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A SURVEY OF DELAWARE CASE LAW ON POST-CLOSING CLAIMS FOR BREACHES OF REPRESENTATIONS AND WARRANTIES IN PRIVATE-TARGET M&A TRANSACTIONS

This article offers a survey of Delaware case law on the primary sources of post-closing liability for breaches of representations and warranties in private-target M&A transactions. The authors first review the key risks faced by sellers, including fraud claims, extra-contractual representations and warranties, and damages calculated using a transaction multiple. They then discuss practical strategies for sellers in addressing these and other risks and for buyers in leveraging their advantages. In particular, the authors discuss recent Delaware case law affecting indemnification claims, including opinions on the validity of claim notices and provisions relating to fee-shifting and advancement of attorneys' fees. The article also discusses the role of representation and warranty insurance, and concludes with practical takeaways for sellers and buyers.

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Post-closing claims in M&A transactions frequently depend on a handful of recurring issues: what the seller represented, whether the buyer can prove the seller's breach of a representation and warranty, the calculation of any resulting losses, how a purchase agreement allocates risk between the parties, and what Delaware courts will allow when the purchase agreement is silent on any of those points. Recent decisions underscore that silence typically advantages buyers, that fraud-based claims can escape many contractual limitations, and that damages often can be measured using the same transaction multiples that were used by the buyer to calculate the purchase price unless doing so is prohibited by the purchase agreement. This article surveys the principal sources of post-closing exposure, synthesizes recent Delaware guidance on the topic, and offers practical drafting and claims-process considerations for both sellers and buyers.

SOURCES OF CLAIMS: WHAT SHOULD KEEP SELLERS (AND THEIR COUNSEL) UP AT NIGHT

Sellers should start every M&A transaction with a defensive mindset. This is because Delaware common law offers innumerable avenues of attack to disgruntled buyers, and therefore the selling party in any M&A transaction must be aware of these risks and how to best address them. When surveying the landscape of potential claims against them, it is helpful for sellers to be aware of, and account for, three categories of risk.

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1. The Risk of Fraud-Based Tort Claims

Normally, a breach of a representation and warranty in a purchase agreement is actionable as a breach of contract, subject to contractual limitations. In M&A transactions, these limitations often include an exclusive remedy provision that makes indemnification and/or representation and warranty insurance the sole remedy available to buyers, subject to deductibles, baskets, and/or caps. However, if the buyer is able to establish that the seller made a misrepresentation in a culpable way, the misrepresentation can give rise to a range of tort causes of action. For example, common law fraud requires proof that (1) the seller made the representation and warranty knowing it was false or with reckless indifference to the truth; (2) the seller intended for the buyer to rely on the representation and warranty; (3) the buyer justifiably relied on the representation and warranty; and (4) as a result, the buyer incurred damages. Sellers must be attuned to the risk of fraud claims for several reasons:

- *Most contractual limitations do not apply to fraud claims.* Unlike a breach of contract claim, Delaware courts have held that, as a matter of public policy, a party cannot waive or limit its liability for intentionally or deliberately making a false contractual representation and warranty.[1] In other words, the contractual deductibles, baskets, and caps that may otherwise apply to indemnification claims cannot limit fraud claims or resulting damages. It is unclear whether fraud claims, which have a statute of limitations of three years, can be made subject to a shorter contractual survival period. Plaintiffs claiming fraud may also seek the equitable remedy of rescinding the contract.

- *In many circumstances, fraud claims may be asserted in tandem with contractual breach claims.* Although fraud claims must be pleaded with specificity, for fraud based on a representation and warranty in purchase agreements for M&A transactions, a court may infer that many elements of a fraud claim have been satisfied, including that the seller intended reliance, the buyer relied on the representation and warranty, and the buyer was harmed as a result.[2] Likewise, Delaware courts had previously taken a more strict approach to enforcing anti-"bootstrapping." That is, they would not allow the buyer to claim that a breach of representation and warranty was fraud by making conclusory allegations about fraudulent intent. However, over time, Delaware courts have been more willing to allow buyers to assert fraud claims alongside indemnification claims in several circumstances, including when the remedies are different (e.g., the purchase agreement provides that, unlike indemnification claims, fraud claim damages would be uncapped) or the buyer made particularized allegations that the seller knew its representation and warranty was false.[3]

- *Claims can be based on recklessness and negligence.* Other tort claims similar to fraud include fraudulent inducement (with elements similar to common law fraud), fraudulent concealment (knowing concealment of a material fact), unjust enrichment (generally available only if the contract was fraudulently induced and may be brought against any person that benefited from the fraud, whether or not they were involved or knew of the fraud), and equitable fraud (can be based on negligent fraud but requires a fiduciary or other special relationship). Delaware public policy allows parties to waive or limit these types of claims to the extent they are based on a state of mind short of being deliberate or intentional (such as recklessness or negligence) or are based on an extra-contractual representation and warranty.[4]

[1] *Express Scripts, Inc. v. Bracket Holdings Corp*., 248 A.3d 824, No. 62, 2020 (Del. Feb. 23, 2021) (Seitz, C.J.).

