Disclaimers of Extra-Contractual Fraud Claims in M&A Transactions Under Delaware Law

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Purchase agreements, whether in the form of asset, stock, merger, or other similar agreements (each generically referred to as an "Agreement") are typically heavily negotiated documents derived from many hours of discussions, diligence, and negotiation among sophisticated parties and their advisors. One of the key features of this process, and of any Agreement, is ensuring the transfer of all relevant knowledge about the assets, liabilities, and operations of the business from the selling parties ("Seller") to the buying parties ("Buyer").

Ideally, this process would result in a complete transfer of all relevant information: Seller would have and make available all such information; Buyer would fully evaluate it and understand exactly what it is buying; and the parties could precisely draft an Agreement without the need to worry about or hedge against undisclosed matters, misunderstandings, or misrepresentations. In reality, the process often falls short for a variety of reasons, such as Seller's representatives being overburdened or historical administrative sloppiness (not to mention occasional outright fraudsters); Sellers may provide incomplete, untimely, or ineffective disclosure; Buyer is often willing to move forward with the transaction based on a gut feeling rather than actual knowledge and understanding of the business it is acquiring; and the parties negotiate Agreements to deal with this imperfect process by assigning risk based on general representations and warranties, with only partial consideration given to actual relevance or facts.

To manage the risks inherent in this process, Buyer and Seller typically negotiate parameters for the remedies available in the event that Seller's representations and warranties are inaccurate or contain misrepresentations about the business. This typically takes the form of an indemnification provision, pursuant to which Buyer may recover some or all of the consideration paid for the business in the event Seller's representations and warranties are inaccurate. However, Seller will often be able to limit this exposure by negotiating a cap on its indemnification obligation at an amount less than the entire consideration it anticipates receiving in the transaction (a "cap"), and Seller is also often able to get Buyer to bear at least some initial cost for minor inaccuracies until the damage to Buyer exceeds some minimum threshold (a "basket"). A variety of factors—market forces, relative bargaining power, disclosures about risks/liabilities—come into play in negotiating these indemnifications, baskets, and caps, but, to one extent or another, they typically find their way into an Agreement.

After these extensive negotiations, one might be tempted to think that Buyer and Seller have considered and negotiated everything important into the Agreement. Despite this, Buyers sometimes find themselves in a position post-closing in which they are no longer satisfied with the Agreement, particularly if their remedies are limited. In an attempt to escape these constraints, some Buyers assert fraud on the part of Sellers, which claims are often carved-out from the indemnifications, baskets, and caps agreed to in the Agreement. These Buyers will often allege that the situation that led to their dissatisfaction with the deal was known or should have been known to Seller but was misstated, undisclosed, or even actively concealed. In making this case, Buyers may claim that they relied on misstatements or inaccuracies contained in diligence materials, representations, warranties, or statements other than those addressed by or contained in the Agreement.

In response to these types of challenges, Sellers have looked to various clauses in their Agreements to argue that Buyers do not have the right to pursue such alleged frauds in an attempt to revise the deal after the fact, particularly those clauses that, in some form, state that: Seller is making no additional representations other than those expressly set forth in the Agreement; Buyer conducted its

own independent investigation and did not rely upon any representation or warranty not contained in the Agreement; and the Agreement and the documents incorporated by reference form the entire agreement among the parties.

As these arguments have been litigated many times in Delaware courts due to the common practice of using Delaware law to govern Agreements, this article looks at Delaware law with respect to the interplay of these clauses with Buyers' fraud claims and common drafting suggestions in connection with the same. Special consideration must be given, however, to the body of law that will govern the actual Agreement, as many jurisdictions differ from Delaware in how fraud claims may be limited (if at all).[1] Indeed, Michigan courts have held that when an integration clause is present, extrinsic evidence is generally admissible to prove fraud that would invalidate the integration clause itself or the entire contract, but not to contradict or vary the terms of the Agreement.[2] Accordingly, Michigan courts have permitted reliance on pre-contractual representations of fact to support claims for fraudulent inducement despite integration clauses.[3]

