



Representation Bring-Downs | Survival

Bring-Downs

Representations are statements of fact at a specific point in time. Representations are made to induce the parties to enter into the Purchase Agreement. The point in time can be the date that the Purchase Agreement is signed, the closing date, or any other date provided for in the Purchase Agreement.

Representations that are made again on a later date are referred to as being "brought-down." The bring-down of representations is usually required when a significant event occurs on a later date. For example, a Purchase Agreement may provide for the transfer of some of the assets on the closing date and some of the assets at a future date. The purchaser will want the seller to bring ensures that there has been no change in facts since the date that the representations were originally made.

Representations are usually brought-down when the Purchase Agreements are signed before the closing date. The representations are made at signing and then the representations are brought down at closing This provides assurances that the facts covered by the representations haven't changed since the signing date.

Survival

A survival clause means that the recipient of a representation continues to have the benefit of that representation after the closing. For example, if three months after the closing date the buyer discovers that a representation was false at the time when it was made, the buyer will have an indemnification claim against the seller.

Absent a survival clause, the buyer may bring a claim for breach of seller's representations and warranties until the statute of limitations expires. A statute of limitations is a law that limits the time in which a certain legal claim may be brought against another party. If a party fails to commence litigation within the applicable statute of limitations, then the claim is barred. The Utah statute of limitations for breach of a contract is six years. Absent a survival clause in the Purchase Agreement, a party may bring a claim for breach of representations and warranties within six years.

When negotiating the Purchase Agreement, the seller will usually want to include a survival clause to shorten the statute of limitations to less than six years. A survival clause typically sets forth that the representations and warranties of the seller "survive" the closing for one year. A survival clause effectively reduces the statute of limitations from six years to one year.