MEMORANDUM

June 30, 2011

To: Judicial Interpretations Working Group of the Negotiated Acquisitions Committee

From: Donald M. Dalik

Re: Judicial Interpretations of Full Disclosure ("10b-5") – Representations

In a typical acquisition agreement, it is common for the buyer to demand a “Full Disclosure” or “10b-5” representation from the seller. A full-disclosure representation serves as

* This memorandum was prepared with the assistance of Sonya Reiss, Deborah Brouwer and Grant Foster of the author’s firm and with editorial input from Michael Gans, Scott Whittaker and H. Lawrence Tafe III.

1 Full-disclosure representations are utilized but not ubiquitous. In particular in transactions with public targets they are infrequent, particularly in the ‘full disclosure’ formulation, due in part to the lack of continuing post-closing reps. in such transactions. In their survey of 83 publicly-available agreements from 2003, Glasgow and Chu found full-disclosure representations in only 64% of the agreements surveyed (Larry Glasgow and Wilson Chu, “Truth or Dare: the Realities of Negotiated Deal Points in M&A”, Financier Worldwide, Issue 16 (April 2004), online: Gardere, LLP <http://www.gardere.com/Content/hubbard/tbl_s31Publications/FileUpload137/928/Glasgow-Financier-DEALPTS.pdf>. In another survey of 30 publicly-available agreements from 2004, Koh and Belisle found full-disclosure representations in only 47% of the agreements surveyed (Jin-Kyu Koh & Jeffrey A. Belisle, “Current Trends in Deal Structures”, online: M&A Chicago <http://machicago.com/tl_articles/71505_DealStructure.htm>). In the ABA’s “2007 Private Target Mergers & Acquisitions Deal Points Study (v.2)” a ‘10(b)-5’ formulated representation appeared in 52% of the agreements, with a further 10% including both it and the broader ‘full-disclosure’ formulation. For Public Targets, in 2008, as reported in the ABA Mergers & Acquisitions Committee 2009 Strategic Buyer/Public Target M&A Deal Points Study, only 2% of surveyed transactions contained a ‘full disclosure’ representation, down from 3% in the
a catch-all safety net for the buyer in which the seller agrees that the specific representations and warranties in the agreement contain no “untrue statements” or “omissions of material fact that would be necessary to make any specific representation or warranty not misleading.” One version of a buyer-friendly representation is set out in the *ABA Model Asset Purchase Agreement*:

“3.33 DISCLOSURE

(a) No representation or warranty or other statement made by Seller or either Shareholder in this Agreement, the Disclosure Letter, any supplement to the Disclosure Letter, the certificates delivered pursuant to Section 2.7(a) or otherwise in connection with the Contemplated Transactions contains any untrue statement or omits to state a material fact necessary to make any of them, in light of the circumstances in which it was made, not misleading.

(b) Seller does not have Knowledge\(^2\) of any fact that has specific application to Seller (other than general economic or industry conditions) and that may materially adversely affect the assets, business, prospects, financial condition or results of operations of Seller that has not been set forth in this Agreement or the Disclosure Letter.”

The language in paragraph (a) of the clause is borrowed from Rule 10b-5 (17 C.F.R. § 240.10b-5) promulgated by the United States Securities and Exchange Commission in order to combat mail fraud in connection with the purchase or sale of a security. The language in paragraph (b) of the clause arguably is intended to include facts about which no other express representation has been made. Despite the similarity between Rule 10b-5 and a contractual full-comparable prior year’s study. The “2009 Private Target Mergers & Acquisitions Deal Points Study” recorded a 58% utilization of the 10(b)-5 rep., and 9% for both it and the ‘full disclosure’ formulation. In 2010 ror public targets however, the “2010 Strategic Buyer / Public Target Mergers & Acquisitions Deal Points Study” observed that 5% included a 10(b)-5 rep. (cited in the study as a ‘full disclosure’ rep.) with none using the ‘full disclosure rep. formulated as referenced in this memorandum. Other studies have reported higher percentages, but there is large variation. See Clifford, Jonkhart & Pearlman, “What’s the Market for that Cross-Border Deal? The European, US and Canadian Private Target M&A Deal Points Studies”, Business Law International, Vol. 12, May 2011.

