



Vinson&Elkins

# Post-Closing Disputes in Private M&A

Part I

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## Speakers



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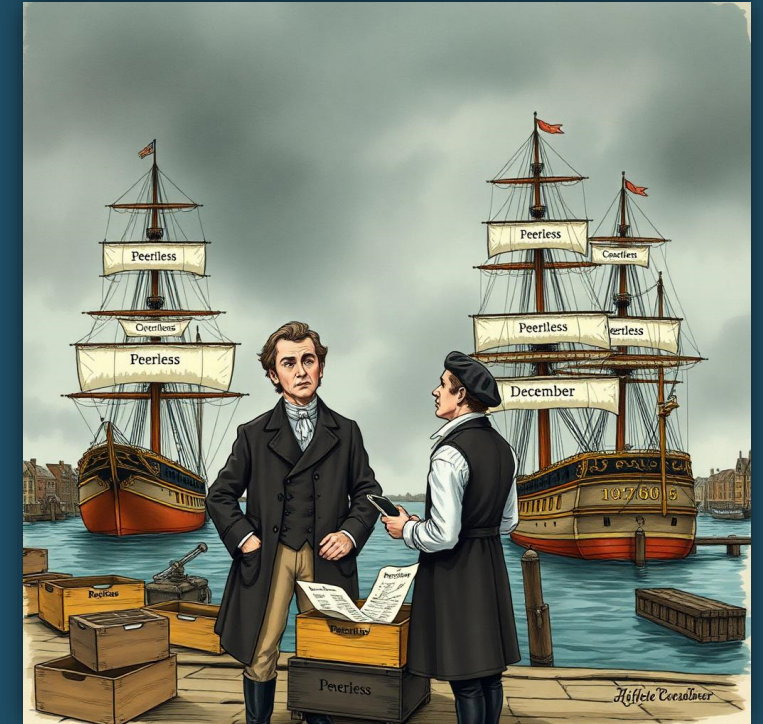
# Agenda

- Unanticipated process
  - Dispute resolution procedure
  - Common claims and limitations
  - Practical considerations
  - Representations and Warranties Insurance
- Anticipated process
  - Invitation to litigation
  - Best practices and warnings
- Drag-Along Rights



