Essay

Still on the Hook: Forward-Looking Releases Reel-in Potential Risks in Mergers and Acquisitions

Mark T. Wilhelm & Madison Fitzgerald†

> A general release [is] one which is intended to cover everything—what the parties presently have in mind, as well as what they do not have in mind, but what may, nevertheless, arise. Such general releases are in common use, and their potency, if it renders them too dangerous for careless handling, is at the same time a constant boon to businesses and courts.[1]

INTRODUCTION

A recent study that analyzed more than 2,100 private-target acquisitions found that 65% of those transactions were structured with a separate signing and closing.[2] While the number of days between signing and closing inevitably varies on a deal-by-deal basis, a prolonged executory period only intensifies concerns that the deal may never cross the finish line and allows for events that were unanticipated and are undesired by the parties to that transaction to occur. Parties and their legal counsel attempt to identify these items prior to signing and address them

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† Mark T. Wilhelm is an associate in the Corporate & Securities Practice Group at Troutman Pepper Hamilton Sanders LLP in Philadelphia, Pennsylvania. Madison Fitzgerald is a J.D. Candidate, at Villanova Charles Widger School of Law (anticipated graduation May 2024). The views expressed in this Article are only those of the Authors and do not reflect the views of Troutman Pepper Hamilton Sanders LLP or its clients. Copyright © 2023 by Mark T. Wilhelm & Madison Fitzgerald.

1. Hob Tea Room, Inc. v. Miller, 89 A.2d 851, 856 (Del. Ch. 1952).

2. *2023 M&A Deal Terms Study*, SRS ACQUIOM INC. 4, 12 (2023), info.srsacquiom.com/2023-srs-acquiom-deal-terms-study [https://perma.cc/HG5B-CVMG] (analyzing 2,100 transactions from a database of over 3,900 private-target M&A deals to find that 65% were structured as "Sign then Close" while 35% were structured as "Simultaneous Sign and Close").

either before signing or during the executory period, but parties also rely on contractual comfort to ease these concerns. One such mechanism is to grant a release, which can be incorporated into definitive transaction documentation to give both the buyer and the seller peace of mind by, among other things, providing certainty to the relationship and barring the opposing party from bringing certain claims after the deal closes. However, it is not entirely clear that the customary method of drafting releases truly serves as a catch-all prohibition on all claims,[3] as two Delaware opinions have notably come to the conclusion that a release does not cover future claims.[4] This Essay reviews the divergent approaches to a release of future claims (also known as a forward-looking release) under New York and Delaware law. This Essay examines a common trap for drafting attorneys with respect to forward-looking releases being used under Delaware law and suggests that a more conservative approach can and should be implemented to ensure that clients are sufficiently protected in connection with M&A transactions.

I. TAKING THE BAIT: RELEASES IN M&A TRANSACTIONS

Although purchase agreements differ in terms and structure, there are some commonalities across customary merger and acquisition documentation. And whether included in an equity purchase agreement or merger agreement,[5] a release is an incredibly common provision in merger and acquisition

3. This Essay focuses on New York and Delaware law as a significant number of M&A transaction documents specify the law of these jurisdictions as the governing law for such agreements.

4. *See generally* UniSuper Ltd. v. News Corp., 898 A.2d 344 (Del. Ch. 2006); Pineda v. Steinberg, C.A. No. 08C-01-226-JRJ, 2008 WL 4817088, at *1 (Del. Super. Ct. Oct. 29, 2008).

5. This Essay uses the term "purchase agreement" to refer generally to equity purchase agreements, merger agreements and, when applicable, asset purchase agreements. It would not be customary to include a release in favor of the buyer and the target in an asset purchase agreement because the parties to the asset purchase agreement would typically exclude any claims of the seller against such parties from the list of assumed assets, rendering a release duplicative at best. A release in an asset purchase agreement would most customarily be in favor of the seller in a transaction using representations and warranties insurance as a means to structure the post-closing liability of the seller to the buyer. *See infra* notes 11–14 and accompanying text.

transaction documents.[6] Part I of this Essay provides an overview of releases, identifies their uses in practice, and outlines the views of both Delaware and New York courts regarding release enforcement. Section A summarizes the two most common ways in which practitioners currently use releases in purchase agreements. Section B addresses how releases generally come to be in purchase agreements. And Section C highlights how New York and Delaware courts differ in interpreting the scope of a valid release.

A. RELEASE USES AND TIMING CONSIDERATIONS

A customary release extinguishes all claims that a certain party may have that arise out of or are in any way related to specified matters. Courts have noted that a release serves as "an important tool for settling disputes precisely because they are designed to prove 'complete peace.'"[7] This effect is accomplished by having the release contain an explicit and unequivocal statement by one party that it intends to abandon its right to prosecute a specified claim or category of claims against the other party.

Transactional lawyers have come to use releases in purchase agreements for two primary reasons: (1) to provide the buyer with certainty that there will be a clean break, especially financially, between the target and the seller on the closing date, and (2) when applicable, to provide the seller with the benefit of the bargain when the parties have agreed that the seller will have little to no post-closing exposure in the purchase agreement for indemnity obligations—a scenario most common when the transaction is supported by a representations and warranty insurance policy.

1. The Traditional Use of a Release

The more traditional use of a release in a purchase agreement is to ensure that the target in the transaction does not have

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6. The enforceability of releases contained in letters of transmittal in connection with mergers is beyond the scope of this Essay. However, Delaware courts in particular have called the enforceability of such releases into question. *See, e.g.*, Cigna Health & Life Ins. Co. v. Audax Health Sols., Inc., 107 A.3d 1082 (Del. Ch. 2014).

