

Traps for the Conventional M&A Thinker

Presented by:

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October 8, 2021 • University of Texas 17th Annual Mergers and Acquisitions Institute

Walk-Away Deals (Not)

The Survival Clause

Survival. None of the representations and warranties of any party contained in this Agreement or any of the other Transaction Documents (including any certificate to be delivered pursuant to this Agreement), and none of the covenants of any party required to be performed by such party before the Closing shall survive the Closing, and thereafter none of the parties hereto or any of their Affiliates or any of their respective Representatives shall have any liability whatsoever with respect to any such representation, warranty, or covenant, and no claim based upon any such representation, warranty, or covenant (whether in contract, in tort or at law or in equity) may be brought after the Closing with respect thereto.

Walk-Away Deals (Not)

The No Recourse Clause

No Recourse. This Agreement, and any claims arising out of, in connection with, or related to this Agreement (whether at law or in equity, based upon contract, tort, statute or otherwise), may only be enforced, made or asserted against the Persons expressly identified as the parties hereto in the preamble to and signature pages of this Agreement and solely in their capacities as such. No Person not a party hereto, including any current, former or future Affiliate or Representative of any party hereto or any current, former, or future Affiliate or Representative of any of the foregoing (such Persons, collectively, but specifically excluding the parties hereto, “Non-Parties”), shall have any liability (whether at law or in equity, based upon contract, tort, statute or otherwise) for obligations or liabilities arising under, in connection with or related to this Agreement or for any Related Claim and each party hereto hereby irrevocably waives and releases all such liabilities, obligations and claims against any such Non-Party.

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Walk-Away Deals (Not)

The Judicial Fraud Carve-out

- Human agents of entity parties have direct personal liability for torts in which they participate, even when they do so solely on behalf and for the benefit of the entity. Piercing the corporate veil is not a prerequisite for imposition of this liability.*
- Delaware (based upon *Abry Partners* and its progeny) recognizes a limited judicial fraud carve-out from contractual provisions otherwise limiting liability for contracting parties, their agents and controlling owners—i.e., intentional fraud respecting the representations expressly set forth in the contract.

* “Flesh and blood humans also can be held accountable for statements that they cause an artificial person, like a corporation, to make. ...It is immaterial that the corporation may also be liable.” *Prairie Capital III, L.P. v. Double E Holding Corp.*, 132 A.3d 35, 59-60 (Del. Ch. 2015).

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Walk-Away Deals (Not)

- According to *Abry Partners*, “if a seller ‘knew that the company’s contractual representations were false,’ the seller cannot ‘insulate’ itself from contractual fraud by hiding behind the company’s representations.”
- Liability for almost any form of misrepresentation-based claim can be eliminated by a combination of a non-reliance and an exclusive remedy provision except for the judicially created fraud carve-out for intentional intra-contractual fraud.
- But just as an exclusive remedy provision cannot eliminate liability for intentional intra-contractual fraud, neither can a no recourse provision exonerate human agents of entity parties from intentional intra-contractual fraud. And a survival clause is likewise incapable of eliminating claims for intra-contractual fraud.

See *Healthnow, Inc. v. CIP OCL Investments, LLC*, 2021 WL 3557857 (Del Ch. Aug. 12, 2021).

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Walk-Away Deals (Not)

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See *Healthnow, Inc. v. CIP OCL Investments, LLC*, 2021 WL 3557857 (Del Ch. Aug. 12, 2021).

See also Glenn West, *Too Much Dynamite—The Non-Recourse and Survival Clauses Are Both Subject to Delaware’s Built-In Fraud Carve-Out for Intentional Intra-Contractual Fraud*, Weil’s Global Private Equity Watch, August 24, 2021, <https://tinyurl.com/kf23vkax>.

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First appeared as part of the conference materials for the
17th Annual Mergers and Acquisitions Institute session

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