

EXERCISE

MATERIALITY SCRAPES

Background

Your client, a bike manufacturer, is being acquired by one of its competitors, and you're working on the deal. The company's leadership team doesn't have much M&A experience.

The draft acquisition agreement received from the buyer includes the following provision:

"For purposes of this indemnification section, including for determining whether a breach has occurred and for determining Losses, the representations and warranties of Target shall not be deemed qualified by any references to materiality or to Material Adverse Effect."

You also notice that the size of the indemnification basket being proposed is on the low side as compared to similar deals you've worked on recently.

The client has called you and said that they'd like to discuss the above provision, as they don't fully understand it and would like you to explain it to them, as well as what you think their response to this provision should be.

Instructions

Come prepared to discuss the following:

- How will you explain this provision to your client?
- How do you think your client should respond to this provision?
- If you try to strike this provision from the agreement, how do you think the buyer will respond?
- Is there a good compromise position if the buyer won't agree to remove this provision?
- Would your advice on this issue change based on whether or not the buyer takes out a rep and warranty insurance policy? If so, how?