranties, covenants, and obligations in this Agreement, the Disclosure Letter, the supplements to the Disclosure Letter, and the certificates and documents delivered pursuant to this Agreement shall survive the Closing and the consummation of the Contemplated Transactions, subject to Section 11.7. The right to indemnification, reimbursement, or other remedy based on such representations, warranties, covenants, and obligations shall not be affected by any investigation (including any environmental investigation or assessment) conducted with respect to, or any knowledge acquired (or capable of being acquired) about, the accuracy or inaccuracy of or compliance with, any such representation, warranty, covenant, or obligation. The waiver of any condition based on the accuracy of any representation or warranty, or on the performance of or compliance with any covenant or obligation, will not affect the right to indemnification, reimbursement, or other remedy based on such representations, warranties, covenants, and obligations.

11.2 Indemnification and Reimbursement by Seller and Shareholders

Seller and each Shareholder, jointly and severally, will indemnify and hold harmless Buyer, and its representatives, shareholders, subsidiaries, and related persons (collectively, the "Buyer Indemnified Persons"), and will reimburse the Buyer Indemnified Persons, for any loss, liability, claim, damage, expense (including costs of investigation and defense, and reasonable attorneys' fees and expenses) or diminution of value, whether or not involving a third-party claim (collectively, “Damages”), arising from or in connection with:

Clauses (a) through (d) below would be included whether the acquisition is in the form of an asset purchase, a stock purchase, or a merger.

(a) Any Breach of any representation or warranty made by Seller or any Shareholder in:

   (i) this Agreement (without giving effect to any supplement to the Disclosure Letter);

   (ii) the Disclosure Letter;

   (iii) the supplements to the Disclosure Letter;

   (iv) the closing certificates delivered pursuant to this Agreement (for this purpose, each such certificate will be deemed to have stated that Seller’s and Shareholders’ representations and warranties in this Agreement fulfill the requirements of [the Section requiring their representations to be correct as of the time of Closing] as of the Closing Date as if made on the Closing Date without giving effect to any supplement to the Disclosure Letter, unless the certificate expressly states that the matters disclosed in a supplement have caused a condition to closing specified in this Agreement not to be satisfied);

   (v) any transfer instrument; or

   (vi) any other certificate, document, writing, or instrument delivered by Seller or either Shareholder pursuant to this Agreement;

(b) Any Breach of any covenant or obligation of Seller or any Shareholder in this Agreement or in any other certificate, document, writing, or instrument delivered by Seller or any Shareholder pursuant to this Agreement;

(c) Any brokerage or finder’s fees or commissions or similar payments based on any agreement or understanding made, or alleged to have been made, by any Person with Seller or any Shareholder (or any Person acting on their behalf) in connection with any of the Contemplated Transactions;

(d) Any matter disclosed in Parts _____ of the Disclosure Letter;

Clauses (e) through (j) would be included if the acquisition is in the form of an asset purchase and would ordinarily not be included if the transaction is a merger or stock purchase.

(e) Any product or component thereof manufactured by or shipped, or any services provided by, Seller, in whole or in part, prior to the Closing Date;

(f) Any Liability arising out of the ownership or operation of any of the properties and assets (whether real, personal, or mixed and whether tangible or intangible) in which Buyer will be owner on consummation of the transaction contemplated by this Agreement (the “Assets”) or any real property leasehold or other interest currently or formerly owned or operated by any of Seller or its subsidiaries (the "Facilities") prior to the Effective Time other than the Assumed Liabilities;

(g) Any non-compliance with any Bulk Sales Laws or fraudulent transfer law in respect of the Contemplated Transactions;

(h) Any Liability under the WARN Act or any similar state or local Legal Requirement that may result from an "Employment Loss", as defined by 29 United States Code, section 2101(a)(6), caused by any action of Seller prior to the Closing or by Buyer's decision not to hire previous employees of Seller;

(i) Any employee benefit plan established or maintained by Seller; or

(j) Any Retained Liabilities.

Note: In the case of a stock purchase, the term "Buyer Indemnified Persons" would include the acquired company and its subsidiaries. In the case of a merger, the term "Buyer Indemnified Persons" would include the surviving corporation of the merger and its subsidiaries.