# Drivers of Post-Closing Disputes

1. Oops...
2. Delayed negotiation
3. Surprise!



Raffles v. Wichelhaus

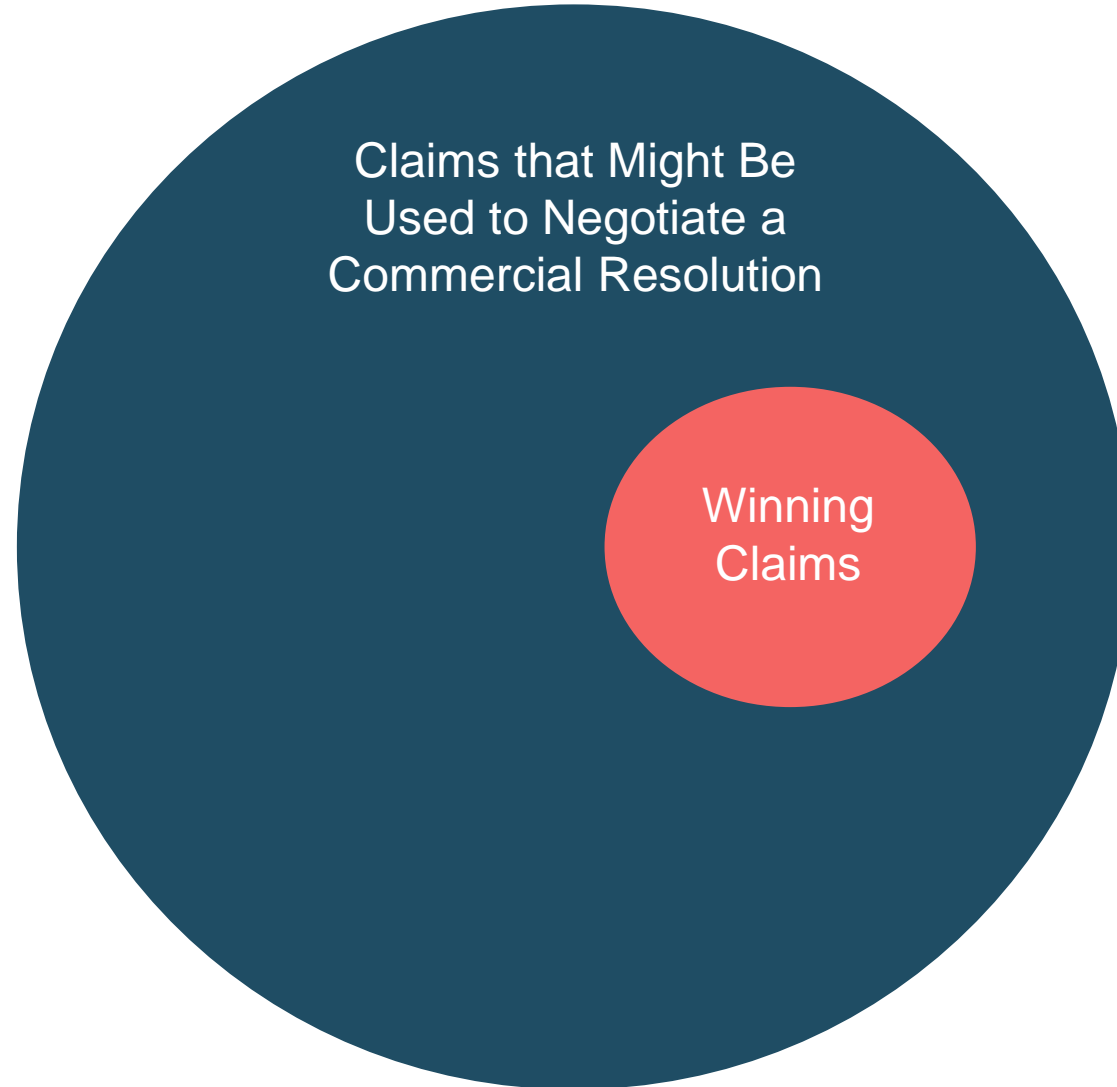


# Unanticipated Post-Closing Disputes



## Drivers of Post-Closing Claims

- Why does this happen so often?
  - Litigation as recovery tool
  - Information asymmetry
  - Emotion
  - Post-transaction leverage



## Drivers of Post-Closing Claims

- Why does this happen so often?
  - Perception of litigation aversion

### Takeaway

Evaluate and engage with post-closing disputes in the broader context of a transaction.

Do private equity firms have a reputation for avoiding litigation?

JL

- ✿ Yes — many private equity (PE) firms have a strong reputation for avoiding litigation when possible, though practices vary by firm and situation.

#### Why they tend to avoid litigation

- Cost and time: Lawsuits are expensive and distract management from value-creation activities central to PE returns.
- Reputation and deal flow: Public litigation can harm relationships with sellers, portfolio companies, lenders and co-investors.
- Predictability: Negotiation, mediation, arbitration and structured contractual protections (representations & warranties insurance, indemnities, escrow) provide faster, more predictable outcomes.
- Control over outcomes: PE sponsors prefer negotiated restructurings, settlements, or covenant/enforcement mechanisms that preserve value rather than uncertain court rulings.
- Confidentiality: Many disputes are handled privately (arbitration or settlement) to avoid publicity.

#### When PE firms litigate

- High-stakes breaches: Significant breaches of purchase agreements, fraud allegations, or large indemnity claims.
- Defensive litigation: To enforce deal protections, recover losses, or defend against shareholder/LP suits.
- Strategic leverage: Sometimes used to pressure counterparties in negotiations.
- Regulator or public-interest issues: Antitrust, securities, or regulatory enforcement may force litigation.

#### Alternatives commonly used

- Arbitration and mediation
- Settlement and structured remediation
- Use of R&W insurance and escrow arrangements
- Workout/restructuring of portfolio companies

#### Bottom line

PE firms generally prefer negotiated, private, and efficient dispute-resolution routes to preserve value and relationships, but they will litigate when stakes, legal merits, or regulatory forces make it necessary.