\(^2\) “Knowledge” - an individual will be deemed to have Knowledge of a particular fact or other matter if:

(a) that individual is actually aware of that fact or matter; or

(b) a prudent individual could be expected to discover or otherwise become aware of that fact or matter in the course of conducting a reasonably comprehensive investigation regarding the accuracy of any representation or warranty contained in this Agreement.

A Person (other than an individual) will be deemed to have Knowledge of a particular fact or other matter if any individual who is serving, or who has at any time served, as a director, officer, partner, executor or trustee of that Person (or in any similar capacity has, or at any time had, Knowledge of that fact or other matter (as set forth in (a) and (b) above), and any such individual (and any individual party to this Agreement) will be deemed to have conducted a reasonably comprehensive investigation regarding the accuracy of the representations and warranties made herein by that Person or individual. (SEE: *ABA Model Asset Purchase Agreement – Definition*)
disclosure representation, the general consensus among commentators is that a seller will be exposed to a much stricter standard of liability under a full-disclosure representation than under Rule 10b-5.³ In particular, commentators emphasize that in order to succeed in a claim for breach of a full disclosure representation, unlike a claim under Rule 10b-5, a buyer will not need to prove that it reasonably relied upon the representation and a seller will be unable to defend against the claim by proving that it acted without knowledge or culpability. However, our review of judicial interpretation of full-disclosure representations in both the United States and Canada found that courts are still reluctant to hold sellers liable under full-disclosure representations. In fact to June 22, 2011, we have not found any material published opinions in favour of a buyer successfully claiming solely under a full-disclosure representation. While it is true that the reasonable reliance of a buyer and the knowledge of a seller are not necessary, on the literal wording of the provision, in order to succeed in a claim for breach of a full-disclosure representation, the courts have nevertheless found various other means by which to limit a seller’s liability. This paper examines the judicial interpretation of full-disclosure representations and finds, in general, that a buyer will have a difficult time succeeding in a claim for breach of a full-disclosure representation.

Knowledge or “Scienter” of the Seller

U.S. Courts have held that liability under Rule 10b-5 requires that the seller had “scienter” or some form of knowledge of the alleged untrue statement or omission; in other words, liability under Rule 10b-5 cannot arise simply from the seller’s negligent conduct. The leading case for this proposition is Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) in which the U.S. Supreme Court reasoned that “scienter” must be required under Rule 10b-5 in order to be consistent with, and to preserve the effectiveness of, more specific provisions of securities legislation which restrict the circumstances in which civil liability may be imposed for negligent conduct.

The requirement that a seller have knowledge of the alleged untrue statement or omission, then, seems specific to a securities context and the same reasoning would not apply when parties are negotiating an acquisition agreement. Nevertheless, in *DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954 (Del. 2005), the Supreme Court of Delaware affirmed that a seller’s disclosure obligations may be restricted to those facts or liabilities known to the seller if there is extrinsic evidence that this was the intention of the parties. In *DCV*, the seller represented that none of the target companies had any undisclosed liabilities or obligations; however, after the sale, the buyer learned that one company had been involved in an undisclosed international price fixing scandal that implicated it in antitrust violations. Although it was admitted that the seller had no knowledge of these antitrust violations, the seller’s representation did not expressly restrict disclosure to those liabilities or obligations known to the seller. Nevertheless, the trial court held, and the Supreme Court agreed, that the knowledge restrictions in other clauses of the same agreement as well as the pattern of negotiations and previous drafts of the contract all made it clear that both parties intended the seller’s disclosure obligations to be restricted to those within the seller’s knowledge.4

