

Morgan Lewis

A DECADE OF LEGAL TRENDS

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Topics of the Past Decade

CROWDFUNDING

JOBS ACT

CFIUS AND FIRRMMA

SELLER'S MARKET

FRAUD CLAIMS

EARNOUTS

STOCKHOLDER ACTIVISM

REPRESENTATION AND WARRANTY INSURANCE

MATERIAL ADVERSE EFFECT

CORPORATE VENTURE INVESTING

DATA PROTECTION AND PRIVACY

Acquisitions of Public Companies

- *In re Trulia Inc.* (2016) – “Disclosure only” settlements acceptable only if disclosures are plainly material.
- *Kahn v. M&F Worldwide Corp.* (2014) – Squeeze-out mergers get deferential business judgement rule review if offer is conditioned from the beginning on the approval of both an independent, adequately-empowered special committee that fulfills its duty of care and the uncoerced, informed vote of the minority stockholders.
- *Corwin v. KKR Financial Holdings LLC* (2014) – Business judgement rule applies to a transaction not otherwise subject to entire fairness review that has been approved by an uncoerced, informed vote of a majority of disinterested stockholders.
- *Dell v. Magnetar Global Event Driven Master Fund* (2017) – Deal price is a reliable indicator of fair value in most cases.

What about Acquisitions of Private Companies?

- There appears to be a movement – admittedly a gradual and at times non-linear movement – towards acceptance of the notion that the rights and obligations of the parties to a transaction (both buyers and sellers) should be governed solely by, and unambiguously defined in, the acquisition agreement.
- There are probably multiple reasons for this:
 - The large number of well publicized M&A market studies.
 - The increase in well-researched and widely distributed articles, memoranda, and other scholarly works focused on transactions.
 - The increased utilization of representation and warranty insurance.
 - The long-running seller's market.

Keeping It Within the Four Corners

- 10b-5 and Full Disclosure Representations
 - No representation or warranty or other statement made by the Seller in this Agreement or the Disclosure Schedule contains any untrue statement of material fact or omits to state a material fact necessary to make the statements herein or therein, in light of the circumstances in which they were made, not misleading. The Seller does not have Knowledge of any fact or circumstance that may materially adversely affect the assets, business, financial condition or results of operations of the Seller that has not been set forth in this Agreement or the Disclosure Schedule.
- Disclaimer of Other Representations
 - Except as expressly set forth in Article III, neither the Seller, its Affiliates nor any of their respective directors, officers, managers, employees or representatives make or have made any other representation or warranty, express or implied, at law or in equity, including with respect to (a) merchantability or fitness for any particular purpose, (b) the operation of the Company and its Subsidiaries by the Purchaser after the Closing, or (c) the probable success or profitability of the Company and its Subsidiaries after the closing.
- Non-Reliance Provision
 - In entering into this Agreement, the Purchaser has relied solely upon its own review and analysis and the specific representations and warranties of the Seller expressly set forth in Article III and not on any representations, warranties, statements or omissions by any Person other than the Seller, or by the Seller other than those specific representations and warranties expressly set forth in Article III.

What's Good for the Goose...

- Anti-Sandbagging
 - No party hereto shall be obligated to indemnify any other Person with respect to any item disclosed in the Disclosure Schedule, or if the Purchaser had knowledge of such item as of the Closing.
- Pro-Sandbagging/Benefit of the Bargain
 - An Indemnified Party's right to indemnification or other remedies based upon the representations, warranties, covenants and agreements of the Indemnifying Party will not be affected by any investigation or knowledge of the Indemnified Party. Such representations, warranties, covenants and agreements will not be affected or deemed waived by reason of the fact that the Indemnified Party knew or should have known that any representation or warranty might be inaccurate or that the Indemnifying Party failed to comply with any agreement or covenant.
- Silence
 - Might be okay in Delaware, but beware of *Eagle Force Holdings v. Campbell* (2018)!

The Basket Case

- True Deductibles v. Tipping Baskets
 - The Seller will not be required to indemnify, defend or hold harmless any Person pursuant to this Article IX unless and until the aggregate Losses of the Purchaser exceed \$5,000,000, after which Seller shall be liable...
 - only for such Losses in excess of such amount. < True deductible
 - for all such Losses from the first dollar without deduction. < Tipping basket
- Mini Baskets/De Minimis/Eligible Claim Threshold
 - The Seller will not be required to indemnify, defend or hold harmless any Person pursuant to this Article IX for any individual items where the Loss relating thereto is less than \$25,000, and such items shall not be aggregated for purposes of determining whether the Basket has been exceeded.

Scrapping About Scrapes

- Single Scrape – Does It Matter?
 - For the purpose of determining the amount of Losses, but not for the purpose of determining whether a representation or warranty has been breached or is inaccurate, all qualifications as to materiality or Material Adverse Effect contained in any representations or warranties shall be disregarded.
- Double Scrape – It Definitely Matters!
 - For all purposes of this Article VIII, including for determining whether a representation or warranty has been breached or is inaccurate, and for determining the amount of Losses, all qualifications as to materiality or Material Adverse Effect contained in any representations or warranties shall be disregarded.

Is That All There Is?

- Indemnification as the sole remedy.
 - Each party hereto acknowledges and agrees that, should the Closing occur, its sole and exclusive remedy with respect to any and all matters arising out of, relating to or connected with this Agreement, the Acquisition and the other transactions contemplated hereby or thereby shall be a claim pursuant to the provisions of this Article IX; provided that the provisions of this Section 9.7 shall not apply in the case of a claim for an equitable remedy by the Seller or the Purchaser.
- Beware the generalized fraud carveout!
 - Each party hereto acknowledges and agrees that, should the Closing occur, its sole and exclusive remedy with respect to any and all matters arising out of, relating to or connected with this Agreement, the Acquisition and the other transactions contemplated hereby or thereby shall be a claim pursuant to the provisions of this Article IX; provided that the provisions of this Section 9.7 shall not apply in the case of a claim for an equitable remedy by the Seller or the Purchaser **or in the case of fraud.**

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THANK YOU

