

Trends in M&A Provisions: Express Non-Reliance Provisions

May 14, 2018
Bloomberg Law

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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. An M&A purchase agreement includes representations from the seller to the buyer and the buyer to the seller. [ii] However, because the seller’s representations are normally broader in scope and substance than the buyer’s representations, the seller is typically more interested in limiting the representations. [iii]

One common concern of the seller is ensuring that statements outside the four corners of the agreement (e.g., written statements in a marketing document prepared in connection with the transaction or verbal statements of company management made in meetings with the buyer) are not treated as actionable representations. Sellers accomplish this through a representation that the buyer has not relied on any representations other than those made in the agreement in deciding to effect the transaction (an “express non-reliance” provision). Express non-reliance provisions often are found paired with a related provision that states that the representations in the agreement are the only representations given by the seller relating to the transaction (often called a “no other representations” or “NOR” provision). This article examines trends in the use of non-reliance provisions in private company M&A transactions.

Express Non-Reliance Provisions

The following (in italics) is an example of 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. [iv]

The example above is a relatively short-form version of the non-reliance language (paired with a NOR provision). Below is a lengthier version of the representation in which the non-reliance language may be found:

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 VI, *and that the Buyer is not relying on any statements, information or data other than the representations or warranties in said Articles V and VI 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

Express non-reliance provisions are related, at least in part, to three other common components of an M&A purchase agreement:

- **No Other Representations or NOR provision:** As noted above, an NOR provision states that the representations in the agreement are the only representations given by the seller relating to the transaction.
- **Sandbagging Provisions:** An “anti-sandbagging” 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-sandbagging” clause expressly permits the buyer to pursue such a claim notwithstanding any knowledge.
- **Exclusivity of Remedies Provision:** This clause states that the indemnification provisions in 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). [v]

Trends in Express Non-Reliance Provisions

Every other year since 2005 the American Bar Association (“ABA”) has released its Private Target Mergers and Acquisitions Deal Point Studies (the “ABA studies”). The ABA studies examine purchase agreements of publicly available transactions involving private companies that occurred in the year prior to each study (and in the case of the 2017 study, including the first half of 2017).

These transactions range in size but are generally considered as within the “middle market” for M&A transactions; the average transaction value within the 2017 study was \$176.3 million. [vi]

The last five ABA studies illustrate that express non-reliance provisions are increasingly common, more than doubling in prevalence during that period, and, as of the 2017 study, are the majority approach.

Conclusion

Express non-reliance provisions have become increasingly common in M&A purchase agreements. The provisions should not, however, be viewed in a vacuum—rather such provisions can relate to other concepts within the purchase agreement, such as NOR, sandbagging and exclusivity of remedies concepts. Counsel for both buyer and seller should consider all of these topics together in the whole when negotiating the M&A purchase agreement.

[i] Daniel Avery is a Director, and Ross Turner is an associate, in the Business Law Group at Goulston & Storrs, in Boston, Massachusetts. Mr. Avery is a member of the ABA’s working group which published the 2017 ABA private company M&A deal points study. This article is based on, and updates, the article titled “No Other Representations” and Non-Reliance Provisions[i] co-authored by Mr. Avery and Rushna Heneghan, published in the Vol. 18, Number 684 edition of Bloomberg BNA’s Mergers & Acquisitions Law Report (2015). This article is one of a series of over 20 articles co-authored by Mr. Avery looking at trends in private company M&A deal points. The series is currently being updated to reflect the 2017 ABA private company study and will be published throughout 2018. The articles can be found on Goulston & Storrs’ “What’s Market” web page at <http://www.goulstonstorr.com/WhatsMarket> and on Bloomberg Law at https://www.bloomberglaw.com/page/infocus_dealpoints.

[ii] 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.

[iii] Accordingly, this article looks at express 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.

[iv] Private Target M&A Deal Points Study, Slide 65, A.B.A. (2015).

*[v] A 2014 article examined fraud exceptions to the exclusivity provision and related concepts. See West, Glenn D., *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*, 69 *Bus. Law.* 1049 (Aug. 2014).*

[vi] This article looks at express non-reliance provisions in private company M&A transactions as reflected in the past five 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 provisions but not at non-reliance provisions. The 2005 ABA study did not look at either provision. Accordingly, this article reviews the relevant information in the 2017, 2015, 2013, 2011, and 2009 ABA studies.