

Indemnification Claims — Follow the Letter of the Contract

PENpoints

In making or defending indemnification claims, parties should pay careful attention to the procedural requirements so that they are not disqualified on a technicality or foot-fault.

Purchase agreements typically include fairly elaborate provisions addressing the step-by-step process of how a buyer can pursue an indemnification claim against a seller for breaches of the terms of the sale. A number of recent Delaware decisions highlight how courts expect parties — both buyers and sellers — to strictly adhere to those terms in the event of a dispute over an indemnification claim or risk losing their right to pursue or defend the claim.

In the most [recent decision](#), the court, in what itself noted “may seem like a harsh result,” granted summary judgment to the buyer on an indemnification claim based on the failure of the seller to object to the buyer’s claim notice within the mandated 10-day objection period. This outcome could be viewed as particularly unforgiving being that the seller did in fact deliver the objection a few days after the deadline and had previously objected in a timely fashion to an earlier claim notice that related to the same underlying claims. However, the second notice contained additional details and certain new claims, effectively restarting the clock for a timely objection notice. In addition, the court refused to even entertain the seller’s counterclaim that the buyer’s indemnification notice itself missed the contractual 10-business day deadline for the buyer to deliver a notice of claim, finding that the seller’s failure to deliver a timely objection notice served as a full waiver of this assertion by the seller.

Similar themes underlie a [2015 decision](#) in a long-running dispute between Al Gore and Al Jazeera over the sale of Current TV. In this case, the court held that certain of the buyer’s indemnification claims were “facially invalid” because the words chosen by the buyer in the claim notice were that it “may incur Damages” from the seller’s breaches, while the language of the

merger agreement required the notice to state that the buyer “reasonably believes it will incur or pay Damages.” Similarly, in the context of an indemnification claim by buyer for expected third-party claims against the acquired business, the court strictly construed the requirement that the buyer’s claim notice describe “the maximum amount reasonably believed by [Buyer] to be demanded by a third party.” Because the merger agreement did not limit this requirement to state the maximum claim to what was then known or knowable by the buyer, the buyer’s failure to predict and then state what was then likely unknowable — the maximum amount an independent third party would ultimately claim against the acquired business — made the claim notice defective and therefore invalid.

If an indemnification claim or dispute does arise, parties should pay careful attention to the procedural requirements such as timing and wording to maximize the chances that their claims will be evaluated on the merits rather than being disqualified on a technicality or foot-fault, even if otherwise massaging the language of the notice would preserve more optionality on the ultimate trajectory of the claim.

In his recent decision, VC Sights captured Delaware’s “contractarian” approach to these issues that favors strict construction over perceived fairness by reiterating that “Delaware courts enforce bad deals the same as good deals...and cannot ignore the plain terms of the contract.”

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PLI Drafting and Negotiating Corporate Agreements 2018**New York, NY, January 18, 2018****Chicago, IL, January 31, 2018**

This PLI seminar will teach the basics of drafting and negotiating corporate agreements — from how the provisions of an agreement fit together, to the fundamental drafting and negotiating principles common to all corporate agreements. Kirkland partners Jonathan Davis and Keith Crow will be panelists at the New York and Chicago events, respectively. Click [here](#) for more information or to register.

**45th Annual Securities Regulation Institute
Coronado, CA, January 22-24, 2018**

Hosted by Northwestern Law, the 43rd Annual Securities Regulation Institute will take place in Coronado, California. One of the most visible and highly regarded securities and corporate law conferences in the country, the Securities Regulation Institute reaches prominent attorneys from both firm and in-house practices. Kirkland partner Scott Falk is on the planning committee and will be a panel member for the Mergers & Acquisitions session. Click [here](#) for more information or to register.

**24th Annual Harvard Business School Venture Capital Private Equity Conference
Boston, MA, January 27, 2018**

Kirkland is a sponsor of the 24th Annual Harvard Business School Venture Capital and Private Equity Conference, which will address a range of today's most relevant topics. Keynote speakers at this year's event are Kewsong Lee, deputy CIO of private equity and head of global market strategies at The Carlyle Group; Sean Klimczak, global head of infrastructure at Blackstone; and Paul Maeder, co-founder and managing general partner at Highland Capital Partners. Click [here](#) for more details or to register.

**17th Annual Becken Petty O'Keefe & Company Private Equity Conference
Chicago, IL, February 23, 2018**

Kirkland is a sponsor of this annual event, which brings together financiers, students and entrepreneurs to network and share insights into the dynamics of investing in a constantly changing economy. This year's conference is themed "Remaining Nimble and Achieving Returns While Facing Uncertainty and Volatility." Click [here](#) for more information.

25th Annual Columbia Business School Private Equity Conference**New York, NY, February 23, 2018**

Kirkland will partner with Columbia Business School to sponsor its annual Private Equity Conference. The event will focus on the emerging challenges and opportunities facing the private equity and venture capital industries in the coming year. The conference will bring together industry professionals, students, alumni and faculty to share their knowledge and experiences. Click [here](#) for more information or to register.

**13th Annual Stern Private Equity Conference
New York, NY, March 2, 2018**

Kirkland will sponsor New York University's Stern School of Business' 13th Annual Stern Private Equity Conference. The conference will provide a forum for industry leaders to discuss the opportunities and risks of today's private equity and venture capital environment, including how tepid global growth, regulatory dynamics, political pressure and financial market conditions are posing challenges to fundraising, deal financing and operations. More information to follow.

Wharton Private Equity & Venture Capital Conference**New York, NY, March 16, 2018**

The Wharton School's Private Equity and Venture Capital Conference will showcase several keynote speeches and panel discussions on the state of the private equity and venture capital industries. Kirkland partner Robert Blaustein will moderate the Funds panel and partner Stephen Hessler will moderate the Distressed Opportunities panel. Click [here](#) for more information or to register.

**2018 Kellogg Private Equity and Venture Capital Conference
Chicago, IL, April 25, 2018**

Kirkland is a sponsor of this annual student-led conference, which brings industry professionals, alumni, students and Kellogg faculty together for a day of discussion on the current state of the industry and its most pressing issues. More information to follow.

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Private Equity Practice at Kirkland & Ellis

Kirkland & Ellis' nearly 400 private equity attorneys have handled leveraged buyouts, growth equity transactions, recapitalizations, going-private transactions and the formation of private equity, venture capital and hedge funds on behalf of more than 400 private equity firms around the world.

Kirkland has been widely recognized for its preeminent private equity practice. The Firm was named "Private Equity Group of the Year" in each of the last six years by *Law360* and was commended as being the most active private equity law firm of the last decade in *The PitchBook Decade Report*. Kirkland has been ranked as a Tier 1 law firm for Leveraged Buyouts and Private Equity for the past seven years in U.S. News and World Report, Best Lawyers' "Best Law Firms" rankings. In 2008-2017, Chambers and Partners named Kirkland the Leading Global-wide Private Equity Firm. The Firm was ranked as the #1 law firm for both Global and U.S. Buyouts by deal volume in Mergermarket's *League Tables of Legal Advisors to Global M&A for Full Year 2011-2016*, and has consistently received top rankings among law firms in Private Equity by The Legal 500, the Practical Law Company and IFLR, among others.

The Lawyer magazine has recognized Kirkland as one of its "Transatlantic Elite," having noted that the Firm is "leading the transatlantic market for the provision of top-end transactional services ... on the basis of a stellar client base, regular roles on top deals, market-leading finances and the cream of the legal market talent."

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