Requirements Under Delaware Law to Disclaim Extra-Contractual Fraud

In looking to avoid an assertion of fraud, Sellers look to Delaware courts to adhere to the concept of contractual freedom: generally, if parties voluntarily agree to a binding contract, Delaware law will respect such agreements absent "a strong showing that dishonoring the contract is required to vindicate a public policy interest even stronger than freedom of contract."[4] Buyers, on the other hand, look to Delaware's strong aversion to insulating fraud, arguing that it provides such a stronger public policy interest.[5] Recognizing these competing policies, a series of Delaware cases has clarified the circumstances under which it will uphold disclaimers of extra-contractual fraud, reasoning that to fail to enforce such disclaimers is to sanction Buyer's own fraudulent conduct in representing to Seller that it was relying only on contractual representations and that no other representations had been made.[6]

In 2001, in *Great Lakes Chem Corp v Pharmacia Corp*, 788 A2d 544 (Del Ch 2001), the Delaware Court of Chancery held that disclaimers of extra-contractual fraud claims were permitted where "two highly sophisticated parties, assisted by experienced legal counsel entered into carefully negotiated disclaimer language after months of extensive due diligence."[7] The disclaimer language at issue was extensively negotiated and contained an express acknowledgement by Buyer that Seller would not incur liability related to any information outside of the Agreement. Moreover, it contained an exclusive representations clause disclaiming any representation or warranty by Seller other than those specifically set forth in the Agreement. The court held that the parties "explicitly allocated their risks and obligations in the [p]urchase [a]greement" and that "a party to such a contract who later claims fraud is not in the same position—and does not have the same need for protection—as unsophisticated parties who enter into…contracts having boilerplate disclaimers that were not negotiated."[8] Accordingly, pursuant to *Great Lakes*, key considerations in upholding a disclaimer of extra-contractual fraud are the sophistication of the parties, whether the clause is explicit, and whether the clause was negotiated between the parties.[9]

ABRY Partners—Seminal Decision for Anti-Reliance Clauses Under Delaware Law

After *Great Lakes*, a line of cases continued the trend of upholding disclaimers of extra-contractual fraud where sophisticated parties conduct extensive due diligence and negotiate explicit disclaimer language.[10] In 2006, however, the Court of Chancery reexamined a Buyer's ability to disclaim extra-contractual fraud claims in *ABRY Partners V, LP v F&W Acquisition LLC,* 891 A2d 1032 (Del Ch 2006). In *ABRY*, Buyer purchased a business and then claimed that it had been defrauded by Seller's manipulation of company financials and omissions about operational problems.[11]

Under the terms of the Agreement at issue, ABRY's "sole and exclusive remedy" was to pursue an indemnification claim.[12] Buyer argued that the Agreement's exclusive remedy provision only applied to claims based on a breach of contract, not fraud.[13] The court disagreed, noting that the indemnification provision that provided the exclusive remedy specified that it was the remedy for any claim arising due to any "*inaccuracy, misrepresentation, breach of,* default in, or failure to perform *any of the representations, warranties or covenants*."[14] Since "misrepresentation," in particular, is commonly treated as

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including and broader than fraud, the court found no reason to treat fraud as not included by the indemnification and exclusive remedies clauses, so, absent some over-arching public policy against fraud, Buyer could only look to the agreement's indemnification for its remedy.[15]

Buyer then argued that public policy would not permit Seller to benefit from the alleged fraud perpetrated by Seller, regardless of the Agreement's terms.[16] The court disagreed, noting that Delaware law permitted "sophisticated parties to negotiated commercial contracts" to agree that they "may not reasonably rely on information that they contractually agreed did not form a part of the basis for their decision to contract."[17] Further, the court held that a party "cannot promise, in a clear integration clause of a negotiated agreement, that it will not rely on promises and representations outside of the agreement" and then turn around and do so in a fraud claim.[18] Doing so would simply permit the substitution of one lie (the alleged representations and warranties not evident in the agreement) for another (the promise that a party had not relied on any representations and warranties not found in the Agreement).[19]

Delaware law does not require specific wording in an anti-reliance clause[.]

