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### MERGER AGREEMENTS

## Trends in M&A Provisions: “No Other Representations” and Non-Reliance Provisions



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In merger and acquisition (“M&A”) transactions, the definitive purchase agreement (whether asset purchase agreement, stock purchase agreement, or merger agreement) typically contains representations, warranties, and covenants, along with related indemnification obligations, provided by the parties.

An M&A purchase agreement will include representations from the seller to the buyer,<sup>1</sup> and vice versa. However, since the seller’s representations will normally be broader in scope and substance than those of the buyer, it is usually the seller who is more interested in limiting the representations within the purchase agreement.<sup>2</sup>

<sup>1</sup> Note that within this article we use the terms “seller” and “company” in the context of a stock purchase transaction—the “seller” would be the selling shareholder(s) making the representations and warranties in the M&A purchase agreement, and the “company” would be the company being acquired. In an asset purchase transaction, the “seller” would be the target company itself but for consistency we are using “seller” and “company” in a stock purchase setting.

<sup>2</sup> Accordingly, this article looks at NOR and non-reliance provisions assuming that the seller is more inclined, and the buyer less inclined, to include such provisions in the M&A purchase agreement.

One common concern of the seller is ensuring that the representations in the purchase agreement are the sole representations being made with respect to the transaction and that statements outside the “four corners” of the purchase agreement—such as written statements in a marketing document prepared in connection with the transaction or verbal statements made by company management in meetings with the buyer—are not treated as actionable representations.

This is accomplished through two related types of provisions in the purchase agreement (which are often combined in one place): the first stating that the representations in the agreement are the only representations given by the seller and relating to the transaction (a “no other representations” or “NOR” provision) and the second stating that the buyer has not relied on any other representations in deciding to effect the transaction (a “non-reliance” provision).

In 2005, 2007, 2009, 2011, and 2013 the American Bar Association (ABA) released its Private Target Mergers and Acquisitions Deal Points Studies (the “ABA studies”). The ABA studies looked at the M&A agreements of publicly available transactions that occurred in the year prior to each study. In each year, the studies reviewed 150, 143, 106, 100 and 136 private company transactions, respectively. These transactions ranged in size from \$17 million to \$4.7 billion, across a broad range of industry sectors.

This article examines trends in the use of NOR and non-reliance provisions in private company M&A transactions, as reflected in the past three ABA studies.<sup>3</sup>

## NOR and Non-Reliance Provisions

The following is an example of an NOR provision:

*Except for the representations and warranties contained in [Target’s representations and warranties] (including the related portions of the Disclosure Schedules), none of Seller, the Target or any other Person **has made or makes any other express or implied representation or warranty, either written or oral, on behalf of Seller or the Target.***<sup>4</sup>

The following is a typical non-reliance provision:

*Buyer acknowledges and agrees that Target has not made and is not making any representations or warranties whatsoever regarding the subject matter of this Agreement, express or implied, except as provided in Section 3, **and that it is not relying and has not relied on any representations or warranties whatsoever regarding the subject matter of this Agreement, express or implied, except for the representations and warranties in Section 3.***<sup>5</sup>

The examples above are reasonably “short-form” versions of the NOR and non-reliance language. The example below is a lengthier version but covering the same topics:

<sup>3</sup> This article looks at NOR and non-reliance provisions in private company M&A transactions as reflected in the past three ABA studies. This article does not address the provisions in other types of transactions or in public-to-public M&A transactions. The 2007 ABA study looked at NOR but not specifically at non-reliance provisions. The 2005 ABA study did not look at either provision. Accordingly, this article reviews the relevant information in the 2013, 2011, and 2009 ABA studies.

<sup>4</sup> 2013 ABA study, slide 79.

<sup>5</sup> 2013 ABA study, slide 80.

*Acknowledgement. The Buyer acknowledges that, except for the representations and warranties contained in Article V and Article VI, none of the Sellers nor any Company nor any of their respective directors, managers, officers, employees, Affiliates, controlling persons, agents, advisors or representatives, makes or shall be deemed to have made any representation or warranty, either express or implied, in connection with the transactions contemplated hereby, including as to the accuracy and/or completeness of any information (including, without limitation, any estimates, projections, forecasts or other forward-looking information) provided or otherwise made available to the Buyer or any of its directors, managers, officers, employees, Affiliates, controlling persons, agents, advisors or representatives (including, without limitation, in any virtual data room management presentations, information or offering memorandum, supplemental information or other materials or information with respect to any of the above), that the sole representations or warranties being made by the Sellers or any Company with respect to the transactions contemplated hereby are set forth in said Articles V and V, and that the Buyer is not relying on any statements, information or data other than the representations or warranties in said Articles V and V in its determination to effect such transactions. With respect to any estimate, projection or forecast delivered by or on behalf of the Sellers or any Company, the Buyer acknowledges that: (i) there are uncertainties inherent in attempting to make such estimates, projections and forecasts; (ii) the Buyer is aware that actual results may differ materially; and (iii) the Buyer shall have no claim against the Sellers with respect to any such estimate, projection or forecast.*

## Related Provisions

The NOR and non-reliance provisions are somewhat related to two other common components of an M&A purchase agreement, as follows.