## Key Focus Areas

- 1 How you bring claims
- 2 What claims you can bring
- 3 Practical considerations



## How You Bring Claims

- How would the following factors impact your analysis of whether you would bring a 50/50 claim?
  - Competitors and customers would know about your claim
  - You or your employees would be deposed and need to testify
  - Your factfinder may not have any experience with your industry
  - Your factfinder might have an incentive to deny dispositive motions
  - Unethical behavior or delay tactics from the other side will be difficult to punish or prevent
- Arbitration misconceptions (or missed opportunities)
  - It is just as slow as litigation
  - It is more expensive than litigation
  - Arbitrators “split the baby”

## How You Bring Claims

- Expedited Arbitration
  - Underutilized tool
  - Adaptable to circumstances
  - Incentivize both sides to focus on key issues
  - Less useful in cases of alleged fraud

### Takeaway

Avoid one-size-fits-all  
dispute resolution  
provisions and tie  
procedure to potential  
claims

Example Arbitration	
<b>Scope</b>	Claims involving R&W's with less than \$5 million in alleged damages*
<b>Arbitrator</b>	Parties have 5 days to agree or chosen by organization
<b>Discovery</b>	None or limited by time period
<b>Timeframe</b>	90 days from selection of arbitrator
<b>Procedure</b>	Briefing followed by presentations of evidence and arbitrator Q&A
<b>Attorneys' Fees</b>	Prevailing party receives set amount absent showing of bad faith*

## What Claims You Can Bring

(1) that a material representation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the speaker made the representation with the intent that the other party should act upon it; (5) the party acted in reliance on the representation; and (6) the party thereby suffered injury.

### Supreme Court of Texas

## Fraud

“*Fraud*” means, with respect to a Person, a knowing and intentional misrepresentation by such Person with respect to any representation or warranty in this Agreement (or the corresponding Schedule, as applicable) or any Transaction Document, or a knowing and intentional concealment of facts by such Person with respect to such representations and warranties. For the avoidance of doubt, “Fraud” does not include any claim based on constructive knowledge, negligent misrepresentation, recklessness or a similar theory.

### Example Purchase and Sale Agreement



## Meridian Forge's Fraud Claim



### Takeaway

Negotiate "Fraud"  
definitions

## What Claims You Can Bring

High litigation areas:

- Non-compete and competition area agreements
- “Best efforts”
- Complicated tax scenarios
- Key contract status representations
- Title

Ongoing litigation and privilege issues

## Practical Considerations

- Who holds the money or the keys to the money?
  - Holdback
  - Escrow release
- Where are your Sellers going?
  - Retirement?
  - Remaining as key employees?
  - A competitor?





## Reps and Warranties Insurance Considerations

### Structure

- Buyer obtains a policy for breaches of reps and warranties
- Parties negotiate how policy is paid
- Buyer waives most post-closing claims except for Fraud
- Escrow can be used to satisfy portion of deductible

### Process

- RW Insurer reviews diligence and questions conclusions or risk areas

## Post-Closing Disputes in Private M&A

# Reps and Warranties Insurance Considerations



A lot like other insurance

## Document Requests

- Initial Rental Agreement
- Final Rental Agreement
- Invoice
- Credit Card Statement
- Incident Report
- Police Report
- Demand Letter
- Proof of no insurance payment
- Two photographs
- Repair Estimate

## Meridian Forge's Fraud Claim



### Takeaway

Work up RWI claim like a lawsuit.