However, the court stated that Delaware law will only enforce such provisions if they clearly state a party's disclaimer of reliance on any matters outside of the scope of the Agreement;[20] otherwise, "murky integration clauses, or standard integration clauses without explicit anti-reliance representations, will not relieve a party of its oral and extra-contractual fraudulent representations."[21] In particular, an integration clause must contain "language that ... can be said to add up to a clear anti-reliance clause by which the [Buyer] has contractually promised that it did not rely upon statements outside the contract's four corners in deciding to sign the contract."[22] The failure to "include unambiguous anti-reliance language" from Buyer means that Seller will not be able to preclude claims for fraud based on representations and warranties outside of the Agreement itself.[23]

Recent Developments in Delaware Law

In *Prairie Capital III, LP v Double E Holding Corp*, 132 A3d 35 (Del Ch 2015), the Delaware Court of Chancery again revisited issues with respect to anti-reliance clauses, including a party's ability to disclaim fraud based on extra-contractual omissions. *Prairie Capital* developed from the sale of stock of a portfolio company by a private equity firm. Buyer in the transaction alleged fraud against the selling stockholders and certain executive officers of the target company on the basis that they made contractual and extra-contractual misrepresentations and omissions relating to, among other things, the target company's financial statements.

The Agreement in *Prairie Capital* contained a provision in which Buyer acknowledged that (a) it had conducted an independent investigation of the financial condition, operations, assets, liabilities, and properties of the target company; (b) it had relied on the results of such investigation and the representations and warranties expressly set forth in the Agreement; and (c) it understood that all other representations were disclaimed.[24] The Agreement further contained a standard integration clause that expressly provided that the Agreement set forth the entire understanding of the parties with respect to the transaction and superseded all other agreements, representations, and statements made in connection with negotiating the terms of the Agreement.[25]

Although the exclusive representations clause was not framed negatively (i.e., that Buyer *did not* rely on extra-contractual representations), the court in *Prairie Capital* held that it was nonetheless sufficient. Specifically, the court held that a Buyer's affirmative representation that it only relied on the representations and warranties set forth in the Agreement clearly "establishes the universe of information on which the [Buyer] relied."[26] Delaware law does not require specific wording in an anti-reliance clause; "language is sufficiently powerful to reach the same end by multiple means, and drafters can use any of them to identify with sufficient clarity the universe of information on which the contracting parties relied."[27] The court in *Prairie Capital* held that the exclusive representations clause, together with the integration clause, added up to a clear anti-reliance clause, despite being framed affirmatively.[28]

The court next turned to the issue of whether an anti-reliance clause that does not expressly mention omissions or the accuracy or completeness of information could disclaim fraud claims based upon extra-contractual omissions or concealment. The Delaware Court of Chancery had previously opined on this issue in *Transdigm, Inc v Alcoa Global Fas-*

teners Inc, No 7135-VCP, 2013 Del Ch LEXIS 137 (May 29, 2013). While the Agreement in *Transdigm* contained an anti-reliance clause in which Buyer expressly disclaimed reliance upon "any express or implied representations or warranties of any nature . . . except as expressly set forth in [the] Agreement,"[29] the court held that Buyer had preserved its rights to bring a fraud claim based on extra-contractual omissions because the anti-reliance clause did not contain an acknowledgement from Buyer that Seller was not making any "representation as to the *accuracy or completeness* of the information it provided . . . or as to extra-contractual *omissions*."[30]

Though the anti-reliance clause in *Prairie Capital* was similar to that in *Transdigm*, the court held that the wording of such anti-reliance clause "bar[s] not only fraud claims based on extra-contractual representations but also fraud claims based on extra-contractual omissions."[31] The court further held that "[t]o the extent *Transdigm* suggests that an agreement must use a magic word like 'omissions,' then [the court] respectfully disagree[s] with that interpretation."[32] Any other interpretation would render anti-reliance clauses ineffective.[33] Until the Delaware Supreme Court resolves this split between the lower courts, practitioners representing Sellers are urged to continue to draft anti-reliance clauses to include an express disclaimer from Buyer as to omissions and the accuracy or completeness of information received in order to be certain that the parties have properly waived fraud claims based on extra-contractual omissions.

In *FdG Logistics LLC v A&R Logistics Holdings, Inc*, 131 A3d 842 (Del Ch 2016), the Delaware Court of Chancery held that an integration clause in the parties' merger agreement did not preclude an allegation of fraud by Buyer against Sellers. Buyer alleged that Sellers had engaged in "an extensive series of illegal and improper activities that were concealed from [buyer] during pre-merger due diligence,"[34] and argued that these pre-merger misrepresentations and omissions formed the basis for a claim of common law fraud;[35] Sellers responded that since such matters were not part of the Agreement, Buyer could not have justifiably relied on them in entering into the Agreement.[36]

