

Sellers Should Beware of Closing Conditions Requiring Representations and Warranties to be "Accurate in All Respects"

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In *HControl Holdings v. Antin Infrastructure Partners*, a Delaware court recently held that the buyer could terminate without closing its agreement to acquire a target company for \$250 million. Due to a \$215,000 ownership related claim by an ex-employee, the seller could not satisfy a closing condition that the seller's fundamental representations and warranties remained "accurate in all respects" at the closing.

As background, when an acquisition agreement provides for a period between signing and closing, each party must typically satisfy, among other conditions to closing, a representation and warranty "bring-down" condition that sets forth the required level of accuracy for a party's representations and warranties that must be met as of the closing date.

Often, this standard of accuracy for "general" representations and warranties relating to the target company is qualified by a materiality or Material Adverse Effect (MAE) standard. An MAE standard (in particular) is a very high threshold that provides a significant degree of deal certainty to sellers. However, those representations and warranties that the parties contractually agree are "fundamental representations" (often including, among other things, representations relating to the target company's existence, capitalization structure, title to securities, the seller's authority to enter the purchase contract, and certain tax matters) are often required to be brought down with a higher level of accuracy. Typical bring-down standards for fundamental representations are often something like "accurate in all respects" or "accurate in all respects, except for failures, individually and in the aggregate, de minimis in nature." This variance in bring-down standards for fundamental representations is generally the result of negotiations between the parties, reflecting customary practices, and recent case law shows the variance can be significant.

The agreement at issue in *HControl* contained a condition to closing that brought down to closing specified "fundamental representations," including a capitalization representation, without a carve out for material or de minimis exceptions. Sellers repeatedly attempted to insert a materiality qualifier into this provision, which would have significantly narrowed the circumstances in which the buyer could refuse to close the agreement. The buyer repeatedly struck this provision, and the final

agreement required the “fundamental representations” to be “true and correct in all respects” at closing. When it came to light that an ex-employee had claims to \$215,000 worth of the target company’s stock, the buyer asserted it was not required to consummate the \$250 million purchase of the target company, and the court ultimately enforced the above described closing condition, which required strict compliance with the terms of the representation, and therefor allowed the buyer to “walk away” from the deal without having to close.

This decision underscores (1) the importance of understanding the variants in M&A closing condition bring-down standards and how each variant allocates risk among the parties and (2) at least in Delaware, courts tend to enforce the plain language of agreements even where the result may seem extreme or unfair.

Sellers, for their part, would do well to fight hard to ensure the representation and warranty bringdowns, even for “fundamental representations,” should be subject to a standard that allows for at least de minimus inaccuracies. This is particularly so given that the *HControl Holdings* decision has been followed in other Delaware court decisions as recently as June 2023 in *Restanca, LLC v. House of Lithium, Ltd.*, No. 2022-0690-PAF, 2023 WL 4306074.

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