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Key Escrow Terms

Courtesy of Fenwick & West

What is the range of most likely outcomes for a "typical" public/private merger as to survival of representations and warranties, indemnity and escrow?

The elimination of the limits fixed by pooling rules gives buyers more flexibility on indemnity, escrow and survival provisions, but targets still push for the old pooling rule limits (escrow (and generally the indemnity cap) not exceeding 10% of deal value and generally no general indemnities (or survival of representations) beyond the first anniversary of closing).

Buyers will instead typically demand survival for **at least two years** on most claims, but **three to six years on matters such as** due authorization, title, capitalization, tax, environmental, ERISA, intellectual property/patent infringement, litigation and intentional misrepresentation. Indemnity escrows rarely exceed 15%-20% (and if they do, they frequently decline during the escrow period), **and they usually last 1 year (or 2 years for specified risks) (although in deals with an earnout, the buyer will usually reserve the right to set off some or all types of indemnity claims against earnout payments, perhaps subject to a cap).** Indemnity caps are often tied to the escrow amount (say 20%), as specified above, but will often be higher for breaches of representations such as due authorization, title, capitalization, tax, environmental, ERISA, intellectual property/patent infringement, and litigation matters.

Baskets are far more typical than deductibles and baskets range from ¼ of 1% to 1% of the deal value. The target shareholders' exposure on identified risk contingencies is often not subject to either the basket or the cap (which is why such claims are often taken into account as a price adjustment based on estimated exposure instead). Other issues include exclusivity of indemnification remedy, exclusivity of escrow as source of remedy, the definition of damages to include interest and consequential damages, ability to credit tax deductions or insurance proceeds received by buyer and control of litigation over third party claims.

http://www.fenwick.com/FenwickDocuments/Mergers_and_Acquisitions_Deals.pdf