Seller's response was premised on the Agreement's exclusive representations and integration clauses. The exclusive representations clause stated that the only representations and warranties made by Seller were those contained in the Agreement, and it expressly disclaimed any representation or warranty based on any projections, estimates, or budgets or any other information made available to Buyer that was not expressly within a representation or warranty in the Agreement.[37] The integration clause stated that the Agreement and certain specified documents "contain the entire agreement between the Parties and supersede any prior understandings, agreements or representations by or between the Parties, written or oral, which may have related to the subject matter hereof in any way."[38]

The court found that the clauses in this merger agreement did not operate to preclude Buyer's assertion of fraud because the exclusive representations and integration clauses did not include "any affirmative expression by Buyer of (1) specifically what it was relying on when it decided to enter the Merger Agreement, or (2) that it is was not relying on any representations made outside of the Merger Agreement."[39] Delaware courts will not bar assertions of fraud based on representations not contained in an Agreement "unless that contracting party unambiguously disclaims reliance on such statements," which "must come from the point of view of the aggrieved party (or all parties to the contract) to ensure the preclusion of fraud claims for extra-contractual statements…."[40] As the exclusive representations clause in the Agreement was a statement by the Company, not Buyer, and the integration clause did not include any such unambiguous statement, they did not preclude Buyer's fraud claim.

Oftentimes, Sellers try to avoid extra-contractual fraud claims through the use of generic integration or exclusive representations clauses.

In *IAC Search, LLC v Conversant, LLC*, No 11774-CB, 2016 Del Ch 176 (Nov 30, 2016), the Delaware Court of Chancery reaffirmed its holding in *FdG Logistics*, as originally held in *ABRY*, that "in order to bar fraud claims, a disclaimer of reliance 'must come from the point of view of the aggrieved party,' meaning that it must come from the buyer who is asserting the fraud claim."[41]

IAC Search arose from the purchase of six subsidiaries of Seller through a stock and asset purchase agreement. Buyer alleged that Seller fraudulently induced it to overpay for one of the subsidiaries by providing false information regarding the subsidiary's advertising sales. Buyer's claim was based upon misrepresentations contained in documents placed in an electronic data room and in response to certain diligence requests during

the diligence period rather than the express representations set forth in the Agreement.

The court noted that three provisions contained in the Agreement were relevant to its analysis: First, the Agreement contained an express disclaimer by Seller of any representation or warranty not contained in the Agreement.[42] Second, the Agreement contained an acknowledgment (referred to as the "Acknowledgement Clause") from Buyer that (a) it was a sophisticated purchaser and had conducted an independent investigation and analysis of the transaction, and (b) it understood that Seller was not making any representation or warranty with respect to any data rooms, management presentations, diligence materials or financial projections or forecasts unless the same was contained in the Agreement.[43] Finally, the Agreement contained a standard integration clause expressly providing that the Agreement and certain other specified documents constituted the entire understanding and agreement of the parties and superseded all prior agreements, representations and statements made with respect to the subject matter of the Agreement.[44]

The court held that "[a]n assertion from the *Seller* 'of what it was and was not representing and warranting' is not sufficient given [Delaware's] abhorrence of fraud."[45] Accordingly, Seller's disclaimer of extra-contractual representations was not, on its own, enough to properly bar fraud claims. That, however, was accomplished through the Acknowledgement Clause and the integration clause. Buyer expressly acknowledged in the Acknowledgement Clause that Seller was not "'making, directly or indirectly, any representation or warranty' with respect to any information it received in due diligence 'unless such information [was] expressly included in a representation and warranty' in the Agreement." Buyer, therefore, contractually agreed to the exact "universe of information on which [it] relied and did not rely when it entered into the Agreement."[46]

In comparing the provisions from *IAC Search* with those in *ABRY*, the court noted that the *ABRY* Agreement contained additional language in which Buyer released Seller from liability with respect to Buyer's reliance on extra-contractual information set forth in data rooms and management presentations.[47] Buyer in *IAC Search* argued that because of this missing information, the Acknowledgement Clause failed to meet the standard to bar extra-contractual fraud claims. Notwithstanding, the court held that while the release language would have certainly reinforced the limiting effect of the anti-reliance clause, its omission is not fatal; "the combined effect of the Buyer's Acknowledgement Clause and the integration clause…nonetheless add up…to a clear anti-reliance clause to bar fraud claims based on extra-contractual statements made during due diligence."[48] The court reasoned that "the integration clause define[d] the universe of writings reflecting the terms of [the] agreement, and the Buyer's Acknowledgement Clause explains in clear terms from the perspective of the Buyer the universe of due diligence information on which the Buyer did and did not rely when it entered into the Agreement."[49]

From a Buyer's perspective, special attention should be given to these provisions early in negotiations, particularly since recent trends indicate that the use of anti-reliance clauses is now relatively common.

