

EXERCISE

UPDATING DISCLOSURE SCHEDULES

Background

Your client, a bike manufacturer, is acquiring one of its competitors, and you're working on the deal. The seller is a smaller company than your client, but the seller also has the most popular products on the market. The seller wants an updating disclosure schedules provision in the acquisition agreement. Specifically, the seller has asked that the provision give the seller the following rights:

- The right, but not the obligation to update the disclosure schedules.
- The ability to update the disclosure schedules if the seller becomes aware of new facts or events that occurred before signing.
- The ability to cure inaccuracies in or breaches of the reps and warranties for purposes of indemnification or termination rights by updating the disclosure schedules.

After you explained the concept of updating disclosure schedules to your client, they said that they're willing to include an updating disclosure schedules provision in the agreement, but they'd like it to be as buyer friendly as possible.

Instructions

Come prepared to discuss:

- Whether you'd advise your client to accept the seller's request to have the right, but not the obligation to update the disclosure schedules, and why.
- Whether your client should accept the seller's request to be able to make updates based on facts or events that occurred before signing, and why.
- Whether your client should agree that the seller can cure an inaccuracy in or breach of the reps and warranties for purposes of indemnification or termination rights by updating the disclosure schedules, and why.
- The types of reps and warranties that you'd suggest the seller be allowed to update.
- How your advice will change if the general counsel tells you they're planning on purchasing rep and warranty insurance.