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# Purchase Agreement Drafting Tips From Indemnification Case



Gail Weinstein



Steven Epstein



David Shaw



Andrea Gede-Lange

By **Gail Weinstein, Steven Epstein, David Shaw and Andrea Gede-Lange**
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In NASDI Holdings LLC v. North American Leasing Inc.,[1] the Delaware Court of Chancery interpreted an indemnification notice deadline provision in a purchase agreement as not applying to the plaintiff's indemnification claim. The court therefore granted summary judgment to the plaintiff-seller on its claim that it is entitled to indemnification.

**Key Points**

- Apparently clear agreement language can be unclear in terms of its interrelationship with other provisions of the agreement. Importantly, the drafting of a provision that relates to indemnification claims (such as, in NASDI, the indemnification claims notice provision) should be clear as to whether the provision covers claims relating to breaches of representations and warranties, or to breaches of covenants, or to both.

- In our view, the decision highlights that the court will not stretch to interpret an agreement in favor of a party whose offending conduct led to the dispute (and, indeed, may stretch to interpret ambiguous language against such a party). While the court characterized the agreement language at issue as "clear [and] unambiguous," the language appears on its face to have been ambiguous and the court's interpretation was consistent with the equities of the case.

- The opinion highlights the potentially ambiguous nature of the phrases "in any event," "but in any event" and "provided that." The decision serves as a reminder to drafters that, even in the case of commonly used phrases, supplemental language may be necessary to clarify the meaning. (See "Practice Points" below.)

**Background**

In 2014, North American Leasing, the purchaser, acquired the demolition and site-redevelopment business (the company) of NASDI Holdings, the seller. As part of the purchase, North American took control of the company's ongoing construction projects, including work under a $20 million subcontract on the Bayonne Bridge between New York and New Jersey.

The company was required to obtain payment and performance surety bonds for the project; and the purchase agreement provided that, after the closing, the seller was required to maintain those bonds,

secured by a letter of credit. In exchange, the purchaser agreed to indemnify the seller for any losses incurred in connection with the bonds or the letter of credit. After the closing, in 2017, the company "walked off the Bayonne Bridge job." As a result, the surety drew more than $20 million on the seller's letter of credit. The seller demanded indemnification from the purchaser for the loss; the purchaser refused; and the seller brought this suit.

***Purchase Agreement Provisions***

The purchase agreement provides as follows:

- Section 9.3(a): To receive indemnification, an indemnitee must provide notice of a claim:

  > [1] within a reasonable time after such Indemnitee becomes aware of the existence of [the] potential claim ... , [2] but in any event before the later of the Termination Date [(March 16, 2016)] or the survival period provided in Section 9.5 with respect to [the] particular representation and warranty to which the matter applies[.]

- Section 7.7: The seller will maintain the surety bonds and letter of credit until a specified date (defined as the "bond covenant termination date") or when the sureties are no longer required by the underlying projects.

- Section 9.2: The purchaser will indemnify the seller for seven types of "losses." The fifth type of loss, set forth in Section 9.2(e), is losses relating to the surety bonds or the letter of credit.

***Conflicting Interpretations of the Indemnification Notice Provision***

The purchaser argued that Section 9.3(a) means that all claims for indemnification must be made within a "reasonable time" and that no claim for indemnification (whether for breach of a representation or warranty or for breach of a covenant) may be made after the termination date (with the only exception to the termination date deadline being for a claim for breach of any representation and warranty for which the agreement provides a survival period beyond that date). As the loss under the letter of credit was not incurred until after the termination date, the claim was time-barred, according to the purchaser. The seller argued that Section 9.3(a) means that indemnification claims for breaches of covenants must be made within a "reasonable time" and claims for breaches of representations and warranties must be made by the termination date (unless the agreement provides a survival period beyond that date).

***Court's Interpretation Based on the Agreement Language***

The court agreed with the seller's interpretation. The court characterized the language at issue as "clear [and] unambiguous." Although it is difficult to reach a firm conclusion without a review of the full language of the purchase agreement, we observe that, arguably, the "plain reading" of Section 9.3(a) is consistent with the purchaser's interpretation — given that, in the provision, the drafter did not distinguish between indemnification claims relating to breaches of representations and warranties as opposed to breaches of covenants.

The court explained its conclusion in a discussion that focused on the difference between an "exception" versus a "qualification" to preceding text — and a view that the phrase "but in any event" in clause [2] of Section 9.3(a) reflects that clause [2] provides an exception to the "reasonable time" requirement of

clause [1], while the phrase "in any event" (without the word "but") would have reflected instead a qualification to the "reasonable time" requirement. According to the court, clause [2] excepted out of the reasonable time requirement claims relating to breaches of representations and warranties — and, therefore, clause 1 applies to claims for breaches of covenants and clause 2 applies to claims for breaches of representations and warranties (with the result that the termination date deadline does not apply to breaches of covenants). If clause [2] were instead a qualification, according to the court, it would mean that all claims were subject to clause [1] and no claim could be made after the termination date (unless it related to a breach of a representation with a longer survival period).