Practical Considerations and Drafting Points to Disclaim Extra-Contractual Fraud Under Delaware Law

Delaware law is clear—despite its strong abhorrence of fraud, sophisticated parties in commercial transactions are permitted to negotiate and agree to the universe of documents, information, and representations relied upon in entering into the Agreement. "A party cannot promise…that it will not rely on promises and representations outside of the agreement and then shirk its own bargain…."[50] To do so would sanction Buyer's own fraudulent conduct.[51]

However, to properly protect against abuses of fraud, Delaware courts only uphold disclaimers of fraud based upon extra-contractual statements and information if Buyer clearly and unambiguously disclaims reliance on the same or, in the alternative, affirmatively states what it relied upon in entering into the Agreement. Absent this clear and unambiguous language from Buyer, Buyer may be deemed to preserve its ability to make an extra-contractual fraud claim. Moreover, through *Transdigm*, Delaware courts have at times required additional language as to the accuracy or completeness of information provided to disclaim fraud based upon concealment or omission rather than misstatements.[52]

Oftentimes, Sellers try to avoid extra-contractual fraud claims through the use of generic integration or exclusive representations clauses.[53] While such clauses otherwise have their purposes, it is clear that they do not

properly disclaim extra-contractual fraud claims under Delaware law as they are not generally drafted from a Buyer's perspective and frequently lack (a) an acknowledgement from Buyer that it is a sophisticated party and that it had conducted its own independent investigation; (b) a clear and unambiguous disclaimer of reliance from Buyer of any representation, warranty, statement or other information or document of any kind other than those representations and warranties expressly provided in the Agreement; (c) an express acknowledgement from Buyer that the only representations and warranties made by Seller are those contained in the Agreement; and (d) an express disclaimer of reliance on omissions as well as the accuracy or completeness of any representation, warranty, statement, or other information or document other than those representations and warranties expressly provided in the Agreement.

From a Buyer's perspective, special attention should be given to these provisions early in negotiations, particularly since recent trends indicate that the use of anti-reliance clauses is now relatively common.[54] A Buyer agreeing to an anti-reliance clause should be mindful of its potentially limiting effects and must carefully scrutinize the representations and warranties contained in the Agreement to ensure they capture those items that Buyer truly relied upon in connection with the transaction. Finally, if Buyer relies on any representation or warranty contained in a document or statement that may otherwise fall outside of the Agreement, such document or statement should be expressly listed as something relied upon in the anti-reliance clause.

