Venture Backed M&A: Special Considerations

14th Annual Mergers and Acquisitions Institute, Dallas, TX, October 4, 2018

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14th Annual Mergers and Acquisitions Institute, Dallas, TX, 10/4/2018

Venture-Backed M&A:

Knowledge? Whose Knowledge?

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WHEN TO KNOWLEDGE QUALIFY?

- Unqualified representation from a purchase agreement; how could Company know?

  "Company is not in breach, default, or violation of any Lease, nor is any other party to any Lease in breach, default, or violation thereof, and no event has occurred that could reasonably be expected to cause a default under any Lease."

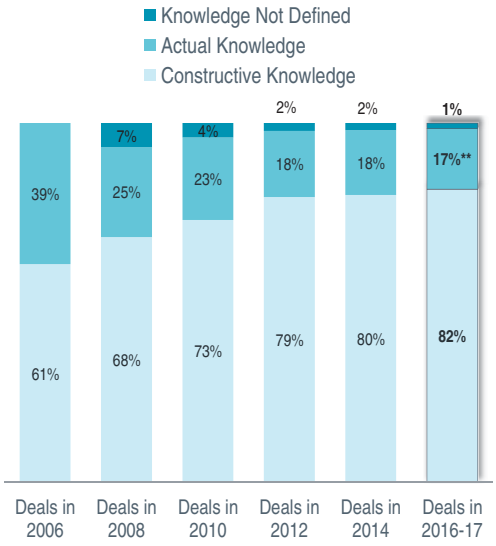
- Same rep with knowledge qualifiers is easier for Company to give:

  "Company is not in breach, default, or violation of any Lease, nor, ***to Company's Knowledge***, is any other party to any Lease in breach, default, or violation thereof, and, ***to Company's Knowledge***, no event has occurred that could reasonably be expected to cause a default under any Lease."

- But whether or not knowledge of a circumstance is possible is often secondary to the risk allocation function of the reps

- What's meant by "Knowledge"?

KNOWLEDGE STANDARDS*



* Excludes three deals in which the Knowledge definition was in an unfiled exhibit or was redacted.

** Includes one deal that referred to both "knowledge of each of the Key Company Executives" and "actual knowledge of each of the Key Company Executives."

KNOWLEDGE STANDARDS

- Actual Knowledge:

  "Knowledge" means ***the actual knowledge of the directors and officers of Target***.

- Constructive Knowledge (Role-Based Deemed Knowledge):

  "Knowledge" means the actual knowledge of the Chief Executive Officer, the President, and the Chief Financial Officer of Target ***and the knowledge that each such person would reasonably be expected to obtain in the course of diligently performing his or her duties for Target***.

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First appeared as part of the conference materials for the
14th Annual Mergers and Acquisitions Institute session
"Special Issues in Acquisitions of Venture-Backed Companies"