[2] *Prairie Capital III, L.P. v. Double E Holding Corp*., C.A. No. 10127-VCL (Del. Ch. Nov. 24, 2015) (Laster, V.C.).

[3] *Pilot Air Freight, LLC v. Manna Freight Systems, Inc.*, C.A. No. 2019-0992-JRS (Del. Ch. Sept. 18, 2020) (Slights, V.C.) (memorandum opinion).

[4] *Express Scripts*, *supra*.

- *Fraud claims may be brought against individuals and entities that are not a party to the purchase agreement.* Although breach of contract and indemnification claims may be brought only against parties to the purchase agreement, fraud claims can be brought against any individual or entity that made a false representation and warranty, or knew that it was false, whether or not the person was a party to the purchase agreement. In other words, claims could be made against the target, the seller, parent entities, a private equity sponsor, a private equity general partner, and individuals, including management, directors, employees and advisors.[5] In addition to direct fraud claims, a buyer could bring claims for aiding and abetting fraud and civil conspiracy to commit fraud, if the person or entity (again, whether or not a party to the purchase agreement) sought to assist in making the fraud.

2. The Risk of Extra-Contractual Representations and Warranties

Delaware courts have long recognized that sellers in M&A transactions may be liable for not only the express representations and warranties that they make in a purchase agreement but also any other representations and warranties made to buyers outside of the contract ("extra-contractual" representations and warranties). Extra-contractual representations and warranties can take any number of forms, including marketing materials, due diligence materials, projections, oral statements, e-mails, and other communications. Clearly, opening the door to extra-contractual representations and warranties allows buyers to multiply the grounds for making both breach of representation and warranty claims as well as fraud claims. Given the potentially disastrous impact of fraud claims outlined above, sellers should be especially attuned to the risks that extra-contractual representations and warranties pose. The good news for sellers, as discussed in more detail below, is that extra-contractual representations and warranties can be disclaimed with a well-crafted, anti-reliance provision in the purchase agreement.

3. The Risk of Multiples of Damages

Sellers should be particularly wary when a buyer determines the purchase price using a multiple of a financial metric, such as a multiple of the target company's EBITDA. In these cases, if the breach of a representation and warranty will affect the financial metric for future periods, then buyers can be entitled to multiply the amount of damages suffered by the same multiple used to calculate the purchase price, unless the purchase agreement provides otherwise.[6] For example, if a buyer calculated the purchase price based on annual EBITDA multiplied by six, and the target company, contrary to its representations and warranties, had suffered a loss of business from significant customers resulting in an annual loss to earnings of $1 million, then the court may award damages based on the lost earnings multiplied by six in this example, or about $6 million. Here, too, as discussed in additional detail below, the good news is that sellers can include specific language in purchase agreements that bar the calculation of indemnifiable losses or damages using a multiple.

STRATEGIES FOR NEGOTIATING THE PURCHASE AGREEMENT

Sellers should approach the negotiation of the M&A agreement with these risks in mind and know the best strategies for minimizing them. Buyers, on the other hand, should be aware of the leverage they have under Delaware law and know how to best use it. The following section discusses these strategies, looking at the default position under Delaware law (i.e., the terms that apply as a matter of Delaware public policy or in the event the agreement is silent on the point) and the terms sellers and buyers can modify.

Generally, in negotiating a purchase agreement, sellers desire to limit the scope of binding representations and warranties that they make, impose limits on the range and size of claims buyers may bring pursuant to the purchase agreement, and ensure that as much of the purchase price as possible is paid at closing or as soon as possible thereafter (with limited conditions tied to receipt of those payments). Conversely, buyers agree to pay a specified purchase price based on a series of representations and warranties made by sellers and information learned about the target company through business and legal due diligence and the expected growth trajectory of the target company (including scheduled disclosures setting forth any exceptions to the seller's representations and warranties). To preserve the economic rationale of an M&A transaction, buyers desire compensation for any substantive deviation from these representations, whether the buyer knew of or intended for the deviation to occur. Also, because recouping such compensation from the sellers may not be easy, buyers often seek to retain a portion of the

[5] *Prairie Capital*, *supra*.

[6] *In re Dura Medic Holdings, Inc.* Consolidated Litigation, 333 A.3d 227, Cons. C.A. No. 2019-0474-JTL (Del. Ch. Feb. 20, 2025) (Laster, V.C.) (post-trial opinion).

purchase price, in the form of an escrow or a holdback, or to defer a portion of the purchase price through the issuance of a promissory note.

1. Seller Representations and Warranties

As already noted above, the default position in Delaware is that a seller is liable for all representations and warranties that it expressly makes in the purchase agreement and for all representations and warranties it has made to a buyer outside of the four corners of the purchase agreement (i.e., extra-contractual representations and warranties), including written and verbal assurances, even if informally made.