The claim in *DCV* was based upon the interpretation of a broad representation (‘no undisclosed liabilities’) and certain specific clauses which contained knowledge qualifiers (in particular ‘compliance with the law’). The Court considered various sources cited by the buyer, including the discussion in the text “Anatomy of Merger: Strategies and Techniques for Negotiating Corporate Acquisitions 262 (1975)”, by Mr. James Freund. Contrary to the discussion in the text, the Court stated: “well settled rules of contract construction require that a contract be construed as a whole, giving effect to the parties’ intentions. Specific language in the contract controls over the general language, and where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one.” The Court recognized that the various provisions were in conflict and read down the general provisions to be subject to the specific provisions. It is also interesting to note that considerable extrinsic evidence on the conduct of negotiations, including the content of the prior drafts and the evolution of a treatment of the various clauses, was admitted and considered in depth by the Court at trial in determining the true intention of the parties.

4 Further discussion of *DCV* can be found in the NAC 2005 Survey, published February 2006.
The decision of the U.S. Court of Appeal for the Second Circuit in *Merrill Lynch & Co., Inc., et al v. Allegheny Energy, Inc., et al* (trial decision 2005 U.S. Dist. LEXIS 14216, July 18, 2005; Appeal decision 2007 U.S. App. LEXIS 20928) dealt with claims brought by *Allegheny* as the buyer of *Merrill*'s global energy markets business (“GEM”) based on fraudulent inducement and breach of a disclosure representation similar to a 10b-5 rep. Post-acquisition some financial data was subsequently found to be inaccurate due to apparently fraudulent transactions connected with Enron energy trading involving an employee of GEM. Although some of the disclosure made during the course of the negotiations contained inaccurate data the trial Court found that the information “… was for the most part, complete and prepared in good faith by the time of signing”. Both claims by *Allegheny* were denied by the Court at trial. On appeal, discussed in more detail below, the trial decision was reversed in part and remanded. We have not found a further trial decision on the remanded hearing.5

**Materiality of the Representation**

A seller’s liability under a full-disclosure representation may be denied if the alleged misrepresentation is insufficiently material; and the materiality of the representation may be determined by the significance that the disclosure would have had on the buyer’s decision-making process. See, eg. *Allegheny* case supra, and the 1988 decision of the U.S. Supreme Court in *Basic Incorporated, et al v. Max L. Levinson et al*, 48 U.S. 224; 1997 U.S. Dist. LEXIS 95820.

To the extent Canadian precedent is instructive, such an analysis occurred in a recent decision of the British Columbia Court of Appeal in *Inmet Mining Corp. v. Homestake Canada Inc.*, 2003 BCCA 610, 38 B.L.R. (3d) 248; (2003), 24 B.C.L.R. (4th) 1. In *Inmet*, a contract for the purchase and sale of a gold mine required the seller to disclose all information relating to “any material fact which could reasonably be expected to have a material adverse effect” on the business or purchased assets. While not ‘Rule 10b-5’, this provision is similar to paragraph (b) of the typical full disclosure representation. The buyer refused to complete the purchase and alleged that the seller breached the full-disclosure requirements by failing to disclose inconclusive test reports which indicated that the mine was possibly less productive than

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5 Preliminary proceedings in the *Allegheny* case were included in the Committee’s 2003 survey as published in *Business Lawyer*, August 2004. At that time Summary Judgment and Dismissal Applications were denied and the
originally contemplated. Adopting a test from a securities decision of the United States Supreme Court, the British Columbia Court of Appeal held that a fact is “material” only if there is: “a substantial likelihood that the disclosure of the omitted fact would have assumed actual significance in the deliberations of the reasonable purchaser, or would have been viewed by the reasonable purchaser as having significantly altered the total mix of information made available” (para. 28). Although this test for materiality is framed solely from the point of view of a reasonable purchaser, the Court in Inmet immediately added that in a contractual context (as opposed to a securities context) “materiality” will also be determined by the nature of the contract, the parties to the contract and “the state of their knowledge about the subject-matter of the contract” (para. 29). Thus, the test for materiality in a full-disclosure representation employs both an objective standard of a reasonable purchaser as well as a subjective standard insofar as the reasonable purchaser must be presumed to be in the same position and have the same knowledge as the actual purchaser (see para. 102). Ultimately, the purchaser’s appeal in Inmet was dismissed on the ground that the undisclosed facts would not have assumed any actual significance in the deliberations of the purchaser while acting reasonably.

