

DyKEMA COX SMITH

Contracts in the Courthouse

Post-Closing Adjustments, Sandbagging and More



California | Illinois | Michigan | Minnesota | Texas | Washington, D.C.

www.dykema.com

**Say what
you mean.**

**Mean what
you say.**

Misusing Forms



- Problems with forms occur when the form and the transaction do not tie
- Occurs often with the “form file”
 - Buyer vs. Seller
 - Differences in leverage
 - Law and standards change over time

def·i·ni·tion

\dē-fə'-nī-shən\
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meaning of a word;
can be subjective

Post-Closing Adjustments

The “Adjustment Amount” (which may be a positive or negative number) will be equal to the amount determined by subtracting the Closing Working Capital from the Initial Working Capital. If the Adjustment Amount is positive, the Adjustment Amount shall be paid by wire transfer by Seller to an account specified by Buyer. If the Adjustment Amount is negative, the difference between the Closing Working Capital and the Initial Working Capital shall be paid by wire transfer by Buyer to an account specified by Seller.

“Working Capital” as of a given date shall mean the amount calculated by subtracting the current liabilities of Seller as of that date from the current assets of Seller as of that date. The Working Capital of Seller as of the date of the Balance Sheet (the “Initial Working Capital”) was _____ dollars (\$_____).

Post-Closing Adjustments

- Methodology is key:
 - Relevant to valuation
 - Easy to administer and determine
 - Consistent with historical practice
- Escrowing adjustment amount
 - Adjustment limited to escrow
 - Escrow limited to adjustment or covers indemnity and other obligations

Reps and Warranties

- Knowledge Qualified
 - Actual vs. Constructive
 - Whose knowledge counts

Disclaiming Reliance

Here's how

- Disclaimer has to be express and precise
- Formation Factors
 - Contract negotiated; not boilerplate
 - Parties specifically discussed issue out of which dispute arises
 - Arms-length
 - Sophisticated parties represented by counsel

Can you?

Sandbagging



Indemnities

- Interplay with limitation of liability provisions
- Duty to defend – who's in charge

Some Factors to Consider

- Is the party with the right to control the defense reasonably capable of providing a defense?
- If the indemnitor has the right to control the defense, are there exceptions to that right? For example,
 - Where the potential liability exceeds the indemnity obligation?
 - Where non-monetary damages are sought?
 - Where claims or an investigation is brought by a regulatory or law enforcement authority?
 - Where there is an express (or implied) conflict between the parties?
- What limits are there to the defending party's ability to settle? Or will the consent of both parties be required?