Generally, sellers can disclaim liability for extra-contractual representations and warranties and can mitigate their exposure for their express contractual representations in the following ways:

- *Anti-Reliance Provision*: Delaware law allows parties to disclaim extra-contractual representations. Delaware courts have made it clear that a typical integration clause (by which the parties agree that the purchase agreement supersedes any other agreements relating to the transaction) is not enough to disclaim extra-contractual representations.[7] However, a clear statement by a buyer that it did not rely on any extra-contractual representations made by a seller will be binding on the buyer.[8] These provisions, referred to as "anti-reliance" or "non-reliance" provisions, are often included among the buyer's representations and warranties and are effective in precluding both breach of contract and fraud claims based on extra-contractual representations and warranties.

- *No Other Representations Provision*: An anti-reliance provision is often accompanied by a statement (possibly as a representation and warranty by a seller and/or an acknowledgment by a buyer) that the seller has not made any representations, other than those expressly stated in the purchase agreement.

- *Disclosure Schedules*: Sellers can narrow the scope of their contractual representations and warranties through the effective use of disclosure schedules, which give sellers an opportunity to list any items and circumstances that operate as exceptions to their contractual representations. In preparing disclosure schedules, sellers should not take for granted that information appearing in one section will necessarily apply to other sections. Recent Delaware opinions suggest that when a disclosure schedule section states "None," courts will take the statement literally, holding that other sections of the disclosure schedule — even if clearly relevant — will not apply to that section. Likewise, when a seller uses express cross-references in some schedules, the court may assume that the parties did not intend to permit implied cross-references. The upshot of these opinions is that sellers should be as clear as possible when drafting disclosure schedules.[9]

Buyers should consider the following:

- *Value of Silence:* Given the Delaware courts' default position on the scope of the seller's representations and warranties, buyers are in a strong position when the agreement is silent on these topics. Buyers do not need to negotiate for an affirmative pro-reliance provision or similar language.

- *Fraud Carveouts:* When a seller includes an anti-reliance provision, a buyer may attempt to include a carveout for fraud within that provision. Delaware courts have interpreted such fraud carveouts as opening the door to fraud claims based on both contractual and extra-contractual claims.[10] However, courts pay careful attention to the wording of the carveout and will not read an anti-reliance provision to permit fraud claims based on extra-contractual representations unless the fraud carveout evidences a clear intent to allow such claims.[11] Fraud carveouts

[7] *Trifecta Multimedia Holdings Inc. v. WCG Clinical Services LLC*, 318 A.3d 450 C.A. No. 2023-0699-JTL (Del. Ch. Jun. 10, 2024), (Laster, V.C.).

[8] *ChyronHego Corporation v. Wight*, C.A. No. 2017-0548-SG (Del. Ch. Jul. 31, 2018), (Glasscock, V.C.) (memorandum opinion).

[9] *Aldrich Capital Partners Fund, LP v. Bray*, C.A. No. 2023-1253-PRW (Del. Ch. May 17, 2024) (Wallace, J.) (letter opinion and order).

[10] *In re P3 Health Group Holdings, LLC*, Consol. C.A. No. 2021-0518-JTL (Del. Ch. Oct. 28, 2022) (Laster, V.C.) (memorandum opinion) (holding that an anti-reliance provision permits fraud claims based on extra-contractual representations when the provision states that "[n]otwithstanding the foregoing or anything else in this Agreement, claims, or allegations arising from or relating to fraud or intentional misrepresentation on the part of [the buyer] shall not be subject to [the anti-reliance provision]").

[11] *ChyronHego*, *supra*. (holding that when an anti-reliance provision states that it "shall not preclude the Buyer Indemnified Parties from asserting claims for Fraud or

to anti-reliance provisions are unusual, and sellers should resist them and any other provision that could be understood to permit fraud claims based on extra-contractual representations.

- *Anti-Reliance Provisions for Buyers:* In most cases, a seller will be the party to benefit most from an anti-reliance provision; however, a buyer should consider making an anti-reliance provision mutual to protect itself against a seller's claims based on extra-contractual representations made by the buyer. Absent an anti-reliance provision in favor of the buyer, Delaware courts have permitted such claims to proceed against buyers when they give informal assurances to sellers about earnouts or company performance in transactions involving the issuance of "rollover" equity as part of the purchase price.[12]

2. Claims for Breaches of Representations and Warranties: Survival, Sandbagging, and Materiality Scrapes

Survival: The Delaware statute of limitations is three years for both contractual and tort (fraud) claims. Parties may agree to shorten or eliminate the survivability of seller's representations and warranties.[13] Parties may also extend the survival period of claims for breaches of representations and warranties. For written contracts involving at least $100,000, a Delaware statute allows parties to extend the limitations period to up to 20 years.[14] Naturally, sellers will desire to reduce or eliminate the survival of their representations and warranties, often with the assistance of representation and warranty insurance (more below). While it is rare for buyers to negotiate for the survival of the seller's representations and warranties to the full extent of the statute of limitations, buyers often do succeed in obtaining longer — and sometimes indefinite periods — for certain fundamental or other special representations. However, buyers should keep in mind that indefinite survival will likely be capped at 20 years under the Delaware statute.