NOTES

1. *See* Wilson Chu and Jessica Pearlman, Practical Law Corporate & Securities, *Disclaimers of Reliance in Private M&A Deals Chart,* http://www.practicallaw.com (accessed July 27, 2017) ("for example, in California (*Danzig v Jack Grynberg & Assocs*, 208 Cal Rptr 336, 342 (Ct App 1984)), Massachusetts (*Sweeney v DeLuca*, No 04-2338, 2006 Mass Super LEXIS 147, at *5–6 (Mar. 16, 2006)) and Nevada (*Blanchard v Blanchard*, 839 P2d 1320, 1322–23 (Nev 1992))").
2. *See UAW-GM Human Res Ctr v KSL Recreation Corp*, 228 Mich App 486, 503, 579 NW2d 411 (1998).
3. *See, e.g.*, *Johnny's-Livonia Inc v. Laurel Park Retail Props*, No 320430, 2015 Mich App LEXIS 1027, at *3-4 (May 19, 2015) (unpublished).
4. *Libeau v Fox*, 880 A2d 1049, 1056-57 (Del Ch 2005), *aff'd in pertinent part*, 892 A2d 1068 (Del Ch Jan 24, 2006).
5. *See, e.g., ABRY Partners V, LP/ v F&W Acquisition LLC*, 891 A2d 1032, 1036 (Del Ch 2006).
6. *ABRY* at 1057.
7. *Great Lakes* at 555; *But see Norton v Poplos*, 443 A2d 1 (Del 1982) (holding that a boilerplate unnegotiated disclaimer was not sufficient to bar fraud claims).
8. *Great Lakes* at 555.
9. *See also Kronenberg v Katz,* 872 A2d 568, 593 (Del Ch 2004) ("Because Delaware's public policy is intolerant of fraud, the intent to preclude reliance on extra-contractual statements must emerge clearly and unambiguously from the contract.")
10. *See, e.g.*, *H-M Wexford LLC v Encorp Inc,* 832 A2d 129 (Del Ch 2003) (Where an Agreement was entered into between sophisticated parties after extensive due diligence, an integration clause expressly disclaiming representations, warranties, covenants or undertakings other than those set forth in the Agreement foreclosed the ability of Buyer to use such extra-contractual representations or warranties as a basis for a breach of the Agreement.)
11. *ABRY,* 891 A2d at 1038-40.
12. *Id.* at 1035.
13. *Id.* at 1053.
14. *Id.* at 1044.
15. *Id.* at 1054-55.
16. *Id.* at 1035.
17. *Id.* at 1057 (quoting *H-M Wexford LLC v Encorp Inc*, 832 A2d at 142 n 18 (Del Ch 2003)).
18. *Id.* at 1057.
19. *Id.* at 1058.
20. *Id.*
21. *Id.* at 1059.
22. *Id.*
23. *Id.*
24. *Prairie Capital*, 132 A3d at 55.
25. *Id.*
26. *Id.* at 51.
27. *Id.*
28. *Id.* (citing *Kronenberg*, 872 A2d at 593).
29. Transdigm at *7
30. *Id.* at *8 (emphasis added)
31. *Prairie Capital*, 132 A3d at 53.
32. *Id.* at 54
33. *Id.*
34. *FdG Logistics LLC*, 131 A3d at 850.
35. *Id.* at 857.
36. *Id.*
37. *Id.* at 858.
38. *Id.*
39. *Id.* at 860.
40. *Id.*
41. *IAC Search* at *6 (citing *FdG Logistics LLC*, 131 A3d at 860).
42. *IAC Search* at *5.
43. *Id.*
44. *Id.*
45. *Id.* at *6 (citing *FdG Logistics LLC*, 131 A3d at 860 (emphasis in original)).
46. *Id.* at *6.
47. The following release was contained in *ABRY* but not in *IAC Search*: ". . . neither the Company nor the Selling Stockholder shall have or be subject to any liability to Acquiror or any other person resulting from the distribution to Acquiror, or Acquiror's use of or reliance on, any such information or any information, documents or material made available to Acquiror in any "data rooms," "virtual data rooms," management presentations or in any other form in expectation of,

or in connection with the transactions contemplated hereby." *See ABRY*, 891 A2d at 1041.

48. *IAC Search* at *7.

49. *Id.*

50. *ABRY,* 891 A2d at 1058.

51. *Id.*

52. *See Transdigm* at *8; *but see Prairie* Capital, 132 A3d at 54.

53. A standard integration clause generally provides: "This Agreement, which includes the exhibits [hereto], constitutes the entire agreement and understanding of the parties hereto with respect to the subject matter hereof and supersedes all prior or contemporaneous agreements, understandings, inducements, or conditions, oral or written, express or implied." *Kronenberg*, 872 A2d at 593.

A standard exclusive representations clause generally provides: "Except for the representations and warranties contained in [Article III] (as modified by the disclosure schedules), none of seller, the company or any other person has made or makes any other express or implied representation or warranty, either written or oral, on behalf of seller or the company." *ABA 2013 Private Target Mergers & Acquisitions Deal Points Study*, http://apps.americanbar.org/dch/committee.cfm?com=CL560003, slide 79 (accessed July 27, 2017).

54. According to the ABA's 2015 Private Target Mergers & Acquisitions Deal Points Study, 40% of the deals subject to the study (those completed in 2014) contained an express anti-reliance provision (compared to 43% of the deals completed in 2012 and 33% of the deals completed in 2010.) *See ABA 2015 Private Target Mergers & Acquisitions Deal Points Study,* http://apps.americanbar.org/dch/committee.cfm?com=cl560003, slide 66 (accessed July 27, 2017). According to the ABA's 2016 Strategic Buyer / Public Target M&A Deal Points Study, 36% of the deals subject to the study (those completed in 2015) contained an express anti-reliance provision (compared to 26% in 2014 and 28% in 2013). *See ABA 2016 Strategic Buyer / Public Target M&A Deal Points Study*, slide 109 (accessed July 22, 2017).

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