Although a buyer may attempt to avoid the materiality requirement by omitting the qualification altogether, the Court in Inmet, supra, held that it was necessary to imply a materiality qualification in another clause where none was expressly provided. The Court noted that it would be unreasonable to require the seller to disclose information that would be of no significance to a reasonable buyer and that the materiality restriction was necessary to avoid a “commercial absurdity” (para. 35). Based on this reasoning it may assist to achieve certainty in an acquisition agreement if the parties expressly stated that they wished the seller’s disclosure obligations to operate without regard to a materiality restriction. However that may still not permit a contract to be avoided where doing so would be a ‘commercial absurdity’. Recent U.S. case was referred for trial. The decision cited herein is that made at trial and subsequent appeal.

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6 TSC Industries Inc. v. Northway Inc., 426 U.S. 438 (1976). At issue in TSC was Rule 14a-9 (17 C.F.R. 240.14a9) promulgated by the Securities and Exchange Commission; Rule 14a-9 is similar to Rule 10b-5 except that Rule 14a-9 prohibits misleading material facts or omissions in proxy solicitations. In order to avoid disproportionate liability for insignificant omissions or statements and in order to avoid burying shareholders in an “avalanche of trivial information”, the United States Supreme Court linked “materiality” with the ability to influence a reasonable shareholder’s deliberations. To establish that a fact is “material”, the plaintiff need not prove that disclosure would have actually resulted in a different vote, but rather, the plaintiff must only prove that the disclosure of the omitted fact would have assumed significance in the deliberations of the reasonable shareholder (pp.765-766).
decisions on the high threshold required to terminate a contract based on a ‘material adverse effect’ would evidence a similar view.

**Sufficient Disclosure**

In a securities context, an investor need not establish due diligence in order to succeed in a claim under Rule 10b-5. As the Second Circuit explained in *Mallis v. Bankers Trust Co.*, 615 F.2d 68, 79 (1980), securities legislation is aimed at deterring intentional misconduct of those who sell or offer securities rather than fostering the due diligence of investors. However, in a contractual context, a significantly higher standard of due diligence is imposed on a buyer who claims against the seller for a breach of a full-disclosure representation. For example, in *C.S.B. Co. v. Isham*, 249 Neb. 66; 541 N.W.2d 392 (1996), the appellant acquired ownership of a Bank by purchasing the stock of a holding company which owned nearly 100% of the Bank’s stock. The seller made a general full-disclosure representation and then specifically disclosed that the Bank was involved in litigation with respect to a “bankruptcy matter”. In fact, the litigation was primarily a lender liability matter against the Bank which the subsequent buyer bore the substantial cost of defending. The buyer claimed that the characterization of the litigation as a “bankruptcy matter” was materially misleading; however, the Court rejected this claim on the ground that the buyer could have easily discovered the nature of the litigation. In particular, the Court emphasized (at p.72) that the name and address of the attorney handling the litigation was disclosed and that the buyer had full access to the Bank’s property and records.

Similarly in *Wannemacher v. Cavalier*, 2004 Ohio 4020 (Ct. App.), the Court refused to find that a seller had breached his full disclosure obligations in an agreement to sell his on-the-road trucking and warehouse company. Although the buyer unexpectedly discovered that the business had significantly fewer assets than the buyer had anticipated, the buyer was a sophisticated businessperson who simply failed to investigate the assets and status of the business even though the means of such an investigation were open to him. Thus at trial and on appeal the buyer failed in his claim against the seller.