Sandbagging: The term "sandbagging" is pejorative, describing a situation in which a buyer is aware pre-closing of inaccuracies in the seller's representations and warranties but closes anyway and later asserts claims based on those inaccuracies. Delaware has long been thought to be a pro-sandbagging jurisdiction; in other words, its courts have recognized that representations and warranties are a risk-shifting mechanism and that sellers should stand by them regardless of what knowledge a buyer might have had about their accuracy. The Delaware Supreme Court seems to have shifted, indicating some ambiguity about this position; however, recent Chancery opinions continue to suggest Delaware remains pro-sandbagging.[15] Given this state of affairs, where they can, parties should expressly agree as to whether the agreement will permit sandbagging or include an "anti-sandbagging" provision, which in effect requires the buyer, when asserting an indemnification claim, to first prove that it did not have knowledge before closing that the seller's representation and warranty was inaccurate.

Materiality Scrapes: When a purchase agreement provides that the buyer's claims against the seller must first meet a threshold value (referred to as a "basket" or "deductible"), buyers will point out the problem of double materiality: both the basket/deductible and the materiality qualifiers in the seller's representations and warranties are meant to prevent immaterial claims, but both of them together is an excessive protection, making claims overly difficult to assert. Faced with double materiality, buyers are often able to negotiate for a "materiality scrape," by which any materiality qualifiers are removed for purposes of determining whether a breach of a representation and warranty has occurred, the amount of resulting damages, or both. Sellers in particular should take care in drafting materiality scrapes to make sure they are not overbroad. In one recent Delaware opinion, the court read the materiality scrape literally, causing one of the seller's representations and warranties to read (after the scrape was applied to remove the word "material") that no event "has had, or could be reasonably expected to have, . . . an adverse

footnote continued from previous page…

indemnification in accordance with [the indemnification provisions of the agreement]," the carveout only makes clear that claims for fraud and indemnification are preserved but does not open the door to fraud claims based on extra-contractual representations and warranties).

[12] *Trifecta Multimedia*, *supra*; *Fortis Advisors LLC v. Johnson & Johnson*, C.A. No. 2020-0881-LWW (Del. Ch. Sept. 4, 2024) (Will, V.C.) (memorandum opinion); and *Pearce v. NeueHealth, Inc*., C.A. No. N23C-09-005 (Del. Super. Jul. 15, 2024) (Rennie, J.) (memorandum opinion and order).

[13] *GRT, Inc. v. Marathon GTF Technology, Ltd*., C.A. No. 5571-CS (Del. Ch. Jul. 11, 2011) (Strine, C.).

[14] Del. Code. Title 10, §8106.

[15] *In re Dura Medic*, *supra*.

effect," which was a significant expansion in coverage compared to the original representation and warranty.[16]

Multiple of Damages: As noted above, if the buyer calculated the purchase price based on a multiple of earnings or another metric, unless the purchase agreement provides otherwise, the court may often award damages for breaches of representations and warranties that affect that metric based on the same multiple used to determine the purchase price. This is another area where buyers benefit from silence (although buyers should be prepared to establish through documents and/or expert testimony that they calculated the purchase price using a multiple) and may even negotiate to expressly provide in the purchase agreement for damages calculated using a multiple. Sellers should consider including a provision expressly prohibiting multiple-based damages.

3. Fraud Claims

As noted above, fraud claims present a distinct risk to sellers. Generally, claims of deliberate or intentional fraud are not subject to contractual limitations and can be brought against any individual or entity that makes a false representation or knows that a representation is false, whether or not the person was a party to the agreement. Beyond fraud claims, buyers could also assert claims of aiding and abetting fraud and civil conspiracy to commit fraud, both of which require a showing of some form of substantial assistance in furtherance of the fraud.[17]

Sellers may reduce their exposure to fraud claims in several ways:

- *Alert the deal team to fraud risks*. Sellers should make the individuals involved in the transaction familiar with the risks of making inaccurate representations, including their potential exposure to fraud claims.

- *Define "fraud" narrowly in the agreement*. Although Delaware public policy prohibits contractual parties from limiting or waiving deliberate or intentional fraud, it does allow the parties to limit liability for lesser mental states, including claims based on recklessness and negligence. Fraud should also be defined to require actual (as opposed to constructive) knowledge and include other elements of Delaware common law fraud, including proof that the seller parties intended for the buyer to rely on the misrepresentation and that the buyer justifiably relied on the misrepresentation. Sellers should be aware that failing to expressly define fraud in this way could open the door to a variety of fraud claims.