11.3 Indemnification and Reimbursement by Seller — Environmental Matters

In addition to the other indemnification provisions in this Article 11, Seller and each Shareholder, jointly and severally, will indemnify and hold harmless Buyer and the other Buyer Indemnified Persons, and will reimburse Buyer and the other Buyer Indemnified Persons, for any Damages (including costs of cleanup, containment, or other remediation) arising, directly or indirectly, from or in connection with:

(a) Any Environmental, Health, and Safety Liabilities arising out of or relating to:

   (i) the ownership or operation by any Person at any time on or prior to the Closing Date of any of the Facilities, Assets, or the business of Seller; or

   (ii) any Hazardous Materials or other contaminants that were present on the Facilities or Assets at any time on or prior to the Closing Date; or

(b) Any bodily injury (including illness, disability, and death, and regardless of when any such bodily injury occurred, was incurred, or manifested itself), personal injury, property damage (including trespass, nuisance, wrongful eviction, and deprivation of the use of real property), or other damage of or to any Person or any Assets in any way arising from or allegedly arising from any Hazardous Activity conducted by any Person with respect to the business of Seller or the Assets prior to the Closing Date, or from any Hazardous Material that was (i) present or suspected to be present on or before the Closing Date on or at the Facilities (or present or suspected to be present on any other property, if such Hazardous Material emanated or allegedly emanated from any Facility and was present or suspected to be present on any Facility on or prior to the Closing Date) or (ii) Released or allegedly Released by any Person on or at any Facilities or Assets at any time on or prior to the Closing Date.

Buyer will be entitled to control any Remedial Action, any Proceeding relating to an Environmental Claim, and, except as provided in the following sentence, any other Proceeding with respect to which indemnity may be sought under this Section 11.3. The procedure described in Section 11.9 will apply to any claim solely for monetary damages relating to a matter covered by this Section 11.3.

11.4 Indemnification and Reimbursement by Buyer

Buyer will indemnify and hold harmless Seller, and will reimburse Seller, for any Damages arising from or in connection with:

Subsections (a), (b), and (c) would be included whether the acquisition is in the form of an asset purchase, a stock purchase, or a merger.

(a) Any Breach of any representation or warranty made by Buyer in this Agreement or in any certificate, document, writing, or instrument delivered by Buyer pursuant to this Agreement;

(b) Any Breach of any covenant or obligation of Buyer in this Agreement or in any other certificate, document, writing, or instrument delivered by Buyer pursuant to this Agreement;

(c) Any claim by any Person for brokerage or finder's fees or commissions or similar payments based on any agreement or understanding alleged to have been made by such Person with Buyer (or any Person acting on Buyer's behalf) in connection with any of the Contemplated Transactions;

Subsections (d) and (e) would be included if the acquisition is in the form of an asset purchase and would ordinarily not be included if the transaction was a merger or stock purchase.

(d) Any obligations of Buyer with respect to bargaining with the collective bargaining representatives of Active Hired Employees subsequent to the Closing; or

(e) Any Assumed Liabilities.

11.5 Limitations on Amount —Seller and Shareholders

Seller and Shareholders shall have no liability (for indemnification or otherwise) with respect to claims under Section 11.2(a) until the total of all Damages with respect to such matters exceeds $____________ , and then only for the amount by which such Damages exceed $_____________. However, this Section 11.5 will not apply to claims under Sections 11.2(b) through (i) or to matters arising in respect of Sections ____ [specified representations relating to title to assets, accounts receivable, taxes, environmental matters, related party transactions, brokers or finders, securities law matters, etc.] or to any Breach of any of Seller's and Shareholders' representations and warranties of which the Seller had knowledge at any time prior to the date on which such representation and warranty is made or any intentional Breach by Seller or either Shareholder of any covenant or obligation, and Seller and the Shareholders will be jointly and severally liable for all Damages with respect to such Breaches.