7. Seven Investments, LLC v. AD Capital, LLC, 32 A.3d 391, 397 (Del. Ch. 2008) (quoting *In re* Philadelphia Stock Exch., Inc., 945 A.2d 1123, 1137 (Del. 2008)).

ongoing liability to the seller post-closing. While buyers will almost always include representations and warranties in purchase agreement regarding related-party transactions and undisclosed liabilities (the representations and warranties most likely to provide protection to the buyer with respect to lingering relationships between the seller and the target), it is possible that a seller or the target could forget to disclose or omit disclosure of certain relationships between the seller and the target for which the target could owe the seller money post-closing. For example, if the target failed to make a required dividend to the seller or has an outstanding contractual obligation to pay the seller a management fee, and for whatever reason those matters are not addressed in other provisions in the purchase agreement—such as through treating those items as debt that is repaid at the closing—then it is possible that the target will owe the seller additional payments outside of the purchase agreement post-closing, at which point in time would be borne by the buyer due to its then-ownership of the target. If such relationships or arrangements were not disclosed to the seller—and even if there are related-party transactions or undisclosed liabilities representations and warranties in the purchase agreement—the buyer's remedy would most likely be an indemnity claim against the seller. However, those representations and warranties are overwhelmingly not carved out from indemnification caps, baskets, and deductibles in customary transactions.[8] Therefore, it is possible, if not likely, that in the case of an undisclosed related-party transaction the target could continue to be liable to the seller post-closing, and the buyer would not have a complete indemnification remedy against the seller for such liability, leaving the buyer at least partially out-of-pocket with respect to the matter.[9]

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8. *See* SRS ACQUIOM INC., *supra* note 2, at 68, 73 (presenting the low prevalence of both related-party transactions and undisclosed liabilities representations and warranties as carveouts to indemnification caps and baskets in purchase agreements).

9. Other potential concerns include the seller's ability to assert causes of action that the seller may have against the target for pre-closing matters, when the target was not under the control of the buyer. For purposes of this Essay, these and similar concerns fall into the same category of claims as the related-party transaction discussed above, which the buyer desires to fully and finally resolve before it takes ownership of the target.

In order to resolve this issue and similar issues, a buyer will require that a release provision be included in the purchase agreement. That way, the buyer has certainty that if it does not know about such relationships, whether due to an oversight, failure of diligence, or something more nefarious, the buyer, via its new ownership of the target, will not be responsible for those sums on a post-closing basis.

Enterprising practitioners will many times attempt to extend this type of release so that it includes a release of any claims that the buyer and the seller may have against one another regarding the negotiation of the purchase agreement between them or otherwise. Whether this attempt is successful is ultimately a product of negotiation, leverage, and the interest of the negotiating lawyers in making the issue a deal point.

In any event, what this Essay views as a traditional release follows the general formula of (1) the seller, on behalf of itself and a litany of other persons and entities, (2) on a particular date specified in the release, (3) releases the target and a litany of other persons and entities, which list may or may not include the buyer, (4) from any and all liabilities and claims plus a litany of similar items that the releasing parties may have against the released parties. For example:

> Seller, on the date hereof and as of the Closing Date, for itself and on behalf of all of its past and present officers, directors, managers, employees, direct and indirect equityholders, and each of their respective beneficiaries, affiliates, successors, assigns, representatives and agents (each, a "Releasor"), fully and unconditionally releases, acquits and forever discharges the Target and each of its past, present and future affiliates and representatives, direct and indirect subsidiaries, officers, directors, equityholders and employees, and each of their respective successors and assigns, in their capacities as such (each, a "Releasee"), from any and all manner of actions, causes of action, suits, proceedings, duties, claims, debts, obligations, demands, liabilities, damages, costs, losses, expenses (including attorneys' and other professional fees and expenses), sums of money, accounts, bonds, bills, covenants, compensation, contracts, controversies, omissions, promises, variances, trespasses, judgments, executions or other relief, whether known or unknown, matured or unmatured, suspected or unsuspected, fixed, contingent or otherwise, whether in law or equity, which such Releasor ever had as of or prior to the date hereof against any Releasee (each, a "Released Claim"). Notwithstanding the foregoing, the Parties hereby agree that Released Claims shall not include any matter that would otherwise be a Released Claim and that arises out of, relates to

> or accrues from this Agreement, the Ancillary Documents or the transactions contemplated hereby or thereby.[10]

2. Representations and Warranties Insurance Coupled with a Release

The use of representations and warranties insurance in mergers and acquisitions has skyrocketed in recent years, especially as buyers took advantage of a red-hot, buyer-friendly market in order to dictate business terms.[11] In order to accommodate the use of such insurance, particularly in "walk-away" or "no-survival" representations and warranties insurance transactions,[12] purchase agreement structures were changed to remove the typical indemnity section and replace it with a release in favor of the seller.[13]

The structure for walk-away representations and warranties insurance-based transactions makes it such that the seller will have no post-closing liability to the buyer with respect to the representations and warranties in the purchase agreement, except—as frequently negotiated—in the case of fraud. Purchase agreements will then include a relatively brief release given by the buyer in favor of the seller in place of the pages-long indemnification section that is included in purchase agreements with a traditional indemnity structure. A release in transactions that are supported by representations and warranties insurance will then follow the general formula of (1) the buyer, on behalf of itself and a litany of other persons and entities, (2) on a particular date specified in the release, (3) releases the seller and a litany of other persons and entities, (4) from any and all liabilities and claims plus a litany of similar items that the releasing parties may have against the released parties regarding the

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10. Capitalized terms used but not otherwise defined in this sample provision would be customarily defined elsewhere in the purchase agreement.

11. *See* Emily Rouleau, *Analysis: How Often Does RWI Appear in M&A Agreements?*, BLOOMBERG L. (Mar. 7, 2023), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-how-often-does-rwi-appear-in-m-a-agreements [https://perma.cc/RNF7-GMZR].

12. *See* Jeffrey Chapman, Jonathan Whalen & Benjamin Bodurian, *Representations and Warranties Insurance in M&A Transactions*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 11, 2017), https://corpgov.law.harvard.edu/2017/12/11/representations-and-warranties-insurance-in-ma-transactions [https://perma.cc/RA8F-228G].