- *Avoid reliance on informal disclosure to buyers; instead, use the disclosure schedules to document exceptions to representations*. To assert a fraud claim, a buyer must show that its reliance on a seller's representations and warranties was justifiable. A seller may therefore prevent a fraud claim by showing that a buyer had information to the contrary and should not have relied on the representation and warranty. But, what kind of disclosure is required to indicate a buyer's reliance was not justifiable? At least one Delaware opinion indicates that the disclosure must be made clearly in the disclosure schedules.[18] In that opinion, the court held that even though the seller had disclosed the existence of certain litigation to the buyer, the court allowed fraud claims to proceed against the seller based on the litigation not being expressly disclosed with respect to each relevant representation in the seller's disclosure schedules. In other words, the buyer's fraud claims survived a motion to dismiss because the seller had not adequately and consistently cross-referenced information about the litigation in the disclosure schedules.

For their part, buyers may subtly enhance their ability to bring fraud claims through the strategic use of fraud carveouts. As noted above, a fraud carveout applicable to an anti-reliance provision has potential to neutralize the provision, allowing a buyer to bring fraud claims based on extra-contractual representations, including informal statements and assurances offered by a seller.

Another subtle strategy for buyers is to leave the term "fraud" undefined in the agreement. As noted above, Delaware public policy does not allow the parties to impose contractual limits on deliberate or intentional fraud claims, so a *de facto* fraud carveout applies to exclusive remedy provisions, as well as liability caps, deductibles, and baskets, regardless of whether the parties to the purchase agreement expressly include one. This means that, for example, even if a cap provision in

[16] *JanCo FS 2, LLC v. ISS Facility Services, Inc*., C.A. No. N23C-03-005 MAA CCLD (Del. Super. Aug. 21, 2025) (Adams, J.) (post-trial opinion).

[17] *Agspring Holdco, LLC v. NGP X US Holdings, L.P*., C.A. No. 2019-0567-AGB (Del. Ch. Jul. 30, 2020) (Bouchard, C.) (memorandum opinion).

[18] *Aldrich Capital*, *supra*.

a purchase agreement does not expressly include a carveout for deliberate or intentional fraud, that carveout may still apply. Of course, if the parties to a purchase agreement include an express carveout for fraud defined as deliberate or intentional fraud, they are only memorializing what Delaware public policy already recognizes. But what if the fraud carveout is undefined and stated only as generic "fraud"? An undefined fraud carveout could be interpreted to refer to not only deliberate and intentional fraud but also lesser mental states. Thus, sellers are potentially worse off for including an undefined fraud carveout than they would have been had the provision been silent on fraud.

4. Indemnification Claims Issues

Buyers must sometimes navigate a contractual thicket to assert indemnification claims. Below, we discuss some of the principal issues buyers should anticipate as they negotiate the indemnification provisions of purchase agreements.

As a fundamental point, a buyer's damages under an indemnification claim are ripe only after they have been finally determined, in other words, at a point where a conclusive dollar amount has been applied to the action because all judicial (including appellate) or arbitration proceedings have concluded or a final settlement has been reached.[19] This makes sense because the amount paid to a buyer for an indemnified loss should not be speculative or subject to change.

Obviously, when purchase agreements contemplate that a seller's representations and warranties will survive closing for only a limited period of one or two years or will not survive at all, the buyer then faces the possibility that its claims will not be fully resolved before the expiration of the survival period. For this reason, most purchase agreements give a buyer the right to notify the seller of an action that may, upon full resolution, be indemnifiable by the seller. In this way, the agreement permits the buyer to preserve potential claims by tolling the survival period until the amount of the claim (if any) is conclusively determined. Although this mechanism operates well enough in most cases, it can give rise to a number of issues that buyers should anticipate. This is particularly true when the indemnification relates to third-party claims, which are claims asserted by a third party against the buyer regarding the seller's pre-closing operation of the target company.

First, buyers must ensure that they deliver an effective notice of claim. It is typical for purchase agreements to require that, to preserve a claim, a buyer must notify the seller within the survival period of any claim, action, demand, or other proceeding (we will refer to these as "adverse actions"), whether commenced or threatened, for which the seller may be required to indemnify the buyer under the agreement. Often, the buyer is required to "promptly" notify the seller, although many agreements provide that a delayed notice will not relieve the seller of its indemnification obligations unless the seller's defense of the adverse action is prejudiced (or sometimes termed as materially prejudiced) as a result of the delayed notice. Buyers should be aware of how indemnification notices can go wrong under this common contractual formulation.

