Global Private M&A Guide - Limited External Content - United States of America

Agreeing to the acquisition agreement → Damages, knowledge

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# Is there an obligation to mitigate damages?

Frequency/market practice: Fairly common. Although a buyer typically has a duty to mitigate damages under the common laws of some states (e.g., New York and Delaware), an acquisition agreement may contain an express requirement that the buyer mitigate its damages. Those agreements with an express duty to mitigate damages may require a buyer to mitigate damages 'to the extent required by law' or through an efforts standard (e.g., by taking all reasonable steps to mitigate damages).

# Is there an exclusion of consequential damages?

Frequency/market practice: While it is somewhat common to expressly exclude consequential damages, most agreements remain silent on the issue, particularly if the transaction uses representations and warranties insurance.

# Are provisions that there is no liability if the buyer has knowledge common, or does buyer knowledge have no effect?

Frequency/market practice: Rarely. It is not common to include such so-called 'anti-sandbagging' provisions (although it is more common for agreements to include "pro-sandbagging" provisions that allow liability if the buyer has knowledge). The majority of the time, however, agreements are silent on this point. Claims under a representations and warranties policy for matters of which the buyer had prior knowledge are likely to be excluded from coverage. In a 2022 case, *Arwood v AW Site Services LLC*, the Delaware Chancery Court affirmed that Delaware is a pro-sandbagging state, holding that unless the parties specifically preclude sandbagging in the agreement, the default Delaware position is that the buyer is entitled to indemnification for breaches of the seller’s representations and warranties even if the buyer knew pre-closing that the representations were not true.

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