13. *See generally* Sean J. Griffith, *Deal Insurance: Representation and Warranty Insurance in Mergers and Acquisitions*, 104 MINN. L. REV. 1839 (2020).

representations and warranties in the purchase agreement and the pre-closing operation of the target's business. For example:

> Each of Buyer and the Target hereby acknowledges and agrees that, following the Closing, the R&W Insurance Policy shall be the sole and exclusive source of recovery and remedy for any losses sustained, suffered or incurred by each of Buyer, the Company and their respective Affiliates resulting from any breach, misstatement, misrepresentation, inaccuracy or omission by the Company of its representations and warranties contained in this Agreement or any Ancillary Document or otherwise at or prior to the Closing (each, a "Released Claim"). Buyer and the Target each, on the date hereof and as of the Closing Date, in each case for itself and on behalf of all of its past and present officers, directors, managers, employees, direct and indirect equityholders, and each of their respective beneficiaries, affiliates, successors, assigns, representatives and agents (each, a "Releasor"), fully and unconditionally releases, acquits and forever discharges Seller and each of its past, present and future affiliates and representatives, direct and indirect subsidiaries, officers, directors, equityholders and employees, and each of their respective successors and assigns, in their capacities as such (each, a "Releasee"), from any and all manner of actions, causes of action, suits, proceedings, duties, claims, debts, obligations, demands, liabilities, damages, costs, losses, expenses (including attorneys' and other professional fees and expenses), sums of money, accounts, bonds, bills, covenants, compensation, contracts, controversies, omissions, promises, variances, trespasses, judgments, executions or other relief, whether known or unknown, matured or unmatured, suspected or unsuspected, fixed, contingent or otherwise, whether in law or equity, related to, in connection with or arising from a Released Claim.[14]

B. RELEASE DRAFTING

The nature of transactional lawyering at least partially explains the prevalence of a customary release used in deal documents. When drafting an agreement, lawyers almost always use a similarly structured agreement as a sample, with such sample being modified based upon the specifics of the current deal. This leads to the outcome suggested by two commentators: "In an attempt to be as expansive as possible, general releases are typically replete with enough synonyms and Latin phrases to make Roget and Black proud, and such creative . . . concepts as 'from the beginning of the world through the date hereof.'"[15]

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14. Capitalized terms used but not otherwise defined in this sample provision would be customarily defined elsewhere in the purchase agreement.

15. David Fox & Daniel E. Wolf, *Kirkland M&A Update: When a General Release Is Too General*, KIRKLAND & ELLIS LLP (June 15, 2010), https://www.kirkland.com/siteFiles/Publications/ACDAF8D11E04E8CF453050E2F7F386B4.pdf [https://perma.cc/4X6F-B9KA].

A 2019 study analyzing the effects of selecting and editing precedent in mergers and acquisitions summarized the typical process:

> The starting point for every M&A deal entails the selection of a precedent agreement, which serves as the textual basis from which the deal document is drafted. . . . Typically, lawyers for the acquirer select the precedent to use as the base for the agreement, customize the draft to fit the needs of the current deal, and forward the agreement to the target. Counsel for the target will then propose changes to the acquirer's draft and initiate negotiations which focus on changes to particular provisions rather than the "form" of the agreement. This process goes back-and-forth several times before the draft is finalized.[16]

As documents often snowball from one recycled agreement to the next, it is not surprising that seemingly boilerplate provisions tend to carry over from agreement to agreement. Therefore, after a release is used once it may be considered "standard," and that release is very likely to find its way into future purchase agreements, often crafted in overly broad language.[17] However, these customary release provisions may not be the most effective way to ensure that clients are protected against claims to the fullest extent permitted by law (and available through negotiation); release enforcement is not universal and diverging views on scope warrant rethinking merely recycling these provisions as standalone protection for clients.

C. New York & Delaware Approaches to Forward-Looking Releases

New York courts generally adhere closely to freedom of contract principles and look to the intent of the parties as demonstrated in the written agreement when issues arise over scope of

16. Jeffrey Manns & Robert Anderson, *Boiling Down Boilerplate in M&A Agreements: A Response to Choi, Gulati, & Scott*, 67 DUKE L.J. ONLINE 219, 228 (2019) (footnotes omitted).

17. Fox & Wolf, *supra* note 15. While not entirely in the purchase agreement context, one Delaware court has reviewed a release so broad as to have seemingly catastrophic consequences. *See* CorVel Enter. Comp v. Schaffer, C.A. No. 4896-VCN, 2010 Del. Ch. LEXIS 109 (Del. Ch. May 19, 2010) (finding a seller's obligations under a stand-alone restrictive covenant agreement executed in connection with a stock purchase released due to a broad, later-executed release in connection with the settlement of an earnout dispute under the relevant purchase agreement).

a release.[18] The scope of agreement is predominantly determined by language: if the release is clear and unambiguous upon signing, the parties are bound to the complete bar of actions that are subject to the executed release.[19] The agreement's language is critical: under New York law, as long as the agreement is fairly and knowingly made, where the parties intend for a release to cover known and unknown claims—past and future—the court will uphold the release as valid.

New York law does not distinguish between a general backwards-looking release and a forward-looking release (forward-looking release in this case meaning either (1) a release that purports to be effective at a date following the execution of the release, or (2) a release that releases claims for conduct that may occur at a future date). In other words, the language of the agreement, rather than timing of conduct underlying the claim, is determinative.

This outcome under New York law can be taken to lengths that may surprise transactional practitioners. Take for example *Centro Empresarial Cempresa S.A. v. America Movil, S.A.B. de C.V.*,[20] in which the court stressed that based upon a written agreement, which included a Members Release[21] and Master

18. *See* Booth v. 3669 Del., Inc., 703 N.E.2d 757, 758 (N.Y. 1998) ("Where [] the language of a release is clear and unambiguous, the signing of a release is a 'jural act' binding on the parties.").

19. *See, e.g.*, Centro Empresarial Cempresa S.A. v. America Movil, S.A.B. de C.V., 952 N.E.2d 995, 1001 (N.Y. 2011) ("Having executed this release, plaintiffs cannot now claim that defendants fraudulently misled them regarding the value of their ownership interests . . . . The fraud described in the complaint, however, falls squarely within the scope of the release . . . ."); Chadha v. Wahedna, No. 652818/2020, 2021 WL 2232526, at *1 (N.Y. Sup. Ct. June 2, 2021) ("Generally, a valid release constitutes a complete bar to an action on a claim which is the subject of the release. Additionally, a release may encompass unknown claims, including unknown fraud claims, if the parties so intend and the agreement is 'fairly and knowingly made.'" (quoting *Centro*, 952 N.E.2d at 1000)).

20. 952 N.E.2d 995 (N.Y. 2011).