- *The claim notice for third-party claims must relate to an adverse action actually commenced or threatened.* Generally, when dealing with potential claims involving a third party, it is not enough for the buyer to notify the seller of a possible breach of a representation and warranty. Delaware courts take literally the contractual requirement that the adverse action must be commenced or threatened: the third party must have asserted a claim or threatened to do so in a way that "a reasonable person would understand that [the third party] was intending to press the issue" through litigation.[20] In other words, the third party must give "signs or warnings" that it intended to commence an action, possibly through deadlines or ultimatums. No action is deemed to have commenced or been threatened if the third party merely delivers notice of a problem (particularly, when the third party helpfully offers to resolve the issue), even if such notice could be evidence of a breach of the seller's representations and warranties. If parties desire to modify this judicial interpretation, they should consider specifically defining the terms "commenced" and "threatened" in the agreement.

- *The buyer must provide sufficient notice to the seller of specific third-party claims and cannot give "placeholder" notice of possible claims*. Even when a third party has commenced or threatened an adverse action against the buyer, the buyer's claim

[19] *Horton v. Organogenesis Inc*., C.A. No. 2018-0537-KSJM (Del. Ch. Jul. 22, 2019) (McCormick, V.C.) (memorandum opinion).

[20] *i/m*^{x} *Information Management Solutions, Inc. v. Multiplan, Inc*., C.A. No. 7786-VCP (Del. Ch. Mar. 27, 2014) (Parsons, V.C.) (memorandum opinion).

notice will preserve only those claims that are actually stated in the notice and cannot be deemed to preserve other, similar claims, even when they are based on the same breach of a seller's representation and warranty.

Buyers might be tempted to believe that the notice of indemnification is meant to notify the seller of a breach of a seller's representation and warranty, and as such, preserves the buyer's right to seek indemnification for all claims stemming from that breach, even for adverse actions commenced or threatened after the survival period. Delaware courts have rejected this theory. Courts have held that allowing "placeholder" notice would render the survival period meaningless and, moreover, would prejudice the sellers because they would lack sufficient information to determine whether to assume the defense of the action.[21] Of course, the parties may exercise their freedom of contract to agree to change this approach and specifically permit placeholder claims in their agreements.

- *The buyer must comply with the indemnification notice requirements, especially when the purchase agreement states that failure to do so will result in loss of indemnification rights.* Although Delaware courts generally do not require a buyer to comply in full with each notice requirement, strict compliance may be required if the purchase agreement includes express language requiring it.

  A panel of the Delaware Supreme Court recently adopted the multi-factor "disproportionate forfeiture" analysis from the Restatement (Second) of Contracts, which assesses whether a condition precedent (such as an indemnification notice requirement) may be excused because enforcing it would result in a forfeiture to the buyer disproportionate to the value of the condition to the seller. The court first determined that the indemnification notice requirement (specifically, requirements that the buyer (1) deliver notice of a claim promptly, and in any event, not later than 30 days after the buyer became aware of the claim and (2) provide copies of all available material written evidence) was a condition precedent because it was clearly stated and the agreement provided a consequence for non-compliance (namely, that the buyer would have "no right to recover any amounts pursuant to" the indemnification provision).[22] After determining that the requirements were conditions precedent, the Court then remanded to the Chancery Court to develop the record as to (1) whether the conditions were a "material part of the agreed exchange," and if not, (2) whether the buyer's alleged non-compliance could be excused because the forfeiture of indemnification rights outweighed the relative importance of the condition to the seller. The case was dismissed on remand, which leaves questions for M&A practitioners about many details of this analysis. In a subsequent case, the Delaware Supreme Court, sitting *en banc*, declined to apply the disproportionate forfeiture doctrine, prompting dissenting opinions from some of the justices who had served on the panel that had previously adopted the doctrine.[23] Practitioners should monitor developments in this area since they can have a significant impact on indemnification and other purchase agreement provisions.

  Aside from the developing principles around disproportionate forfeiture, Delaware courts have generally understood that an indemnification notice requirement will operate as a condition precedent resulting in loss of indemnification rights only if the condition is stated clearly and unambiguously and is accompanied by a clear statement of the consequences for failure to comply.[24]

  How should parties respond to these developments? For their part, sellers who want to impose strict indemnification notice requirements can negotiate to include forfeiture language, along with a "time is of the essence" clause requiring delivery of an indemnification notice to be timely and language stating that the indemnification

[21] *Id*.

[22] *Thompson Street Capital Partners IV, L.P. v. Sonova United States Hearing Instruments*, *LLC*, 340 A.3d 1151, No. 166, 2024 (Del. Apr. 28, 2025) (Valihura, J.).

[23] *In re Aearo Technologies, LLC*, ___ A.3d ___, Nos. 381, 2024, 423, 2024 (Del. Aug. 12, 2025) (Griffiths, J.).

[24] *Four Cents Holdings, LLC v. M&E Printing, Inc*., C.A. No. N23C-08-212-SKR CCLD (Del. Super. Aug. 12, 2025) (Rennie, J.) (memorandum opinion and order).

requirements are material and can only be satisfied by full compliance. For buyers, this language makes asserting indemnification claims much more difficult and should be resisted.

