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Your Mother Was Right: Following Your Friends (or Market Studies) Off a Bridge is a Bad Idea

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Almost everyone can remember a time when you asked permission to do something that your mother thought was ill-advised, dangerous or just plain stupid. And when your mother said "no" and you protested that all your friends were doing it, your mother would ask the inevitable question: "Well, if your friends jumped off a bridge would you do it?" While there is a precocious few that might have answered "it depends on the reason they were jumping, or how high the bridge was … maybe they know something I don't about the bridge,"[1] most of us simply said "no" and that was the end of the discussion. In today's private equity deal dynamics, the friends deal professionals and their counsel are being encouraged to follow off a bridge can sometimes be the numerous deal point studies that have proliferated in the market place since the ABA first published its pre-eminent Private Target Deal Points Study in 2006. While all these deal point studies have their benefits, their major drawback is that they only examine a limited data set that is available either publicly or proprietarily to the study's provider,[2] and they tend to group various deal points in a manner that does not reflect important nuances in language that can dramatically impact the effectiveness of certain provisions. Another more fundamental drawback is that even when the limited data set that forms the basis for a particular study accurately reflects what is actually happening in the market place, the market (like your friends) may be doing things that are ill-advised, dangerous or just plain stupid.

A particular case in point are non-reliance/no other representations clauses and related fraud carve-outs. According to the 2019 ABA Private Deal Point Study, approximately 63% of the deals included in the data set include some form of non-reliance provision, although the authors of the study suggest that, based on Delaware caselaw declining to require "magic words," this 63% includes clauses that may not specifically include a variant of the word "rely." Thus it is not clear how effective all of these various clauses are in accomplishing the objective of a non-reliance clause, which is to eliminate any claims of fraud based upon purported statements of fact made outside of the express representations and warranties bargained for in the written acquisition agreement.[3] According to

Delaware law, as recently reiterated in *Kainos Evolve, Inc. v. In Touch Technologies, Inc.*, C.A. No. 2018-0712-AGB, 2019 WL 7373796 (Del. Ch. Dec. 31, 2019):

> As explained in *Abry*, the Court will not bar a contracting party from asserting claims for fraud based on representations outside the four corners of the agreement unless that contracting party unambiguously disclaims reliance on such statements. The language to disclaim such reliance may vary, as the Court noted in *Prairie Capital*, but the disclaimer 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 under *Abry* and its progeny.[4]

While a statement by the *buyer* that the seller has not made any other representations beyond those set forth in the written agreement may theoretically be sufficient, in Delaware, to disclaim reliance upon extra-contractual statements that are nonetheless alleged to have been made by the seller, that is not true in all states.[5] Moreover, in Delaware a simple "assertion by the *seller* 'of what it was and was not representing and warranting' is not sufficient" to eliminate claims of fraud based upon extra-contractual statements of fact that the buyer claims it did in fact rely upon.[6] Thus, in *Kainos Evolve*, Chancellor Bouchard refused to dismiss fraud claims brought by InTouch against Kainos Evolve based upon purported extra-contractual representations allegedly made by Kainos Evolve where the contract only contained a standard integration clause and a "no representations" clause that provided: "[Kainos] makes no warranties of any kind, whether express, implied, statutory or otherwise, and specifically disclaims all implied warranties." According to Chancellor Bouchard, "the cited provisions of the Agreement, considered collectively, do not contain language that amounts to an unambiguous disclaimer of reliance on statements outside the Agreement's four comers that comes from the point of view of the "aggrieved party," i.e., the party asserting the fraud claim—InTouch."[7]

But even if all of the clauses comprising the 63% containing some form of non-reliance clause are effective, that still means there are a significant number of acquisition agreements that do not contain any purported non-reliance clause of any kind. More disturbing still, the 2019 ABA Private Deal Point Study also reveals that a substantial majority of the non-reliance clauses making up that 63% include express fraud carve-outs. And the study does not reveal whether these fraud carve-outs are of the undefined or the defined variety. If the express purpose of the non-reliance clause is to eliminate all fraud-based claims that could otherwise be premised upon extra-contractual statements (by expressly disclaiming reliance upon any such statements), it is nonsensical to carve out

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