21. *Id.* at 998. The "Release for Agreement Among Members" stated the sellers released Telmex and its affiliates, shareholders, and agents from:

> all manner of actions, causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands, liability, whatsoever, in law or equity, whether past, present or future, actual or contingent, arising under or in connection with the Agreement Among Members and/or arising out of, based upon, attributable to or

Release,[22] the parties effectively released future fraud claims.[23] Other New York courts have relied upon the holding in *Centro Empresarial* to uphold and enforce extensive releases when such a reading was supported by the text of the release.[24] The takeaway for practitioners should therefore be that, under New York law, unknown, future claims may be released if they fall under the language of the written agreement—almost regardless of how broad the language appears.

In contrast, Delaware courts have affirmatively concluded that a release does not encompass claims arising out of future conduct. Notably, in *UniSuper Ltd. v. News Corp.*,[25] the Court of Chancery stated that "[t]he rule in Delaware is that a release cannot apply to future conduct."[26] Stemming from class action litigation, the opinion discussed a settlement release that the court declared was "overly broad" and further concluded was invalid because it released claims stemming from future conduct.

> resulting from the ownership of membership interests in [TWE] or having taken or failed to take any action in any capacity on behalf of [TWE] or in connection with the business of [TWE].

Id.

22. *Id.* at 998–99. The "Release for Master Agreement" released the Telmex-related parties from claims:

> relating to (A) the ownership by the Telmex Released Parties of the [TWE] Units, or (B) any matter arising under or in connection with the Master Agreement, or any other document, agreement, instrument related thereto or executed in connection therewith . . . *provided* that the foregoing release shall not release any claims involving fraud.

Id. at 999.

23. *Id.* at 1000 ("The phrase 'all manner of actions,' in conjunction with the reference to 'future' and 'contingent' actions, indicates an intent to release defendants from fraud claims, like this one, unknown at the time of contract.").

24. *See, e.g.*, Kafa Invs., LLC v. 2170-2178 Broadway, LLC, 958 N.Y.S.2d 577 (N.Y. Sup. Ct. 2013); U.S. Life Ins. Co. v. Horowitz, No. 650221/2019, 2020 WL 4226880 (N.Y. Sup. Ct. 2020).

25. 898 A.2d 344 (Del. Ch. 2006).

26. *Id.* at 348. The release at issue revolved around a class action settlement before the court for approval. The redrafted release before the court amended the prior release to clarify that the release does not extend to "claims challenging the merits of future conduct," yet included a parenthetical excepting claims relating to the adoption of the October 2006 Rights Plan, which "will be adopted, pursuant to a shareholder vote, at the October 2006 shareholders meeting [held in five months' time.]" *Id.* at 347–48. For the entirety of the original release, see Liberty Media Corp. Objection to the Proposed Settlement ¶ 15, UniSuper Ltd. v. News Corp., 898 A.2d 344 (Del. Ch. 2006) (C.A. No. 1699–N).

The Chancery Court reasoned that while under Delaware law a release can encompass claims not explicitly asserted, it "can only release claims that are based on the 'same identical factual predicate' or the 'same set of operative facts' as the underlying action," meaning that "[i]f the facts have not yet occurred, then they cannot possibly be the basis for the underlying action."[27] The court noted that the release was overly broad, in part, by releasing claims arising from an event that had not yet occurred and ordered further adjustments in order to approve the proposed settlement.

The *UniSuper* opinion is not the only Delaware opinion to discuss the validity of forward-looking releases. In *Pineda v. Steinberg*,[28] the Delaware Superior Court stated that a general release "does not bar claims that were non-existent at the time it was executed."[29] The *Pineda* court acknowledged that a release may encompass unknown claims but declined to hold that a release can cover *any* claim arising out of future wrongdoing after the agreement was executed. The conclusion for practitioners should therefore be that Delaware law puts tighter parameters on the scope of an effective release, especially as compared to New York law.

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27. *UniSuper Ltd.*, 898 A.2d at 347 (quoting Nottingham Partners v. Dana, 564 A.2d 1089, 1106–07 (Del. 1989)).

28. No. 08C-01-226-JRJ, 2008 WL 4817088, at *1 (Del. Super. Ct. Oct. 29, 2008). The release in dispute stated:

> Hector Pineda, for and in consideration of the sum of ten dollars ($10.00) and other good valuable consideration, now, finally and forever hereby waives, releases and discharges the Corporation, and its, current and former officers, shareholders, associates, employees, successors and assigns of each of them and all persons acting by, through, for or in concert with any of them, from any and all causes of action, charges, complaints, suits, debts, obligations, claims, sums of money, controversies, damages, contracts, promises, representations, agreements, damages, demands, covenants, fees (specifically including attorney fees), costs and expenses, of every kind, legal and equitable, known and unknown, foreseen and unforeseen, that Hector Pineda has or may hereafter have against the Corporation or its current and former officers, shareholders, associates, employees, successors and assigns.

Id.

29. *Id.* at *1–2 ("The General Release is clear and unambiguous . . . . While the General Release, by its express terms, bars claims that were 'known or not known' at the time it was executed, it does not bar claims that were non-existent at the time it was executed.").

II. OPENING A CAN OF WORMS: UNDERSTANDING THE RAMIFICATIONS OF A FORWARD-LOOKING RELEASE UNDER DELAWARE LAW

Due to Delaware's approach, which does not recognize nor enforce a release of future claims, it is necessary to determine whether releases in purchase agreements that are structured with an executory period—a separate signing and closing with a period of time in between during which the parties satisfy certain closing conditions—can be classified as forward-looking releases. If so, the concern would be that what the parties may expect to be a full and total release would not actually foreclose certain claims. The sections that follow address the implications of a release being deemed forward-looking by highlighting the risk that some claims arising after the execution of the purchase agreement may fall outside the scope of the release. This Part reviews closer the legal effective time of releases in transactions with a separate signing and closing and the potential impact that forward-looking classification has on barred claims.[30] Section A discusses the legal effect of signing a release and analyzes the impact on the validity of a release under two common drafting scenarios. Based upon that effect, Section B addresses possible implications if a release is construed as forward-looking under Delaware law.