Another area that continues to be the subject of Delaware court opinions is the question of fee-shifting and advancement of fees in connection with indemnification claims.

- *Fee-Shifting:* Delaware follows the "American Rule" on legal fees, by which each party pays for its own attorneys' fees and expenses when enforcing indemnification claims, unless there is a clear and unequivocal provision in the agreement to the contrary. These opinions distinguish between "first-party" claims, which are claims by the buyer against the seller as parties to the purchase agreement, and "third-party" claims, which are claims against the buyer brought by third parties for which the buyer may seek indemnification from the seller. The American Rule applies only to first-party claims — in other words, when defending third-party claims, the buyer typically can include the cost of its attorneys' fees in the list of indemnifiable expenses it submits to the seller. However, any dispute between the buyer and seller over the indemnification claims are considered first-party claims, subject to the American Rule, and the buyer should expect to pay its own attorneys' fees unless the agreement clearly and unequivocally provides for fee-shifting.

  What kind of language is sufficient for fee-shifting? It is often repeated in Delaware opinions that a general indemnification provision, even one where the term "Losses" is defined to specifically include attorneys' fees, is not enough to effect fee-shifting. This conclusion is only reinforced when the parties include an express fee-shifting provision with respect to another part of the agreement (such as for an expert determination under a purchase price adjustment provision). Also insufficient is language that only obliquely suggests fee-shifting applies to first-party claims, such a definition of "Losses" that includes attorneys' fees "whether or not involving a third-party claim." Courts have held that a "prevailing party" provision, by which a prevailing party in litigation is entitled to recoup fees from the losing party, is a hallmark of fee-shifting provisions."[25] The bottom line: any buyer that desires to provide for fee-shifting in first-party claims against the seller, should expressly provide for it by including a prevailing party provision. Such a provision itself is subject to a body of Delaware case law interpreting how a prevailing party is determined, which is beyond the scope of this article — suffice it to say that parties always benefit from a clear statement of how attorneys' fees will be allocated.

- *Advancement of Fees:* Similar to fee-shifting, buyers frequently argue that a general indemnification provision requires a seller to indemnify a buyer for the costs and fees of litigating third-party claims as the buyer incurs them. Delaware courts have rejected this interpretation. Instead, a court will read the agreement as a whole to determine whether there is clear evidence of a promise to pay costs and fees in advance of the final determination.[26] Notably, language such as "indemnify, defend, and hold harmless," "pay as incurred," and "advance" are helpful terms but not sufficient if the agreement otherwise lacks a clear promise to pay in advance.

REPRESENTATION AND WARRANTY INSURANCE

Although this article focuses on indemnification, sellers should always consider whether representation and warranty insurance ("RWI") and other forms of transaction insurance make sense as part of their strategy to manage liability. RWI is available as a buy-side policy, where the buyer is insured against losses arising from breaches of the seller's representations, and as a sell-side policy, where the seller is insured against breaches of its own representations. Generally, policies are subject to a variety of coverage exclusions, most notably for breaches known to the insured party prior to binding the policy and other matters that are difficult to determine through due diligence (such as losses related to material adverse effect representations, interim breaches, environmental liabilities, criminal acts, asbestos claims, etc.). Buy-side RWI policies also typically include coverage for a buyer's losses stemming from a seller's fraud. While these policies preserve the insurer's subrogation rights with respect to sellers' fraud, it is rare for insurers to pursue subrogation rights against

[25] *Id*.

[26] *GreenMarbles, LLC v. Cushing*, C.A. No. 2025-0282-SEM (Del. Ch. Jul. 24, 2025) (Molina, S.M.) (senior magistrate's final report).

sellers. In contrast to buy-side policies, a sell-side RWI policy usually will not cover claims for the seller's fraud. In addition to fraud losses, some RWI policies cover damages that are calculated using a multiple.

Sellers can benefit from a buy-side RWI policy in a number of ways. The acquisition agreement could reduce the seller's exposure to post-closing indemnification claims by requiring the buyer to first make a claim against the RWI policy. The agreement could also be structured as a no-seller recourse transaction, where the buyer's sole remedy is to make claims against the RWI policy, eliminating the seller's risk of post-closing indemnification claims altogether. Also, an RWI policy generally reduces or eliminates the amount of the purchase price held in escrow or as a holdback. Typically, RWI claims are subject to a retention (i.e., a deductible) that the buyer must pay out of pocket before the RWI policy covers the claim. The retention amount usually ranges from 0.4-1% of the enterprise value of the target company, and this amount may decrease over time, known as a "dropdown." The parties may agree that the buyer can recoup from the seller a portion of the retention, which amount might be held in escrow. Alternatively, the parties may agree (especially where the seller has no indemnification obligations) that the seller will not be liable for any portion of the retention. Either way, the amount of the escrow or holdback (if any) is likely to be much less than the traditional amount of an indemnification escrow.