11.6 Limitations on Amount —Buyer

Buyer will have no liability (for indemnification or otherwise) with respect to claims under Section 11.4(a) until the total of all Damages with respect to such matters exceeds $__________ , and then only for the amount by which such Damages exceed $__________ .However, this Section 11.6 will not apply to claims under Section 11.4(b) through (e) or matters arising in respect of Section ____ [brokers or finders] or to any Breach of any of Buyer's representations and warranties of which Buyer had knowledge at any time prior to the date on which such representation and warranty is made or any intentional Breach by Buyer of any covenant or obligation, and Buyer will be liable for all Damages with respect to such Breaches.

11.7 Time Limitations

(a) If the Closing occurs, Seller and Shareholders will have liability (for indemnification or otherwise) with respect to any Breach of (i) a covenant or obligation to be performed or complied with prior to the Closing Date (other than those in Sections ____ [assets Seller agreed to deliver and liabilities Seller agreed to satisfy] and Articles 10 and 12, as to which a claim may be made at any time) or (ii) a representation or warranty (other than those in Sections ____ [specified representations relating to title to assets, accounts receivable, taxes, environmental matters, related party transactions, brokers or finders, securities law matters, etc.] as to which a claim may be made at any time), but only if on or before ___________ , 20__. Buyer notifies Seller or Shareholders of a claim specifying the factual basis of the claim in reasonable detail to the extent then known by Buyer.

(b) If the Closing occurs, Buyer will have liability (for indemnification or otherwise) with respect to any Breach of (i) a covenant or obligation to be performed or complied with prior to the Closing Date or (ii) a representation or warranty (other than that set forth in Section ____ [brokers or finders], as to which a claim may be made at any time), but only if on or before _______________, 20__ Seller or Shareholders notify Buyer of a claim specifying the factual basis of the claim in reasonable detail to the extent then known by Seller or Shareholders.

11.8 Right of Set-Off; Escrow

On notice to Seller specifying in reasonable detail the basis therefore, Buyer may set off any amount to which it may be entitled under this Article 11 against amounts otherwise payable under the promissory note made by Buyer in favor of Seller as part of the Purchase Price (the "Promissory Note") or may give notice of a claim in such amount under the Escrow Agreement. The exercise of such right of set-off by Buyer in good faith, whether or not ultimately determined to be justified, will not constitute an event of default under the Promissory Note or any instrument securing the Promissory Note. Neither the exercise of nor the failure to exercise such right of set-off or to give a notice of a claim under the Escrow Agreement pursuant to which $________ of the Purchase Price was deposited in escrow at the Closing will constitute an election of remedies or limit Buyer in any manner in the enforcement of any other remedies that may be available to it.

11.9 Procedure for Indemnification —Third-Party Claims

(a) Promptly after receipt by a Person entitled to indemnity under Sections 11.2, 11.3 (to the extent provided in the last sentence of Section 11.3), or 11.4 (an "Indemnified Person") of notice of the assertion of a Third-Party Claim against it, such Indemnified Person shall, if a claim is to be made against a Person obligated to indemnify under such Section (an "Indemnifying Person"), give notice to the Indemnifying Person of the assertion of such Third-Party Claim, but the failure to notify the Indemnifying Person will not relieve the Indemnifying Person of any liability that it may have to any Indemnified Person, except to the extent that the Indemnifying Person demonstrates that the defense of such Third-Party Claim is prejudiced by the Indemnified Person's failure to give such notice.

(b) If any Third-Party Claim referred to in Section 11.9(a) is against an Indemnified Person and it gives notice to the Indemnifying Person of the assertion of such Third-Party Claim, the Indemnifying Person shall be entitled to participate in the defense of such Third-Party Claim and, to the extent that it wishes, unless:

(i) the Indemnifying Person is also a Person against whom the Third-Party Claim is made and the Indemnified Person determines in good faith that joint representation would be inappropriate; or

(ii) the Indemnifying Person fails to provide reasonable assurance to the Indemnified Person of its financial capacity to defend such Third-Party Claim and provide indemnification with respect to such Third-Party Claim, to assume the defense of such Third-Party Claim with counsel satisfactory to the Indemnified Person.