A. LEGAL EFFECT OF A RELEASE AT SIGNING

Delaware case law supports that a release is effective only as of the date the agreement is signed and executed.[31] In *Pineda*, the Delaware Superior Court used the date the agreement was signed by both parties to determine which claims were barred under the release and which were outside the scope. As a baseline, the court stated that a release "bars claims that were 'known or not known' at the time it was executed, [but] it does not bar claims that were non-existent at the time it was executed."[32] The court determined that the release was valid against

30. For a discussion of the topic of forward-looking releases in the context of class action settlements, see James Grimmelmann, *Future Conduct and the Limits of Class-Action Settlements*, 91 N.C. L. REV. 387 (2013).

31. *See, e.g.*, *Pineda*, 2008 WL 4817088, at *1–2; Medtronic AVE, Inc. v. Advanced Cardiovascular Sys., Inc., 247 F.3d 44 (3d Cir. 2001).

32. *Pineda*, 2008 WL 4817088, at *2. The *Pineda* court also cited *Williston on Contracts* as support that "[a] general release covers only those matters

claims that accrued prior to being executed—both known and unknown—but rejected that unknown claims extend to any underlying conduct occurring after the agreement was signed. To the court, the date the agreement was signed served as the benchmark for assessing the scope of the release, ruling that a claim based upon conduct following the date of execution was not barred by the release.

Beyond Delaware and cited by *Pineda*, there is additional support within the Third Circuit that the date upon which an agreement containing a release is signed is when the release becomes effective. In *Medtronic AVE, Inc. v. Advanced Cardiovascular Systems, Inc.*,[33] the circuit court noted that "a release usually will not be construed to bar a claim which has not accrued at the date of its execution or a claim which was not known to the party giving the release."[34]

B. IMPLICATIONS ON THE VALID SCOPE OF A RELEASE

Given the date of execution's legal effect on released claims, deals that operate on a sign and then close timeline may not adequately cover parties to the purchase agreement based upon release structures customarily used in purchase agreements. The concern then is that when parties execute the agreement on a date prior to close, certain claims subject to any of (1) a broad, general release agreed upon by the parties, (2) a release explicitly stating it becomes effective as of closing,[35] or (3) a release stating that claims arising from or related to documents that will be executed and delivered at the closing are also the subject of the release,[36] may not be truly barred by the release.

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about which there was some dispute, and not a future claim." (quoting 29 RICHARD A. LORD, WILLISTON ON CONTRACTS § 73.4 (4th ed.)).

33. 247 F.3d 44 (3d Cir. 2001).

34. *Id.* at 58.

35. The two sample releases included in Part I.A of this Essay each provide an example of release language that would purport to provide a release at both the signing of a purchase agreement and the closing of the transaction due to the inclusion of the phrase "on the date hereof [i.e., the date that the purchase agreement is signed] and as of the Closing Date."

36. This type of release is particularly relevant in transactions that are supported by representation and warranty insurance. The sample release included in Part I.A.2 of this Essay provides an example of release language that would purport to provide a release of claims related to documents to be delivered in the future due to the inclusion of the phrase "representations and warranties contained in . . . any Ancillary Document . . . ." For a transaction that employs

Consider two scenarios. First: a stock purchase agreement is entered into and signed by all parties on January 1, 2023 and purports to release all claims relating to or arising out of the transaction (other than as specifically provided for in the indemnification section of the purchase agreement). The transaction closes two months later on March 1, 2023. Second: a membership interest purchase agreement is entered into and signed by all parties on June 1, 2023 and purports to release all claims that the seller may have against the target and explicitly states that the release is effective at the closing. The transaction closes five months after the membership interest purchase agreement is executed, with a closing date as of November 1, 2023.

In both hypothetical scenarios, the purchase agreement incorporates a forward-looking release. Under applicable Delaware law, claims arising from events after either agreement is executed would not be covered and effectively released. In the first scenario, the forward-looking characterization is clearer based upon the open-ended period of time covered by the release. Under *Pineda* and *UniSuper*, the release only encompasses claims that accrued prior to the date the agreement was executed (in this case January 1, 2023) meaning a claim stemming from some non-existent event that occurs during the one month between signing and closing is not barred by the release. Despite the over-simplified facts, the public policy rationale for excluding these claims seems clear. Both Delaware opinions stressed that public policy opposes a release of future claims, with the *Pineda* court stating, "to hold that the General Release bars plaintiffs' claims under these circumstances [barring all future claims] would give defendants *carte blanche* to commit future wrongdoing against plaintiffs."[37] From a policy perspective, the first scenario falls within Delaware precedent that a release of *all* future claims runs counter to good public policy and is therefore unenforceable. As follows from that rationale, a release without bounds as to waived future claims deserves scrutiny to assess whether it covers claims post-execution.

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a walk-away representations and warranties insurance-based structure, the seller should be concerned about whether the delivery of a bring-down certificate (which may also be known as an officer's certificate or a closing certificate) would serve as new representations and warranties that a buyer could use as a basis to seek damages from a seller on a post-closing basis. *See generally Bring Down*, WESTLAW (2023) (Glossary 4-382-3286).

37. *Pineda*, 2008 WL 4817088, at *2.

As illustrated in the second scenario above, despite the agreement's explicit reference to a later effective date, express language may not be sufficient to overcome the forward-looking hurdle. Agreements that attempt to circumvent the future claims pitfall by explicitly including language as evidence of the parties' intent to release past and future claims still risks running afoul of the rule established in *UniSuper*. The Court of Chancery did not find that including an explicit exception solved the underlying issue, stating "I agree with Liberty [plaintiff asserting the release was unenforceable] that a date five months hence is clearly in the future. The rule in Delaware is that a release cannot apply to future conduct."[38] Delaware law does not seem to weigh the parties' intent against the validity of released future claims, which puts agreements that attempt to side-step the issue at risk of enforcement complications. Thus, even if a release expressly states it becomes effective at close, that future closing date is still "in the future," meaning claims up to and after that date may be deemed future conduct.

III. HOOK, LINE, AND SINKER: POSSIBLE SOLUTIONS TO ADDRESS FORWARD-LOOKING RELEASES FOR UNCOVERED CLAIMS

With Delaware's treatment of forward-looking releases, practitioners should be mindful to draft releases that minimize the legal challenges that can be brought successfully. This Part highlights four solutions that can be used to achieve the general purpose of a release of future claims, while avoiding the forward-looking enforcement issues addressed in Part II. These solutions serve as a more conservative approach to ensure clients are adequately covered throughout the duration of the signing and closing period and after the closing of the transaction.