Buyers can also benefit from RWI: it allows buyers to propose more seller-favorable terms in a competitive auction process (such as reducing or eliminating any indemnification escrows) and to make claims against the RWI insurer (which is motivated to preserve a customer-friendly reputation), rather than pursue indemnification claims against the seller. In addition, RWI coverage remains in effect longer than most seller indemnification survival periods (RWI policies typically have a coverage term of three years for breaches of general representations and six years for breaches of fundamental representations) and have a coverage limit above the traditional indemnification cap. Finally, RWI gives the seller less incentive to push back on buyer-favorable representations, although the RWI insurer may still object to terms that are overly favorable to the buyer.

However, RWI is not without complications for buyers. If the RWI coverage exclusions are significant to the buyer, the buyer may need to negotiate for seller indemnification to backstop RWI coverage, possibly supported by an indemnification escrow. These terms add complexity to the purchase agreement and its negotiation. Also, while RWI claims are generally easier to assert than indemnification claims, the claims process is still adversarial, and there is a risk that coverage may be denied. Buyers should make advance preparations to marshal evidence when submitting a claim and make sure they understand the RWI policy requirements and limitations. Most claims are resolved within a year, but some can stretch to 18 months to two years.

TAKEAWAYS

What should sellers and buyers keep in mind for their next transaction? Below are some key considerations for sell-side and buy-side parties.

1. Sell-Side Considerations

- *Sellers must play defense*. Generally, silence in purchase agreements works against the seller. Sellers must affirmatively include defensive provisions.

- *"Anti-reliance" and "no other representations" disclaimers are essential.* These provisions limit claims for breaches of representations and fraud to the seller's contractual representations and eliminate claims based on any extra-contractual representations purportedly made by the seller to the buyer outside of the purchase agreement.

- *Avoid fraud carveouts that do not define fraud or that define it to include lesser forms of fraud.* These types of carveouts can expose sellers to liability for non-intentional fraud claims that could otherwise be blocked by limiting the fraud definition to intentional fraud.

- *There are very few contractual limits for intentional fraud claims.* Accordingly, sellers should take care in making contractual representations, including performing seller due diligence, leveraging the disclosure schedules, and informing the deal team about potential liability for fraudulent conduct.

- *Non-parties should be aware of potential liability.* Any person or entity that knowingly participates in intentional fraud can be liable, whether or not they are a party to the purchase agreement, even if they are several layers removed from the target company.

- *RWI has many advantages.* It allows sellers to reduce or eliminate post-closing indemnification obligations and avoids tying up a portion of sales

proceeds in an escrow or holdback. It can also make the relationship between the buyer and seller, both during negotiations and after closing, much less contentious.

2. Buy-Side Considerations

- *Buyers should be aware of their points of leverage under Delaware law.* Buyers benefit from silence in purchase agreements and can push back on seller defensive provisions with fraud carveouts.

- *Buyers should not count on fraud claims*:

  — Although fraud claims are increasingly common, successful cases typically involve egregious behavior.

  — Generally, a buyer must prove the seller acted intentionally and not merely inadvertently or recklessly.

  — Generally, the buyer must prove it was justified in relying on the seller's representations. Any information that puts the buyer on notice will make this difficult to prove. This could include information in the purchase agreement (including the disclosure schedules) and outside of the purchase agreement (e.g., in due diligence materials, discussions, site visits, etc.).

  — Buyers should expect their claims for most breaches of sellers' representations and warranties to be subject to contractual remedies, such as indemnification or RWI.

- *Litigation is no substitute for good due diligence.* Despite the panoply of claims buyers may bring, the best approach is to identify issues early in the process and address them in the purchase agreement.

- *Buyers should consider when they might benefit from an anti-reliance provision*. Particularly in transactions with earnouts or that use buyer equity as consideration, buyers should include an anti-reliance provision to exclude seller claims for fraud or breaches of the buyer's representations and warranties arising from the buyer's purported extra-contractual representations.

- *Buyers should be aware of hurdles to preserving indemnification claims*. Although Delaware courts do not always require precise compliance with indemnification claim notice requirements, buyers should take care as to what requirements they agree to include in the purchase agreement and as to how they comply with those requirements.

- *Fee-shifting and advancement-of-fees requires express language in the purchase agreement*. If a buyer desires to recover attorneys' fees for indemnification claims against the seller and advancement of fees in defending third-party claims,it must ensure that the purchase agreement clearly and unequivocally provides for these rights.

- *RWI has benefits.* It can replace or supplement contractual indemnification and other forms of recovery, giving assurance that the buyer will have recourse for claims. It also extends the recovery period, giving the buyer longer to identify claims.

- *RWI also has limitations.* Because of RWI policy exclusions and limitations, buyers ideally should still rely on indemnification and escrows in their deals, which add to the expense and the complexity of the agreements. Obtaining RWI can add considerably to deal time and expense, and the post-closing claims process might still require significant time and attention. ■