



# WHAT M&A LAWYERS FIGHT ABOUT

Closing Your Deals on the Best of Terms

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## Closing Your Deals on the Best of Terms



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# SO WHAT EXACTLY DO M&A LAWYERS FIGHT ABOUT?

- As taken from the SRS 2019 Deal Points Study
  - 1,200 deals from 2014 to 2019
    - » Most undisclosed
  - 60% were \$100M or less; 40% greater
- Also from our collective experience

# A COUPLE KEY POINTS ABOUT DEAL POINTS STUDIES

- They are backward looking and may not be relevant to your specific facts
- The more leverage one party has the more likely they will have the result in the study that skews to their favor
  - If the other side needs the deal, you may prevail despite the stats: you can be more firm in your negotiating position

# CONSTRUCTIVE VS. ACTUAL KNOWLEDGE: WHO HAS TO KNOW?

- 89% of deals use constructive knowledge
- 52% use a “reasonable” or “due” inquiry standard (they’re deemed to know what they’d know if they conducted “reasonable / due inquiry,” whether they did or not).
- 21% have a role-based constructive knowledge (you’re deemed to know what someone in that role would usually know)

# NO UNDISCLOSED LIABILITIES REP: 60/40 BUYER VS. SELLER-FRIENDLY DEFINITION

- Pro-buyer: covers any liability
- Pro-seller: limited to liabilities that should be on the financials
- Lots of things can be contingent liabilities not usually disclosable on the balance sheet

# FULL DISCLOSURE REP

- Only 27% of deals have such a rep (more for smaller deals)
- Of those that do, nearly all are a 10b-5 formulation: there's been no untrue statement or omission of a material fact necessary to make the statements made not misleading
- Only 1% of all deals have the formulation that the seller has disclosed everything material about the business

# 91% OF DEALS HAVE A MATERIALITY SCRAPE

- 37% for determining damages only (more seller-friendly)
- 47% for determining both breach and damages (buyer-friendly)
- Separates diligence from indemnity
- Minimum claim sizes also on the rise



# DEDUCTIBLES GROWING; FIRST DOLLAR SHRINKING

- 31% of deals had deductibles in 2015; now 50% of deals

# BASKET SIZE MAY BE SHRINKING

- 93% of deals 1% or lower
- May be a function of there being more large deals

# WHAT'S A “FUNDAMENTAL” REP?

- Fundamental reps are:
  - excluded from the basket
  - have higher caps (at the purchase price)
  - typically survive longer
- They usually include:
  - Capitalization
  - due authority
  - Taxes
  - fraud (but less on intentional misrepresentation)
  - No conflicts only at 39%

# ESCROW SIZE

- Trends around 10%
- Larger for deals under \$50M

# KEY ISSUES TAKEN FROM OUR OWN EXPERIENCES

- Founder issues can make deals more risky / problematic:
  - Poor record keeping leads to more risk on the buyer, deals taking longer
  - Sellers need good advisors to understand what's market and how deals work
  - Employment agreements can be key to avoid “founder flight”

# MORE ON FOUNDER ISSUES

- Founders can become emotionally attached to their “baby”; may want to dictate post-closing processes
- Different risk tolerances than sophisticated buyers—may not understand the risks they are being asked to take are typical
- Difficulty living in a corporate environment with more policies and procedures
- Founders are typically used to running the show, not having to report to corporate
  - Importance of non-competes
  - Big company vs. entrepreneurship cultures
- Other retention issues?

# POST-CLOSING ISSUES

- Earnout calculations
  - Failure to meet earnout targets can result in hurt feelings / litigation
- Integration issues

# Thank you!



Questions? Please feel free to  
contact me any time for guidance.

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