A. COVENANT NOT TO SUE

Perhaps the most cautious and most effective solution to the problem of Delaware's prohibition on forward-looking releases is to couple a backward-looking release with a forward-looking covenant not to sue. Distinguishable from a release, a covenant not to sue "is not an abandonment or relinquishment of a right or

38. UniSuper Ltd. v. News Corp., 898 A.2d 344, 348 (Del. Ch. 2006). For the language of the release discussed in *UniSuper*, see *supra* note 26 and accompanying text.

claim," but rather serves as an agreement not to sue on an existing claim or not to proceed against a particular party.[39] As covenants not to sue are inherently forward-looking, unlike a release, a covenant not to sue *can* apply to future claims. Thus, a covenant not to sue is a viable alternative to a forward-looking release to avoid potential issues of scope in Delaware courts.[40] In fact, one Delaware court has specifically identified and described this alternative, saying:

> When parties settle all claims relating to a past transaction or event, a release and a covenant likely are equivalent. But part of the value of a covenant lies in its ability to address claims relating to future conduct. A release can extinguish claims based on past conduct that a party might learn of or assert in the future, but it cannot cover claims based on future conduct.[41]

Because a valid covenant not to sue on future claims still must satisfy certain criteria (particularly in Delaware, as discussed below), it would be prudent for practitioners to include both release and covenant not to sue provisions in any given purchase agreement to provide the released party with the maximum ability to bar claims.[42]

As noted by the Chancery Court in *New Enterprise Associates 14, L.P. v. Rich*,[43] although covenants not to sue have more leeway in terms of neutralizing future claims, these covenants are distinguished from a release when applied to joint tortfeasors. In contrast to a release, in which one person or entity can forfeit a cause of action as to all joint tortfeasors, a covenant not to sue does not extinguish a cause of action, meaning an action can still be brought against other joint tortfeasors.[44] Perhaps it

39. 66 AM. JUR. 2D *Release* § 4 (2023).

40. *Id.*

41. New Enter. Assocs. 14, L.P. v. Rich, 295 A.3d 520, 535 n.8 (Del. Ch. 2023).

42. As a drafting matter, practitioners should be mindful of the use of defined terms in a covenant not to sue. For example, if Delaware law governs the purchase agreement and a covenant not to sue is only applicable with respect to "Released Claims" (or some other defined term for the matters being released in the release provision of the purchase agreement), then the covenant not to sue would *not* cover future claims: "Released Claims" would be backward looking under Delaware law. Therefore, a new, carefully considered statement regarding matters that may not be the subject of a lawsuit should separately consider future claims. *Cf. infra* notes 59–60 and accompanying text (examining the potential effects of defined terms within bring down releases).

43. 295 A.3d 520 (Del. Ch. 2023).

44. AM. JUR. 2D, *supra* note 39.

can be seen as somewhat redundant, but including both provisions not only ensures that future claims are covered, but also addresses instances where a client may be one of several defendants involved. Additionally, it is important to understand how covenants not to sue are treated under New York and Delaware law: although both state laws affirm that these covenants are enforceable against future claims, different limitations arise in each jurisdiction.

1. New York: Covenants Not to Sue

Covenants not to sue are "expressly permitted under New York law."[45] When two parties sign a covenant not to sue, the agreement is enforceable with respect to any dispute between the signatories arising out of conduct covered by the agreement, and the case must be dismissed.[46] However, there are certain considerations relevant to determining whether a covenant not to sue is enforceable under New York law. First, courts have noted that specificity is needed to determine what claims the parties intended to cover under the covenant not to sue.[47] Second, no matter the agreement's terms, an exculpatory clause is unenforceable against "intentional wrongdoing," which includes fraudulent and malicious conduct, in addition to willful or gross negligence.[48] Subject to these considerations, a covenant not to sue will generally be enforceable under New York law.

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45. Joao v. Cenuco, Inc., 376 F. Supp. 2d 380, 382 (S.D.N.Y. 2005) (citing Kamfar v. New World Rest. Grp., Inc., 347 F. Supp. 2d 38, 50 (S.D.N.Y. 2004)).

46. Kamfar v. New World Rest. Grp., Inc., 347 F. Supp. 2d 38, 50 (S.D.N.Y. 2004) (finding the covenant at issue unambiguous and enforceable against subsequent defamation claim brought by plaintiff). The covenant included in the written agreement stated:

> Except as to his right to enforce this Agreement, Kamfar [plaintiff in this action] covenants, to the maximum extent permitted by law, that he shall not at any time hereafter commence . . . any action . . . with respect to any actual or alleged act . . . including, without limitation, any disclosures made publicly . . . at any time regarding any subject matter against or concerning the Company, . . . [or] . . . [its] . . . officers [or] directors . . . .

Id.

47. *See generally Joao*, 376 F. Supp. 2d at 383–85.

48. Kalisch-Jarcho, Inc. v. City of New York, 448 N.E.2d 413, 416 (N.Y. 1983) ("But an exculpatory agreement, no matter how flat and unqualified its terms, will not exonerate a party from liability under all circumstances.").

2. Delaware: Covenants Not to Sue

Under Delaware law, covenants not to sue are valid so long as "public policy is in no way concerned with the option which a person has to sue or to forbear suit."[49] Notably, this interpretative restriction does not limit covenants not to sue due to a purported bar on future claims. This conclusion may seem curious in light of Delaware's prohibition on forward-looking releases. However, the divergence has been recognized and explained by the Chancery Court:

> A covenant not to sue and a release are different things. "A covenant not to sue or execute is distinguished from a release as a forbearance of a right rather than a discharge of liability." Historically, that distinction carried significance, because in most jurisdictions, a release of one joint tortfeasor extinguished the cause of action as to all joint tortfeasors. That rule created problems for partial settlements, because a settlement and release with one joint tortfeasor extinguished the settling party's claim against all other joint tortfeasors. A covenant not to sue avoided that problem, because the covenant did not extinguish the claim.[50]

Two recent Delaware decisions support that covenants not to sue are enforceable as to future claims but both outline parameters of a valid agreement. In 2019, the Court of Chancery rejected an argument that a covenant not to sue was unenforceable as to future claims for breach of fiduciary duty.[51] The court rejected the argument that enforcing the covenant would be in contravention of public policy, dismissing an argument that extinguishing claims for breach of the duty of loyalty runs afoul of the covenant's permissible scope. In the case of covenants not to sue and stockholder claims, potential public policy concerns

49. New Enter. Assocs. 14, L.P. v. Rich, 295 A.3d 520, 536 (Del. Ch. 2023) (quoting 17A C.J.S. *Contracts* § 338, West (2023)). "Delaware applies the same public policy limitations to covenants not to sue that it applies to contracts generally." *Id.* at 537.

