

Fraud Carve-Outs in Acquisition Agreements

☒ Dallas lawyer Glenn D. West recently posted a complimentary white paper on the use of fraud carve-out in acquisition agreements.

In the introduction to the white paper, West says that “a well-crafted waiver of reliance provision can effectively eliminate the specter of a buyer’s post-closing fraud claim based upon alleged extra-contractual representations of the seller or its agents. But undefined “fraud carve-outs” continue to find their way into acquisition agreements notwithstanding these otherwise well-crafted waiver of reliance provisions.

“An undefined fraud carve-out threatens to undermine not only the waiver of reliance provision, but also the contractual cap on indemnification that was otherwise stated to be the exclusive remedy for the representations and warranties that were set forth in the contract. Practitioners continue to exhibit a limited appreciation of the many meanings of the term “fraud” and the extent to which a generalized fraud carve-out can potentially expand the universe of claims and remedies that can be brought outside the remedies specifically bargained-for under the parties’ written agreement. Given the frequent insistence upon (and continued acceptance by many of) undefined fraud carve-outs, and recent court decisions that bring the undefined fraud carve-out issue into focus, this article will examine the various (and sometimes surprising) meanings of the term “fraud,” and the resulting danger of generalized fraud carve-outs, and will propose some possible responses to the buyer who insists upon including the potentially problematic phrase “except in the case of fraud” as an exception to the exclusive remedy provision of an acquisition agreement,” the article

continues.

Read the white paper.