2023 ABA PRIVATE TARGET MERGERS ACQUISITIONS DEAL POINTS STUDY

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US Corporate Article

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The American Bar Association's (ABA) Business Law Section has released its 2023 Private Target Deal Points Study (the “Study”), the flagship product of the Market Trends Subcommittee of the Mergers and Acquisitions Committee. The Study is widely recognized as the gold standard for market metrics of key negotiated legal issues in acquisitions of US private companies. K&L Gates partner Jessica Pearlman is Chair of the Study (a role she has held for over 14 years), leading the effort of the over 50-member working group including K&L Gates partners Andrew Lloyd, Shoshannah Katz, and Remsen Kinne.

The Study is the preeminent study of M&A transactions, utilized internationally by practitioners, investment bankers, corporate development teams, and other advisors. It examines the prevalence of specified provisions in publicly-available private target M&A transactions, in this case from 2022 and the first quarter of 2023 with a purchase price between US$30 million and US$750 million.

Although the 108 deals in the 2023 Study reflect a broad swath of industries, technology and health care together made up nearly one-third of the deals. Asset deals comprised 18% of the study sample, with the remainder either equity purchases or mergers.

Of the Study sample, 26 deals signed and closed simultaneously, whereas the remaining 82 deals had a deferred closing some time after execution of the definitive acquisition agreement.

The 2023 version of the Private Target Deal Points Study has a number of features that differentiate it from prior iterations.

- A new elegant look and feel. It was time for a refresh on fonts and color scheme, and grey is used for prior study data to help current year data stand out more.
- New data points and correlations. New data points and correlations are included throughout. Look for the “new data” flags to make them easy to spot.

NEW REPRESENTATIONS AND WARRANTIES INSURANCE (RWI) CORRELATIONS

A large number of existing data points are now correlated by deals that reference use of RWI (the study's proxy for whether the transaction utilized RWI), allowing for comparison between RWI and non-RWI deals.

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#METOO NUANCES

Based on input from Ally Coll of The Purple Campaign, the Study includes a more nuanced look at #MeToo representations. 57% of all transactions analyzed in the 2023 Study included a stand-alone #MeToo representation, as compared to 37% of deals in the 2021 Study. New nuanced data points measure whether the representation includes language regarding corrective action (5% of #MeToo representations in the 2023 data set do), settlement agreements (74% of #MeToo representations in the 2023 data set do, with 11% qualified by the knowledge of the party making the representation), or allegations of sexual harassment (all #MeToo representations in the 2023 data set do, with 37% knowledge-qualified).

CLOSER LOOKS AT FRAUD CARVE OUTS

The Study now examines how often a deal that had an express fraud carve out to the non-reliance provision also has such a carve out to the exclusive remedy provision; likewise, the Study now measures how often the fraud carve out to the exclusive remedy provision is limited to fraud as to the representations and warranties in the transaction documents.

BREACH OF COVENANTS AS STAND-ALONE INDEMNITY

New to this year's Study is a data point on how often breach of covenants appears as a stand-alone basis for indemnification. Interestingly, only 94% of transactions included a stand-alone breach of covenant indemnity.

RWI

Mentions of the use of RWI decreased for the first time since measured in the Study but maintained a majority position: 55% of deals analyzed by the 2023 Study referenced RWI as compared to 65% of the deals analyzed by the 2021 Study.

Earnouts

Earnouts became more prevalent and displayed some buyer-friendly features. Use of earnouts increased significantly – by 30% (i.e., from 20% in the 2021 Study to 26% in the 2023 Study). Earnouts are often used to address valuation gaps, and this data point suggests growing valuation gaps during the period covered by the 2023 Study (2022 and Q1 2023).

Anti-Sandbagging

Express anti-sandbagging decreased. The percentage of deals that were silent with respect to sandbagging continued to increase to 76% in the 2023 study as compared to 68% in the 2021 Study and 59% in the 2019 Study. As a reminder, silence may have a different effect under the laws of different states, so the parties need to consider the effect of being silent under applicable law.

The 2023 Private Target Deal Points Study is available for download by M&A Committee members from the Market Trends Subcommittee's page on the ABA's website. More information about the study (and a copy for those who cannot otherwise access it) is available by contacting Jessica Pearlman.

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