50. *Id.* at 535 (quoting 76 C.J.S. *Release* § 51, West (2023)) (footnote omitted).

51. *Id.* at 588 (citing Transcript of Record, *In re* Altor Bioscience Corp., No. CV 2017-0466 (Del. Ch. May 15, 2019)). The section of the agreement at issue stated that the two former directors of the company committed for a period of five years that they would not "directly or indirectly commence, prosecute or cause to be commenced or prosecuted against any Company Releasee any action or other proceeding of any nature before any court, tribunal, Governmental Authority or other body, except for the Company's breach of this letter agreement." *Id.* at 588, (quoting Transcript of Record, *supra*, at 10). The Vice Chancellor held this provision was "tantamount to a covenant not to sue." *Id.* at 588, (quoting Transcript of Record, *supra*, at 13–14).

must be assessed in light of two scenarios: (1) where all stockholders are signatories, meaning no one could sue pursuant to the agreement's covenant, and (2) where "others not bound by the contract could bring suit."[52] The court found a covenant not to sue would be unenforceable in the first scenario, but valid in the latter. This outcome is to ensure that *some* claimant is able to pursue potential claims in order to protect the public's interest, although, with this goal in mind, the identity of the claimant that pursues such claims is less important.

A forward-looking covenant not to sue was addressed again in 2023, when the Court of Chancery issued its opinion in *New Enterprise Associates*. The court enforced a forward-looking covenant not to sue[53] that was conditioned upon a future event

52. *Id.* at 588, (quoting Transcript of Record, *supra* note 51, at 15–16).

53. The voting agreement that contains the covenant not to sue at issue was not disclosed in its entirety as a part of the *New Enterprise Associates* proceedings, but some portions of the voting agreement were included in the Chancery Court's opinion. *See New Enterprise Associates*, 295 A.3d at 537–38. The court's discussion of the voting agreement notes:

> For the Drag-Along Right to apply, the Sale of the Company must receive approval from both (i) the holders of a majority of the issued and outstanding shares of Preferred Stock, and (ii) the Board, including the director appointed by the Lead Investor and at least one other director approved by the holders of the Preferred Stock. If the Drag-Along Right applies, then the Signatories must fulfill a series of contractual commitments. But no Signatory has to comply with those obligations unless the Sale of the Company satisfies eight requirements. This decision defines a Sale of the Company that meets the eight requirements as a Drag-Along Sale.
>
> In abbreviated form, the requirements include: [1] Each holder of shares of stock of each class or series must receive the same form and amount of consideration as the other shares in their class or series, [2] The transaction consideration must be distributed in order of priority as set forth in the charter, [3] If there is a choice of consideration, then each holder receives the same choices, [4] Signatories cannot be required to make representations and warranties except as to the ownership of, authority over, and ability to convey title to their shares, [5] Signatories cannot be required to agree to restrictive covenants, [6] Signatories cannot be required to terminate or alter any contractual agreements with the Company, [7] Signatories cannot have any liability for a breach of any representation, warrant, or covenant, except to the extent paid from an escrowed portion of the transaction consideration designated for that purpose, and [8] Signatories cannot be required to fund the escrow beyond their pro rata share of the negotiated amount. Because of these conditions, the Drag-Along Right does not apply to a transaction in which the Rich Entities extract additional or unique consideration for themselves.

occurring, and therefore prohibited future breach of loyalty claims. The covenant not to sue at issue in *New Enterprise Associates* outlined that if eight requirements were met to satisfy the drag-along sale provision, the covenant was triggered and all relevant signatories were bound to waive any claims for breach of fiduciary duty.[54] The court did note that the validity of these covenants must be assessed in light of specific transactions; in this case, the covenant was not ambiguous, affected a specific groups, involved sophisticated parties, and was not unreasonable based upon the totality of facts.[55] Therefore, it was enforceable.

B. DELAY EXECUTION OF RELEASE AND "BRING DOWN" RELEASE PROVISIONS

There are two solutions that partially address concerns over forward-looking releases. However, neither of these two approaches would release future claims that arise post-closing as they still conflict with public policy concerns discussed by

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> If the Drag-Along Right applies, then each Signatory must take a series of actions. They include: [1] Voting for the Drag-Along Sale if it requires stockholder approval, [2] Executing and delivering documentation in support of the Sale of the Company that the Company reasonably requests, [3] Agreeing to appoint a stockholder representative with authority to take action under the transaction documents after closing, and [4] Agreeing to the Covenant. Under the Covenant, each Signatory commits to refrain from (i) exercising any dissenters' rights or rights of appraisal under applicable law at any time with respect to such Sale of the Company, or (ii) asserting any claim or commencing any suit (x) challenging the Sale of the Company or this Agreement, or (y) alleging a breach of any fiduciary duty of the Electing Holders or any affiliate or associate thereof (including, without limitation, aiding and abetting breach of fiduciary duty) in connection with the evaluation, negotiation or entry into the Sale of the Company, or the consummation of the transactions contemplated thereby.

Id. at 537–38.

54. *See id.* at 537–39 (outlining the eight requirements for the Sale of the Company as a Drag-Along Sale, and the attaching covenant not to sue that was triggered and upheld as valid). For the abbreviated language of the requirements as stated by the court, see *supra* note 53.

55. *See id.* at 589–91 (addressing factors to consider when assessing whether the covenant provision is reasonable). Factors for reasonableness include "(i) a written contract formed through actual consent, (ii) a clear provision, (iii) knowledgeable stockholders who understood the provision's implications, (iv) the Funds' ability to reject the provision, and (v) the presence of bargained-for consideration." *Id.* The court found that the covenant's provision met the reasonableness standard under Delaware law. *See id.* at 590–91.