In *Merrill Lynch v. Allegheny*, supra, in commenting on the breach of warranty claim the trial Court affirmed the onus on the party alleging breach was to prove: “(1) the existence of an

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express warranty, (2) material breach of the warranty, (3) damages proximately resulting from the material breach, and (4) justifiable reliance on the warranty.” In addition, in commenting on the fraudulent inducement claim, the Court confirmed the proposition that “in assessing the reasonableness of the Plaintiff’s alleged reliance [the Court should] consider the entire context of the transaction, including the factors such as its complexity and magnitude, sophistication of the parties and content of any agreements between them.” The record showed that the seller opened its books and records with respect to GEM and afforded Allegheny four months of due diligence by a highly qualified team. The ‘full-disclosure’ provision in question was set forth in section 3.16 of the Purchase Agreement and stated in part “… the information provided by the Sellers to the Purchasers, in the aggregate, includes all information known to the Sellers which in their reasonable judgement exercised in good faith, is appropriate for the Purchasers to evaluate the trading positions and trading operations of the Business.” The Court affirmed the proposition that where sophisticated business parties have access to critical information but fail to take advantage of that access they are not justified in subsequent claims of reliance on more general provisions in the agreement. Further, in referring to some lines of jurisprudence which distinguish “peculiar knowledge” as requiring a heightened level of disclosure by a seller, the Court stipulated that as the Purchaser had full access to the seller’s books and records it was provided with an independent means for discovering the truth and could have done so without great difficulty, disentitling Purchaser, to any claim on that basis. On Appeal the 2nd Circuit Court stated that while the trial Court imposed ‘too stringent a standard of reliance’ a party cannot demonstrate reliance on statements it knew were false. This was stated to be “in contrast to the reliance required to make a claim for fraud, the general rule is that a buyer may enforce an express warranty even if it had reason to know that the warranted facts were untrue.” Although to succeed in this latter approach it is a condition to show that buyer believed “it was purchasing sellers promise regarding the truth of the warranted facts.” Therefore on remand Allegheny would be required to show “… that its reliance on the alleged misrepresentations was not so utterly unreasonable, foolish or knowingly blind as to compel the conclusion that whatever injury it suffered was its own responsibility.”

Two other cases are illustrative of the tendency of the Courts to limit disclosure obligations to those expressly agreed upon in negotiations. In Harsco Corporation v. Rene Segui, et al 91 F. 3d 337; 1996 U.S. App. LEXIS 18878, the Purchaser, Harsco, brought a claim
based on alleged misrepresentations or omissions by the Vendor pursuant to an agreement which had extensive specific representations and warranties but no ‘full disclosure’ provision. To compensate Harsco sought to rely on Rule 10b-5 itself. The Court of Appeal for the 2nd Circuit disallowed such reliance based on provisions in the agreement disclaiming any representations or warranties other than as expressly set forth in the agreement (s. 2.05) and stating that the document constitutes the ‘entire agreement’ (s. 7.02). The Court held that the parties had enforceably chosen their remedies and Rule 10b-5 could not be relied upon. In the Pennsylvania case of Environ Products, Inc. v. Advanced Polymer Technology Inc, et al 1997 U.S. Dist. LEXIS 9582 the District Court held that a broadly worded mutual release precluded a claim based on information not disclosed at the time of contracting under a stock repurchased agreement.

In short, then, these cases show that a buyer cannot expect to succeed in a claim against the seller for breach of a full-disclosure representation unless the buyer can prove that it exercised reasonable due diligence in investigating the status, assets and affairs of the acquired business. The standard will be determined in reference to the full context of the transaction, including the business sophistication of the parties.