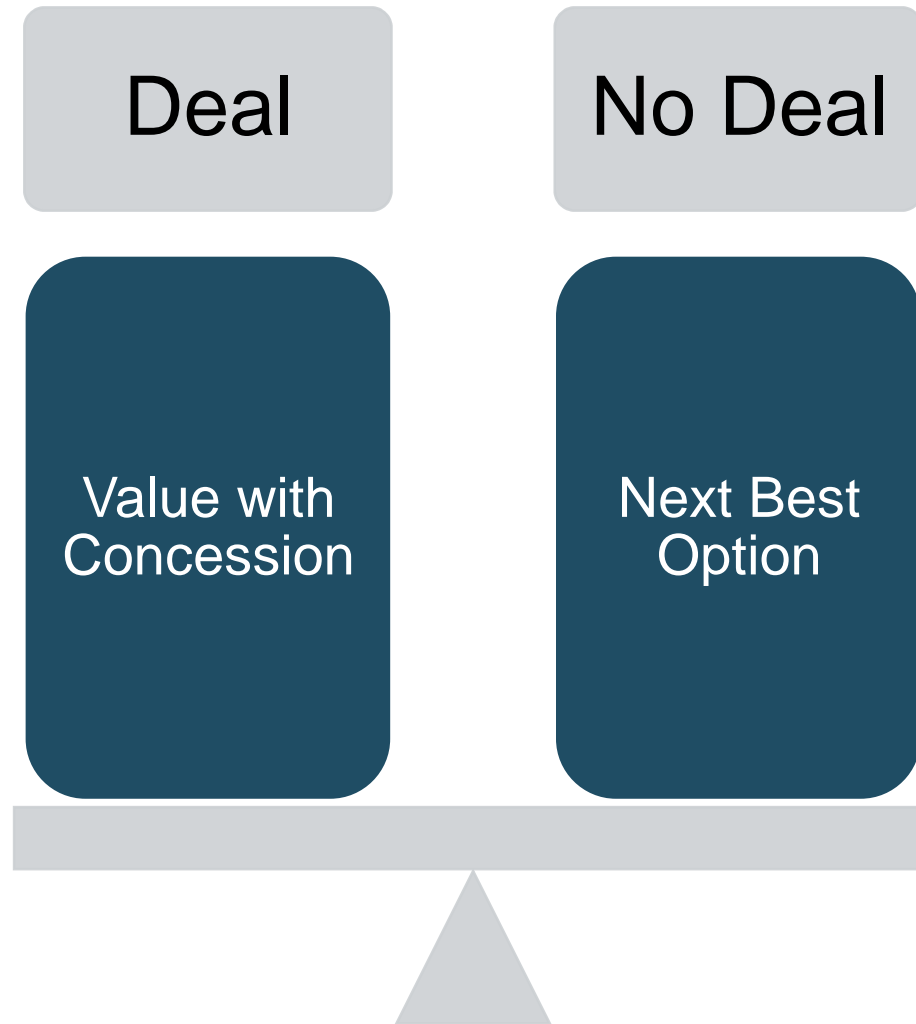
Be aware of subrogation rights.



