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PRACTICE GUIDE · CORPORATE GOVERNANCE

M&A and Post-Closing Disputes

Grand Park Law Group · 2026



A. **Earnout Enforcement**

Earnouts are notorious litigation generators because they ask sellers to trust buyers' post-closing operational decisions to drive contingent payments. California courts apply the implied covenant of good faith and fair dealing to earnout provisions: a buyer cannot take action with the **purpose** of avoiding earnout obligations, even if the action would otherwise fall within the buyer's discretion under the agreement. Disputes typically center on (i) shifts in revenue recognition, (ii) channel-stuffing or revenue acceleration that depletes earnout-period sales, (iii) reorganization that moves business away from the earnout target, and (iv) discretionary "synergies" that suppress measured EBITDA. Drafting matters: explicit operating covenants ("buyer shall operate the business in the ordinary course consistent with past practice") and acceleration triggers (full earnout payment on a covenant breach or change of control) reduce litigation risk dramatically.

B. **Working Capital and Net Debt True-Up**

The post-closing purchase price adjustment is mechanical in form but contentious in practice. The standard mechanism: an estimated balance sheet at closing, a closing balance sheet delivered within a fixed period after closing, a dispute notice from the seller, mandatory negotiation, and binding determination by an independent accounting firm. Common disputes include the proper accounting basis (GAAP versus "consistent past practice"), classification of items as working capital versus indebtedness, treatment of contingent liabilities, and whether the accountant has authority to address legal as well as accounting questions. California courts generally enforce arbitral accountant determinations under standards analogous to commercial arbitration review unless the determination exceeds the scope of the submission.

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C. Breach of Representations and Warranties

R&W claims are governed by the indemnification architecture of the purchase agreement: survival periods, baskets/deductibles, caps, and exclusive-remedy provisions. California enforces these limitations, but with two important qualifications. First, *anti-sandbagging* clauses are generally enforced — if the buyer knew of the breach and closed anyway, recovery may be barred. Second, exclusive-remedy clauses are construed strictly against the drafter and do not bar **fraud** claims absent unmistakable language and adequate consideration.

D. The Robinson Helicopter Fraud Carve-Out

Robinson Helicopter Co., Inc. v. Dana Corp. (2004) 34 Cal.4th 979, is essential reading for any California M&A litigator. The Supreme Court held that intentional misrepresentation that induces a party to perform under or alter its position in reliance on a contract is **not** barred by the economic loss rule. The decision created a robust fraud carve-out around limitation-of-liability and exclusive-remedy provisions in commercial contracts: where a seller affirmatively misrepresents a material fact in the representations and warranties (as opposed to merely failing to perform a contractual obligation), the buyer may sue for fraud and recover punitive damages, exemplary damages, and consequential losses without regard to the indemnification cap. *Robinson Helicopter* is the leading authority that justifies preserving fraud carve-outs in indemnification clauses and is frequently invoked to defeat motions to dismiss tort claims pleaded alongside breach claims.

E. R&W Insurance Recovery

Representation-and-warranty insurance has become standard in mid-market M&A and has changed the post-closing dispute landscape. Buy-side R&W policies typically have a retention equal to ~0.5–1% of enterprise value, exclude known matters, and exclude certain categories (covenant breaches, purchase price adjustments, certain tax matters). When a covered loss occurs, the buyer's recovery sequence is generally: (i) escrow/holdback (if any), (ii) self-insured retention, (iii) policy limits. Coverage disputes turn on whether the loss arose from a covered representation, whether notice was timely under the policy, and whether the loss falls within an exclusion. California insurance bad-faith doctrine applies to first-party R&W coverage disputes and provides a meaningful lever where the carrier's denial is unreasonable.

Practice	Corporate Governance
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