Delaware case law.[56] Nonetheless, including a covenant not to sue in addition to implementing either solution discussed in this section, can be drafted to cover future claims post-close that may arise between the signing parties.

1. Delayed Release Execution

One solution is to sign a release at closing instead of an earlier signing date. Mirroring a simultaneous sign and close timeline, executing the release on a later date falls within Delaware precedent to circumvent enforcement issue as to claims arising post-execution (but pre-closing). Where the date of execution is now the future closing date, the release then includes possible claims arising from the executory period as they have "accrued" prior to executing the release.

The challenge with this approach is that if the purchase agreement is terminated or a dispute between the parties arises between signing and closing, the party that would have been released as of the signing of the purchase agreement would not be so released. Therefore, the released parties have incrementally more liability exposure until closing than they would if the release had been effective when the purchase agreement was signed.

2. "Bring Down" Release

The second solution is to require the releasing party to "bring down" at the closing a release originally given at the signing. Such a structure would involve the purchase agreement including as a closing deliverable a document stating that the releasing party confirms, ratifies, and remakes the release as of closing. In other words, this provision effectively makes the releasing party sign the release twice. The first execution covers everything prior to the initial signing while the second execution would cover the period between signing and closing.[57] In this way, a "bring down" release effectively extends coverage of

56. For further discussion of Delaware precedent regarding a release of future claims, see *supra* Part II.B.

57. The parties could additionally agree to have the releasing party "re-release" the previously-released claims at the closing. However, the benefit of such "re-release" is social and political, if not belt-and-suspenders: the legal benefit to such "re-release" is likely none because the matters had already been released at the signing of the purchase agreement in the original release.

released claims by including an additional date of execution to encompass a broader range of claims throughout the deal timeline.

This "bring down" release approach would be familiar to practitioners and simple to implement.[58] Purchase agreements with a separate sign and close structure already customarily include a similar mechanism with respect to representations and warranties, where the parties "bring down" the representations and warranties in the purchase agreement at closing to a particular standard that is negotiated between and agreed to by the parties.[59] While incorporating an extra closing deliverable into a purchase agreement would add some incremental level of time and expense to the transaction, it would be akin to the time and expense of other customary, mechanical deliverables that are not heavily negotiated: that is, so minimal as to not weigh in whether to incorporate such deliverable.

Practitioners implementing the "bring down" release concept into purchase agreements should take care to closely review the use of defined terms in such provisions. Take for example the following release, which is a simplified version of the release discussed in Part I.A.1.[60]

> Seller fully and unconditionally releases, acquits and forever discharges the Target from any and all manner of actions, causes of action, suits, proceedings, claims, debts, obligations, losses, expenses (including attorneys' and other professional fees and expenses), or other relief, whether known or unknown, matured or unmatured, suspected or unsuspected, fixed, contingent or otherwise, whether in law or equity,

58. Additionally, some practitioners already employ the bring down release structure in the context of employment agreements and related termination or severance agreements to address statutory waiting periods, revocation periods, and similar requirements. *See, e.g.*, United Airlines Holdings, Inc., Ex. 10.1 Retirement and Transition Agreement by and among United Airlines Holdings, Inc., United Airlines, Inc. and Gerald Laderman Dated May 25, 2023 5 (Form 8-K) (May 31, 2023), https://www.sec.gov/Archives/edgar/data/100517/000110465923066339/tm2317201d1_ex10-1.htm [https://perma.cc/BH8D-NYNV]; NCL Corp. Ltd., Ex. 10.3 Transition, Release and Consulting Agreement by and between and NCL (Bahamas) Ltd. and Frank J. Del Rio, entered into on March 15, 2023 1 (Form 8-K) (Mar. 20, 2023), https://www.sec.gov/Archives/edgar/data/1513761/000155837023004150/nclh-20230315xex10d3.htm [https://perma.cc/D44Y-W277].

59. *See Bring Down*, *supra* note 36; *see also* SRS ACQUIOM INC., *supra* note 2, at 45–46 (identifying the frequency of various bring down standards in purchase agreements).

60. *See supra* notes 8–10 and accompanying text.

> which Seller ever had as of or prior to the date hereof against Target (each, a "Released Claim").

Transactional lawyers may be inclined to draft the "bring down" referencing the defined term "Released Claim." For example, the "bring down" release may say:

> Seller hereby fully and unconditionally releases, acquits and forever discharges the Target from any and all Released Claims.

Such a release would be arguably ineffective from a practical perspective as the defined term "Released Claim" includes the timing reference "prior to the date hereof." Absent clarification that "the date hereof" refers to the date of the "bring down" release, there is ambiguity as to whether "the date hereof" continues to refer to the date of the original release or is updated to the date of the "bring down" release. Practitioners can avoid this issue and similar issues by carefully drafting and critically reviewing the use of defined terms in "bring down" releases.

C. Choose New York Law for Friendly Contract Interpretation

Lastly, as discussed throughout this Essay, New York law tends to have a more generous interpretation of releases and covenants not to sue. Although it is not always practical in the transaction context, choosing New York law instead of Delaware law to govern a given purchase agreement affords greater leniency to the parties' intent as evidenced through the written agreement if it is reviewed by the court. Drafting purchase agreements that are governed by New York law not only seemingly avoids potential issues regarding forward-looking releases, but also has fewer barriers to enforcing covenants not to sue.[61] Purchase agreements that seek to release claims that occur throughout the executory period and post-closing can benefit from the friendly nature of New York law, providing clients and counsel peace of mind that the release's scope adequately covers future claims.

CONCLUSION

The complexity and evolving nature of mergers and acquisitions requires flexibility to provide optimal representation

61. For further discussion of general releases under New York law, see *supra* notes 19–23 and accompanying text. For further discussion of covenants not to sue under New York law, see *supra* notes 45–48 and accompanying text.

throughout the deal process. Although the process of transactional work is unlikely to change anytime soon, rethinking certain seemingly boilerplate and often recycled provisions is worthwhile when faced with the potential uncertainty of a reviewing court. Particularly where deals are operating under Delaware law, a more conservative approach is warranted in order to provide clients with protection against risks that may not be extinguished by a traditional customary release. Under the relatively more skeptical view of Delaware law regarding forward-looking releases, incorporating supplemental provisions into purchase agreements is not only a viable solution, but also recommended to obtain a sense of relief.