**Causation**

Under Rule 10b-5, it is not sufficient for the buyer to prove that, but for the untrue statement or omission, the buyer would not have bought the security. Instead, the buyer must establish that the untrue statement or omission was in some reasonably direct or proximate way responsible for the loss in question. In other words, the buyer must establish “loss causation” (also known as “legal” or “proximate” causation) rather than simply “transactional” or “but for” causation. Thus, if the value of securities dropped due to general market conditions unrelated to an untrue statement or omission, a buyer would be unable to establish “loss causation” and so would be unable recoup its losses by a suit under Rule 10b-5. In Huddleston v. Herman & MacLean, the United States Court of Appeals for the Fifth Circuit explained that a strict requirement for proximate causation is necessary to prevent Rule 10b-5 from serving as “an insurance plan for the cost of every security purchased in reliance upon a material misstatement or omission.” In Dura Pharmaceuticals Inc. et al v. Broudo et al (Slip opinion) No. 03-932,
Decided April 19, 2005 the U.S. Supreme Court affirmed the various requirements to sustain a private securities fraud action in connection with trades in a publicly traded security, including the need to prove both economic loss and loss causation. Proximate causation was similarly required in Allegheny, and failure to prove it undermined both a contractual and fraudulent inducement claim. (Also Shanahan v. Vallat, U.S. District Court for the Southern District of New York, 2008 U.S. Dist. LEXIS 77608, citing Allegheny.)

Similarly in Canadian law, the Supreme Court of Canada has considered whether the strict requirement for proximate or “loss” causation, as developed in the context of Rule 10b-5, should be more generally extended to limit damages in other contexts. In Hodgkinson v. Simms, [1994] 3 S.C.R. 377, the majority of the Court held that the requirement for proximate causation under Rule 10b-5 is driven by a policy tailored to the securities context, namely, to ensure that capital markets are not hampered by a potential explosion of securities fraud litigation (para. 89). Thus, outside of a securities context, where litigation does not threaten the efficiency of capital markets, the policy reasons to insist on strict proximate causation are not as pressing.

Ultimately, the majority found that “but for” causation was sufficient for damages for breach of fiduciary duty. However, in dissent, Sopinka and McLachlin JJ. considered the slightly different question of whether the requirement for proximate causation as developed under Rule 10b-5 should be extended to a claim for damages for breach of contract. In contrast to the majority, the dissent found that the requirement for proximate causation under Rule 10b-5 is driven by a widely applicable policy to avoid “undue harshness” in contractual damage awards particularly when the direct cause of the loss is outside of the defendant’s control (para. 151). Thus, the dissent would have denied damages for breach of contract on the ground that the appellant could only establish “but-for” causation. This decision has not yet been reconsidered by the Supreme Court of Canada but has subsequently been distinguished in at least 21 decisions in provincial, superior and appellate Courts in Canada. In short, then, although there is no definitive ruling on the causation required to recover damages for breach of a full-disclosure representations, the parties to an acquisition agreement should be aware that “but for” causation may not be sufficient to establish a loss recoverable in damages.