- The “sandbag” provisions of the M&A purchase agreement. An “anti-sandbag” provision precludes a buyer from bringing a claim for a breach of representation following the closing if the buyer knew of the breach (or the facts triggering the breach) as of closing. A “pro-sandbag” clause expressly allows the buyer to pursue such a claim notwithstanding any knowledge.
- The “exclusivity of remedies” provision. This clause states that the indemnifications of the purchase agreement constitute the sole remedy of the parties to bring claims relating to the transaction (subject to limited exceptions, such as for fraud).<sup>6</sup>

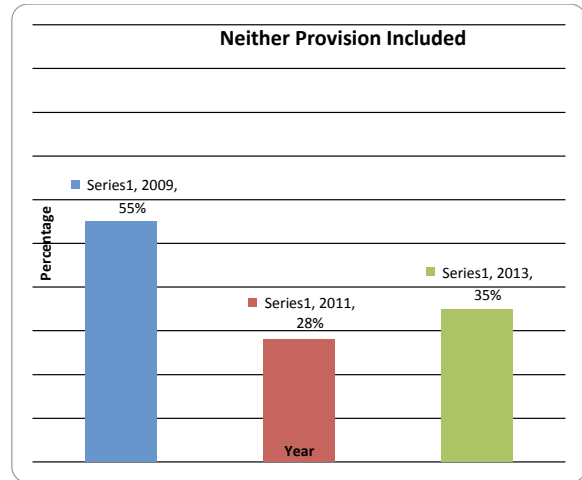
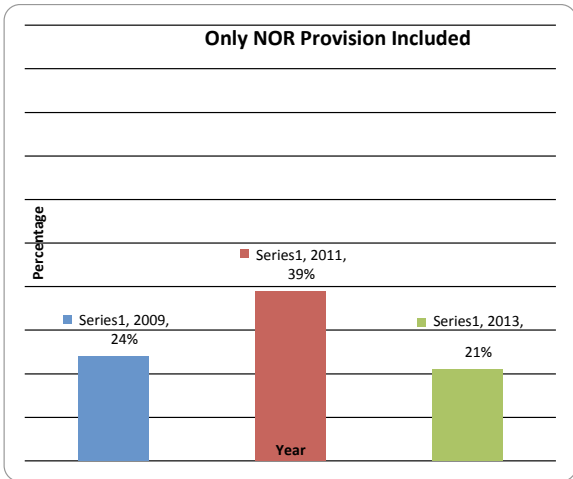
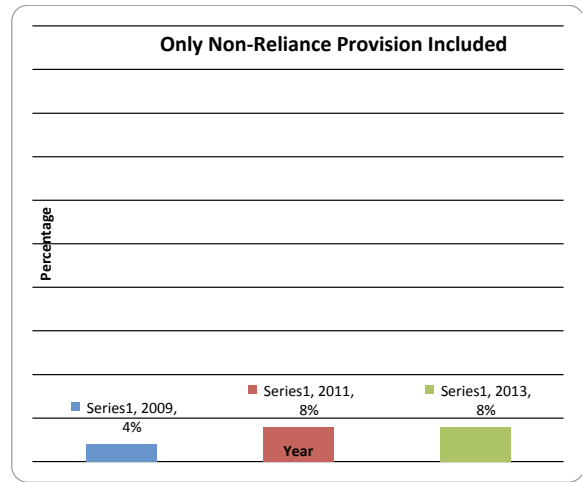
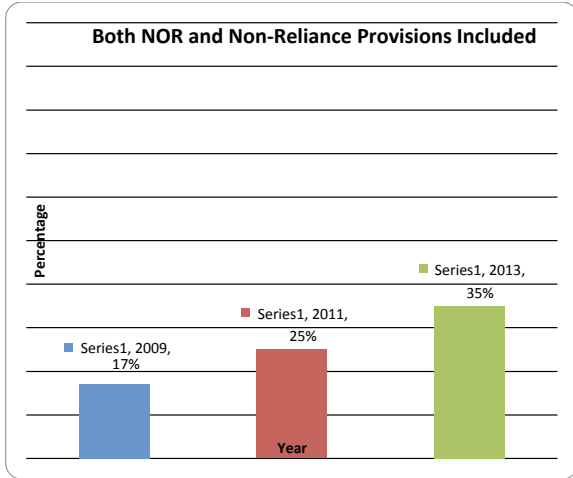
Earlier articles in this series looked at trends in sandbag and exclusivity of remedies provisions.<sup>7</sup>

<sup>6</sup> An excellent recent article examined fraud exceptions to the exclusivity provision and related concepts. See West, *That Pesky Little Thing Called Fraud: An Examination of Buyer’s Insistence Upon (and Sellers’ Too Ready Acceptance of) Undefined “Fraud Carve-Outs” in Acquisition Agreements*, *The Business Lawyer*, Vol. 69, August 2014.

<sup>7</sup> See Avery and Weintraub, *Trends in M&A Provisions: “Sandbagging” and “Anti-Sandbagging” Provisions*, *Bloomberg Law Reports*, March 2011, reprinted at <http://www.goulstonstorr.com/WhatsMarket>; and Avery and Perricone, *Trends in M&A Provisions: Indemnification as an Exclusive Remedy*, *Bloomberg Mergers and Acquisitions Law Reports*, Sept. 16, 2013, reprinted at <http://www.goulstonstorr.com/WhatsMarket>

## Trends in NOR and Non-Reliance Provisions

The last three ABA studies (looking at transactions in 2012, 2010 and 2008, respectively) show that one or both of the NOR and/or non-reliance provisions are increasingly common, most recently (for transactions in 2012) in a majority of reported transactions. The charts below reflect this information:



### Conclusion

NOR and non-reliance provisions are increasingly common in M&A purchase agreements. The provisions

should not, however, be viewed in a vacuum—rather these provisions can relate to other concepts within the purchase agreement, such as sandbagging and exclusivity of remedies concepts. Counsel for both buyer and seller will want to consider all of these topics together in the whole when negotiating the M&A purchase agreement.