***Court's Interpretation Based on "the Purpose of Indemnification"***

The court wrote:

> By zeroing in on the words 'in any event,' the [Purchaser] lose[s] sight of the purpose of the indemnification provisions as a whole. That purpose was to indemnify [the Seller] for seven types of 'Losses' set forth in Section 9.2" (the fifth one of which was Losses relating to the bonds or letter of credit). By interpreting clause [2] as terminating the Seller's right to indemnification relating to the letter of credit "before [the Purchaser's] obligation to maintain the Letter of Credit ceases, [the Seller] undermines the purpose of the indemnification provisions.

The vice chancellor reasoned that the "structure" of the language in clause [2] "roughly parallels" the provisions of Section 9.5 which govern the survival of the representations and warranties. Under Section 9.5, the representations and warranties survive until the termination date, but with two exceptions: certain specified representations survive indefinitely and other specified representations survive for the full period of the applicable statutes of limitations plus 60 days.

The vice chancellor observed:

> The language of [clause [2] of the indemnification notice provision] ties to the default (the 'Termination Date') and the exceptions ('the survival period provided in Section 9.5')." She concluded: "In sum, the purpose of [clause 2] is to ensure that [the Seller is] able to notice indemnification claims relating to the representations and warranties for the life of those representations and warranties, not to cut short indemnification rights relating to the Letter of Credit.

**Practice Points**

***Need for Clarity in Drafting of Agreements, Including the Interrelationship of Provisions***

It cannot be emphasized enough that drafting must be as clear as possible and that a common area of ambiguity is how separate agreement provisions interrelate with each other. As illustrated by NASDI, when a provision relates to "indemnification," the provision should be clear whether it covers all indemnity claims or only claims for breaches of representations and warranties.

When a covenant includes a provision for indemnification, it should be clear whether the general indemnification provision (for example, with respect to notice requirements and deadlines) does or does not apply. The NASDI agreement provision at issue could have easily been clarified to mean what the court concluded it meant, by adding the following bolded language:

[To receive indemnification, an indemnitee must provide notice of a claim] within a reasonable time after such Indemnitee becomes aware of the existence of [the] potential Claim…, but, ***in the case of claims relating to breach of a representation or warrant, the notice must be provided*** in any event before the later of the Termination Date or the survival period provided in Section 9.5 with respect to [the] particular representation and warranty to which the matter applies[.]

***Clarity in Drafting Indemnification Provisions***

We offer the following suggestions:

- The drafting of indemnification provisions (and, when an indemnification claim arises, notice of the claim) should be reviewed by litigators familiar with the transaction.

- If there are particular areas of importance, concern or uncertainty, it can be useful to specify in the agreement how that issue would be handled. It can also be useful to provide hypothetical examples to illustrate how the parties intend certain provisions to operate.

- An agreement should clearly specify with respect to any provisions relating to indemnification whether they apply to indemnification for breaches of representations and warranties, or to breaches of covenants, or to both. The time periods for survival of each representation and warranty and each covenant, and the notice period for each, should clearly reflect the business arrangement between the parties.

- In NASDI, the court offered that, typically, the court will interpret the following words and phrases as follows (notably, in NASDI, the context buttressed this interpretation):

    - In the interpretation of agreement language, the word "but" generally indicates an exception to the text before it rather than a qualification.

    - The phrase "in any event" generally indicates a qualification to the text before it, while the phrase "but in any event" generally indicates an exception. (As discussed above, the court's holding in NASDI was based in large part on the court's interpretation of clause [2] of the notice indemnification provision (which began "but in any event") as constituting an exception to, rather than a qualification of, the "reasonable time" requirement in the first clause of the provision.)

    - The phrase "in any event" is more precise than "provided that." The court cited an article that (a) states that "using provided that is an imprecise way to signal the relationship between two conjoin contract provisions" and (b) recommends the use of in any event instead of provided that "to impose a limitation."

***Parties should think through, and clearly and specifically address in the purchase agreement, which party will have what responsibility with respect to long-term or problematic ongoing projects (debts or other liabilities) of the acquired company.***

For example, in NASDI, in lieu of the agreement that the seller would maintain the surety bonds (and the purchaser would indemnify the seller for any losses under the bonds), the parties could have agreed that the purchaser was required to provide substitute surety bonds, with the seller released from liability. To the extent that bonds (or other liabilities) are not replaceable or otherwise transferable in a

deal, possible alternatives would include (i) changes in the purchase price, (ii) back-to-back bonds or other financing (in other words, if the purchaser cannot be substituted for the seller, the purchaser would obtain mirror surety that would reimburse the seller if the seller has liability under its bonds), or (iii) as in NASDI, indemnification.

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*Gail Weinstein is senior counsel and Steven Epstein, David L. Shaw and Andrea Gede-Lange are partners at Fried Frank Harris Shriver & Jacobson LLP.*

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[1] NASDI Holdings LLC v. North American Leasing Inc. (Apr. 9, 2019).