Extrinsic Evidence

8 640 F.2d 534, 549 (5th Cir. 1981), aff’d in part, rev’d in part on other grounds 459 U.S. 375 (1983)
It is significant to note that implicitly in these decisions, and in some cases explicitly, the broad construction of the full-disclosure provisions is found to be patently inconsistent with other more express representations and warranties in the agreements. While in some instances the patent inconsistency can be viewed as simply requiring a judicial interpretation or construction of the language found within the four corners of document it appears that Courts wish to make their decisions on a more fully informed basis and therefore admit extensive parol and extrinsic evidence. In *DCV* there appears to have been evidence at trial as to contents of the evolution of the language in the conflicting clauses starting from the first draft and proceeding through all the drafts exchanged through the negotiations. In *Allegheny* the Court considered extensive evidence as to the collateral disclosures made by seller and the due diligence reviews undertaken by buyer in evaluating the nature and extent of disclosure actually made. It is clearly not the intent of parties nor their corporate legal advisors to create documents which have within them patent inconsistencies. It is further unlikely that any of the parties wish to have extensive parol evidence introduced when the intent is to focus on the final definitive documents. In the *Tyson* case, *supra note 7*, Vice-Chancellor Strine discussed inconsistencies and parol evidence. Parol evidence cannot be used to create contractual ambiguity. Rather “… such ambiguity must be discerned by the court from its considerations of the contract as an entire text.” Further he noted that when provisions in a contract are “… susceptible to more than one reasonable interpretation, the court may consider extrinsic evidence to resolve the ambiguity.” In citing other New York authority he also noted one principle of interpretation was that “particular words should be considered… in the light of the obligation as a whole” and “not as if isolated from the context.” The Vice Chancellor further preferred a “common sense” interpretation over that which is “quite literalistic and technical.” In discussing the effect of a proviso on various representations and warranties it was viewed as more “commercially reasonable” to read it “…as a safe-guard that ensures that more specific aspects of the representations and warranties in the Agreement will govern over the more general, when giving literal effect to both the general and specific provisions produces an unreasonable result.”

**Conclusions**
Unless there is evidence that a seller deliberately withheld material information, it is unlikely that a buyer will succeed in a claim for breach of a full-disclosure representation. The courts may mitigate a seller’s liability by various means including:

a) an implied qualification regarding the seller’s knowledge;

b) an implied qualification regarding the materiality of the facts to be disclosed;

c) a requirement that the undisclosed fact or information would have assumed significance in the reasonable buyer’s deliberations;

d) a requirement that the buyer exercised reasonable care or due diligence;

e) a possible requirement that the alleged misrepresentation be the strict or “proximate” cause of the buyer’s loss.

Thus, the parties to an acquisition agreement should keep in mind the court’s tendency to favour the seller when interpreting full-disclosure representations; and, in particular, a buyer should be careful not to take false comfort in the apparently wide scope of a seller’s full-disclosure representation.

Practice Considerations

1. Entire Context – the entire factual matrix of the transaction is important to the Courts, not just the language contained within the four corners of the document.

2. Technicalities – courts appear reluctant to use a very technical interpretation to relieve parties from consequences of the agreements they have made, particularly where they are seeking to rely upon them to relieve themselves from further ongoing performance obligations which they may have such as payment of additional instalments of price, etc.

3. Inconsistency – a use of a broad representation, particularly after extensive, detailed negotiations resulting in specific representations and warranties, appears to be viewed as potentially creating a patent inconsistency or ambiguity as a result of which parol and extrinsic evidence may become fully applicable in any hearing on the issue.

4. Read Down – as a matter of pure contractual construction, the courts tend to read down broad general clauses where they conflict with specific provisions so as to give effect to these specific provisions which often have been intensively negotiated in detail and are viewed as giving the best indication of the agreement between the parties.
5. Extrinsic Evidence – if parol or extrinsic evidence becomes applicable, it is difficult to limit its extent and full review of all drafts of agreements and activities undertaken in respect of the disclosure and due diligence may become part of the trial record.

6. Full Disclosure – quite apart from the specific representations and warranties contained within an agreement, the affording to buyer by the seller of full disclosure and a reasonable opportunity to examine the information regarding the purchased business is regarded favourably by the courts. Under such circumstances buyers are then put on a heightened reliance on their own due diligence with respect to matters of detail and, absent express concealment tantamount to fraud, would have difficulty in relying upon a broad representation where no specific representation and warranty had been breached.

7. Alternative General Provision – a possible variation may be to utilize a form of full, true and plain disclosure representation adapted from public market disclosure documentation. This may have a greater chance of being enforced by a court where it does not require implied or inferred knowledge of the Buyer’s mind and decision criteria. One such formulation is: “To the knowledge of [Seller], it has not withheld from [Buyer] any material information or documents concerning [Target] or any of its subsidiaries or their respective assets or liabilities during the course of [Buyer’s] review of [Target] and its assets.”