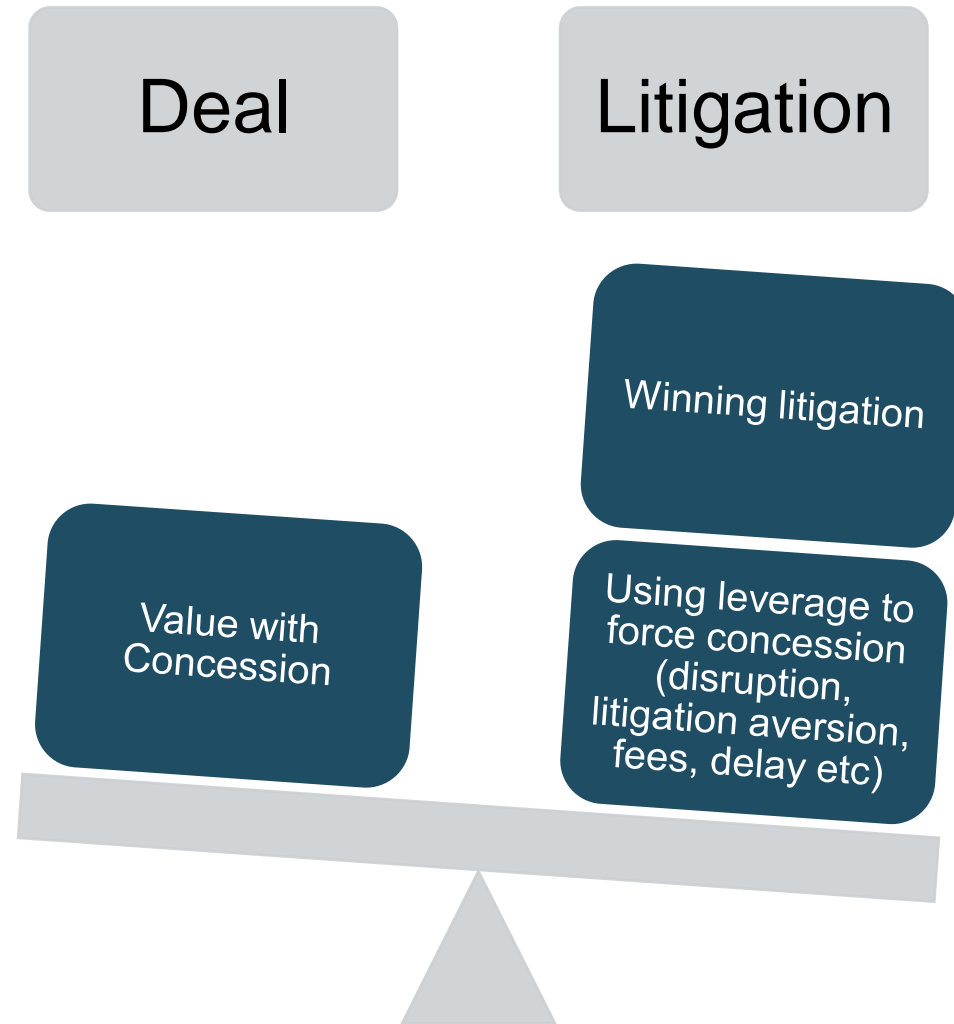
# Anticipated Post-Closing Process

PPA, Earnouts, Working Capital

## Pre-Close Negotiation Analysis



## Post-Close Negotiation Analysis



## Post-Closing Negotiation

- How to change this dynamic?

### Takeaway

Deploy post-closing adjustments sparingly and craft a process that aligns with likely disputes.

# Anticipated Process Considerations

- Temperament and incentives of counterparty
  - Post-closing leverage
  - Idle hands
  - Opposing counsel
- Degree of ambiguity
  - External evaluation?
  - Binary outcome?
  - Expert submissions required/allowed?
- Limit scope of factfinder





## Incentivize Rational Behavior

### Litigation Math

$$(\text{Claim Amount} \times \text{Probability of Winning}) - (\text{Cost of Suit}) = \text{Value of Claim}$$

More Likely to Litigate	Less Likely to Litigate
<ul style="list-style-type: none"><li>• Expedited process</li><li>• Fee shifting (confident litigant)</li><li>• No <i>mens rea</i> element</li><li>• Range of outcomes</li></ul>	<ul style="list-style-type: none"><li>• Vulnerable to discovery burdens</li><li>• Fee shifting (tossup litigant)</li><li>• Indefinite timeline</li><li>• All or nothing</li></ul>

### Takeaway

Deploy post-closing adjustments sparingly and craft a process that aligns with likely disputes.

# Drag-Along Rights

Post-Closing Disputes in Private M&A

# Drag-Along Rights



## Drag-Along Rights

- Drafting considerations
  - Objective criteria
  - Clarity about fiduciary duties
  - Reduce steps
  - Automate
  - Impose duties
- Buyer considerations

“

“The parties may have regarded it as so obvious that the Company could only enforce the Drag Along if the board complied with its fiduciary duties that it would have been ‘obvious and provocative’ to include such a term explicitly.”

”

*In re Good Technology Corp. Stockholder Litigation*, 2017 WL 2537347 (Del. Ct. Chancery 2017).

## Executing the Drag

- To drag or not to drag?
- Notice, notice, notice
- Physical assets and data
- Future competition and IP

## Buyer considerations

- Notice
- Indemnity?
- Representations



## V&E Capabilities



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Chris serves as Head of Vinson & Elkins' Complex Commercial Litigation practice and is a member of the firm's Management Committee. Chris is a trial lawyer who practices before courts and arbitration panels across the United States. He has tried and litigated a range of commercial cases involving merger disputes, environmental matters, antitrust, corporate governance, intellectual property, tax, constitutional rights, Internet media, class actions, and other commercial matters. He has earned recognition for his practice from leading legal publications, including *Chambers USA* (2022 – present), *Legal 500* (2022 – present), *Lawdragon* (2022 – present), and Thomson Reuters' *Super Lawyers* (2020 – present).



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James is a litigator whose practice centers around business disputes between commercial parties. James is skilled in untangling complex cases for the judge, jury, or arbitrator and meeting challenges with efficient, creative problem solving. He has litigated and arbitrated a range of commercial cases involving constitutional rights, antitrust, merger disputes, tax issues, trade secrets, and numerous corporate governance and fiduciary duty claims. James served on the board of the Houston Bar Association's pro bono services organization (HVL) from 2019-2025 and now serves on the Executive Committee of the Houston Ballet's Board of Trustees. At the firm, James is the Talent Lead for the Complex Commercial Litigation group's Houston office and the Houston Hiring Lead for the University of Texas School of Law.

# Thank you!



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