

# Illustrative Negotiation of Controversial M&A Deal Terms

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# Parties; proposed transaction:

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- **Rick's client** -- a privately held, founder-backed corporation (“Target Company”) and its sole stockholder (“Seller”)
- **Joel's client** -- a large-cap, publicly traded strategic acquirer (“Buyer”)
- **Proposed transaction** -- Buyer to purchase all of Target Company’s outstanding stock from Seller for \$300M in cash
- **Antitrust considerations** -- The proposed transaction will require HSR Act notifications. A “second request” from the FTC is a possibility, but the parties believe the transaction will ultimately receive HSR clearance without the imposition of material remedies. The time period between the signing of the stock purchase agreement and the closing of the transaction could be 6 months or longer.

## Excerpts from Buyer's draft of indemnification provisions:

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- ***“Seller shall indemnify Buyer against any Damages directly or indirectly incurred by Buyer as a direct or indirect result of or directly or indirectly related to any inaccuracy in any of Seller’s representations and warranties.”***
- ***“ ‘Damages’ includes any damages, losses, diminution or decline in value, lost opportunities, costs or expenses (including costs of investigation and attorneys’ fees, whether relating to claims by third parties against Target or relating to indemnification claims by Buyer against Seller).”***

## Seller's mark-up of Buyer's draft:

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- “*Seller shall indemnify Buyer against any **foreseeable** Damages ~~directly or indirectly~~ incurred by Buyer as a ~~direct or indirect~~ result of ~~or directly or indirectly related to~~ any inaccuracy in any of Seller's representations and warranties.*”
- “*‘Damages’ includes **means** any damages, losses, ~~diminution or decline in value, lost opportunities,~~ costs or expenses (including **reasonable** costs of investigation and **reasonable** attorneys' fees, ~~whether~~ relating to **indemnifiable** claims by third parties against Target or relating to indemnification claims by Buyer against Seller), **but excludes consequential damages.***”

## Buyer's draft of "non-meritorious" claims indemnity:

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***“[Seller shall indemnify Buyer against any Damages incurred by Buyer as a result of]...any claim asserted by any third party that, if meritorious, would constitute or give rise to an inaccuracy in any of Seller’s representations and warranties.”***

## Buyer's draft of "10b-5" representation:

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***“[Seller represents and warrants to Buyer that]...neither this Agreement nor the Disclosure Schedule contains any representation or other statement that omits to state a material fact necessary to make the representations or other statements therein, in light of the circumstances in which they were made, not misleading.”***

# Caveats:

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- The sample provisions included in these materials are intended only to serve as examples of hypothetical provisions. All provisions must be carefully tailored to reflect the specific terms of the transactions to which they relate; accordingly, it may be necessary to make substantial modifications to these provisions before they can be used in the context of any proposed transactions.
- This presentation is not intended to provide legal advice or to establish an attorney-client relationship.