(c) After notice from the Indemnifying Person to the Indemnified Person of its election to assume the defense of such Third-Party Claim, the Indemnifying Person shall not, as long as it diligently conducts such defense, be liable to the Indemnified Person under this Article 11 for any fees of other counsel or any other expenses with respect to the defense of such Third-Party Claim, in each case subsequently incurred by the Indemnified Person in connection with the defense of such Third-Party Claim, other than reasonable costs of investigation.

(d) If the Indemnifying Person assumes the defense of a Third-Party Claim:

(i) Such assumption will conclusively establish for purposes of this Agreement that the claims made in that Third-Party Claim are within the scope of and subject to indemnification; and

(ii) No compromise or settlement of such Third-Party Claims may be effected by the Indemnifying Person without the Indemnified Person's Consent unless:

(A) there is no finding or admission of any violation of Legal Requirement or any violation of the rights of any Person and no effect on any other claims that may be made against the Indemnified Person;

(B) the sole relief provided is monetary damages that are paid in full by the Indemnifying Person; and

(C) the Indemnified Person shall have no liability with respect to any compromise or settlement of such Third-Party Claims effected without its Consent.

(e) If notice is given to an Indemnifying Person of the assertion of any Third-Party Claim and the Indemnifying Person does not, within 10 days after the Indemnified Person's notice is given, give notice to the Indemnified Person of its election to assume the defense of such Third-Party Claim, the Indemnifying Person will be bound by any determination made in such Third-Party Claim or any compromise or settlement effected by the Indemnified Person.

(f) Notwithstanding the foregoing, if an Indemnified Person determines in good faith that there is a reasonable probability that a Third-Party Claim may adversely affect it or its Related Persons other than as a result of monetary damages for which it would be entitled to indemnification under this Agreement, the Indemnified Person may, by notice to the Indemnifying Person, assume the exclusive right to defend, compromise, or settle such Third-Party Claim, but the Indemnifying Person will not be bound by any determination of any Third-Party Claim so defended for the purposes of this Agreement or any compromise or settlement effected without its Consent (which may not be unreasonably withheld).

(g) Seller and each Shareholder hereby consent to the non-exclusive jurisdiction of any court in which a Proceeding in respect of a Third-Party Claim is brought against any Buyer Indemnified Person for purposes of any claim that a Buyer Indemnified Person may have under this Agreement with respect to such Proceeding or the matters alleged therein, and agree that process may be served on Seller and Shareholders with respect to such a claim anywhere in the world.

(h) With respect to any Third-Party Claim subject to indemnification under this Article 11:

(i) both the Indemnified Person and the Indemnifying Person, as the case may be, shall keep the other Person fully informed of the status of such Third-Party Claims and any related Proceedings at all stages thereof where such Person is not represented by its own counsel; and

(ii) the parties agree (each at its own expense) to render to each other such assistance as they may reasonably require of each other and to cooperate in good faith with each other to ensure the proper and adequate defense of any Third-Party Claim.

(i) With respect to any Third-Party Claim subject to indemnification under this Article 11, the parties agree to cooperate in such a manner as to preserve in full (to the extent possible) the confidentiality of all Confidential Information and the attorney-client and work-product privileges. In connection therewith, each party agrees that:

(i) it will use its Best Efforts, in respect of any Third-Party Claim in which it has assumed or participated in the defense, to avoid production of Confidential Information (consistent with applicable law and rules of procedure); and

(ii) all communications between any party hereto and counsel responsible for or participating in the defense of any Third-Party Claim shall, to the extent possible, be made so as to preserve any applicable attorney-client or work product privilege.

11.10 Procedure for Indemnification —Other Claims

A claim for indemnification for any matter not involving a Third-Party Claim may be asserted by notice to the party from whom indemnification is sought and shall be paid promptly after such notice.

11.11 Indemnification in Case of Strict Liability or Indemnitee Negligence

The indemnification provisions in this article 11 shall be enforceable regardless of whether the liability is based on past, present, or future acts, claims or legal requirements (including any past, present, or future bulk sales law, environmental law, fraudulent transfer act, occupational safety and health law, or products liability, securities, or other legal requirement), and regardless of whether any person (including the person from whom indemnification is sought) alleges or proves the sole, concurrent, contributory, or comparative negligence of the person seeking indemnification, or the sole or concurrent strict liability imposed on the person seeking indemnification.