



Court of Appeal Upholds Contractual Limitations Period In Acquisition Agreement

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Yesterday, the Fourth District Court of Appeal issued an opinion addressing two issues that should be of interest to the M&A community. [Zalkind v. Ceradyne, Inc.](#) involved a dispute concerning an asset purchase agreement. The Zalkinds (Stanley, Elizabeth and Quest Technology, LP, a limited partnership owned by them) agreed to sell all of Quest's assets to Ceradyne, Inc. for cash and unregistered shares of Ceradyne's stock. Although the Securities and Exchange Commission eventually declared the [registration statement](#) effective and the Zalkinds had sold their shares, they sued Ceradyne alleging breach of the registration requirements of the asset purchase agreement. The Zalkinds alleged that the delay in effectiveness prevented them from selling during a period in which Ceradyne's stock price had spiked.

The trial court granted Ceradyne summary judgment on the basis of a two-year limitation period on indemnity claims in the asset purchase agreement. On appeal, the Zalkinds argued that the limitations period in the agreement only covered claims by third parties and not direct claims against Ceradyne. The Court of Appeal rejected the Zalkinds' argument based on a careful parsing of various provisions of the asset purchase agreement and an analysis of the legal definition of "indemnify" (the limitations period in the agreement applied to claims for indemnification). The Court of Appeal also rejected the Zalkinds' argument that the limitations period in the agreement violated public policy.

Here are some additional observations that I have concerning the Court of Appeal's opinion:

- The case is a good reminder that California recognizes the objective theory of contracts. Thus, a party's undisclosed intent or understanding is irrelevant to contract interpretation.
- California statutorily defines "indemnity" as "a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or some other person." Cal. Civ. Code § 2772.
- California has a statute governing the interpretation of contracts of indemnity – Cal. Civ. Code § 2778. However, that statute does not apply when "a contrary intention appears".

Please contact [Keith Paul Bishop](#) at Allen Matkins for more information kbishop@allenmatkins.com

Ceradyne also filed a cross-complaint alleging that the Zalkinds violated Corporations Code Section 25401 by making false statements and omissions in connection with the purchase and sale of the stock consideration. I'll discuss the Court of Appeal's analysis of that claim in a future post.

Please contact **Keith Paul Bishop** at Allen Matkins for more information kbishop@allenmatkins.com

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