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Debunking the Myth of the Sandbagging Buyer: When Sellers Ask Buyers to Agree to Anti-Sandbagging Clauses, Who Is Sandbagging Whom?

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In golf, a "sandbagger" is a person who pretends to be a worse player than he or she really is in order to take advantage of an unsuspecting opponent. By lying about his or her true playing abilities, a sandbagging golfer gains additional handicap strokes that increase his or her chances of winning a match. The term "sandbagging" is derived from the use, by 19th century gangs, of socks filled with sand (i.e., "sandbags") as weapons. While seemingly harmless, these sandbags were apparently very effective and could inflict substantial damage on the "sandbagged" victim.[1] Over time, to "sandbag," according to Webster's, came to mean "to conceal or misrepresent one's true position, potential or intent…in order to take advantage of [another person]." Another word for this deplorable behavior in golf is, of course, "cheating;" and there is little tolerance for the sandbagger in even the most friendly "dollar-a-hole" matches.

The use of the term "sandbagging" is not limited to discussions of golf or 19th century street crime. Indeed, it is a term that is frequently employed in the negotiation of private equity acquisition agreements. In the context of a U.S. business acquisition, "sandbagging" typically refers to a situation in which the buyer is or becomes aware (through its own diligence or superior knowledge, either as of signing or between signing and closing) that a specific representation and warranty made

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by the seller in the acquisition agreement is untrue, signs and/or closes the transaction despite his or her knowledge of such breach, and then seeks to hold the seller liable for such breach post closing. While the harsh term "sandbagging" may not be used, given our shared common law heritage, similar issues appear to arise in the context of business acquisitions in the United Kingdom as well. [2]

The Myth of the Sandbagging Buyer

While the phrase "to sandbag" evokes connotations of malfeasance and wrongful intent, the actual reasons the buyer decides to sign and/or close in these situations vary and do not always involve morally questionable behavior on the part of the buyer. Indeed, the discovered facts may be unclear as to whether a breach has really occurred, or even if the breach is clear, its materiality and the right of the buyer to treat the breach as an unfulfilled condition to closing may be unclear (e.g., if buyer must close unless an "Material Adverse Effect"[3] occurred between signing and closing). The seller may in fact be or become aware of the same facts as the buyer prior to signing and/or closing. The seller may be indirectly "dumping" the "newly" discovered information on the buyer at a late date in an effort to avoid its bargained-for representations and warranties. The seller may have previously indicated an unwillingness to agree to a purchase price adjustment, provide an express indemnification or concede that the buyer has the right to terminate the transaction for other similar purported breaches. Rather than being forced to choose between negotiating a price concession or terminating or attempting to terminate the deal in such circumstances, the buyer may simply wish to enforce the benefit of the bargain it made by choosing to close the transaction and seek indemnification based upon the specific, contractual representations and warranties it negotiated with the seller.

It is a brave buyer indeed that would deliberately sign or close a transaction in the face of a "material" breach actually "known" by the buyer, but unknown to the seller, on the assumption that the buyer will be able to sue and collect from the seller after closing. If such private equity buyers exist, they must be represented by someone else. Indeed, the buyer's ability to enforce an indemnity in the face of such circumstances is uncertain in many jurisdictions. Moreover, in today's market, the bargained-for indemnification from the seller is likely to be subject to a generous deductible and a limited cap that was intended by the buyer to cover the unknown and unexpected breach. The existence of a "known" breach as of the closing date will mean that the buyer's limited, bargained-for indemnification obligation from the seller will, at best, now have been spoken-for to the extent of this now "known" and "closed-over" breach. But, even in the situation where the buyer in fact knowingly signs and/or closes over a breach of which the seller was unaware, is such a buyer truly to be likened to the sandbagging golfer or a street thug carrying a deadly sock? Are connotations of wrongdoing truly appropriate if the buyer determines not to forfeit the benefit of its bargain in such circumstances?

"Sandbagging" as a Fraud-Like, Contort Concept Applied to the Buyer

When emotionally charged terms like "fraud" are applied to the seller in the negotiation of an acquisition agreement between sophisticated parties that have chosen to define their rights and responsibilities exclusively in contract, there is a danger of introducing misunderstood tort concepts into an otherwise carefully crafted and well understood agreement. The result can be a contortion of contract and tort law concepts that unfairly allows a buyer to avoid the bargained-for contractual limitations on the liability of the seller.

Contrary to popular belief, tort concepts like "fraud" are not limited to deliberate lying or other egregious behavior. As a result, sellers are ill-advised to broadly carve-out "fraud" from the exclusive remedies provision of an acquisition agreement.[4] Instead, the private equity seller generally seeks to construct the sale and purchase agreement so that, as much as possible, the various common law tort concepts are not allowed to create additional liabilities for the seller beyond the exclusive and limited contractual obligations for which it bargained for in the written contract. In particular, the seller almost always seeks to assure that the buyer has agreed to a "non-reliance" provision pursuant to which the buyer is (hopefully) precluded from asserting claims based on breaches of representations and warranties

made outside the written contract. The seller also seeks, pursuant to an "exclusive remedies" clause, to make the seller's liability for any breaches of representations and warranties that are made in the written contract subject to specific, limited and contractual (as opposed to tort-based) remedies. These are all considered appropriate allocations of risk between the buyer and seller. When a buyer seeks to avoid subjecting itself to tort-like concepts that might deprive the buyer of the benefit of the exclusive and limited indemnification obligations it bargained for from the seller based on what the buyer knew, discovered or might be deemed to have known or discovered outside the four corners of the agreement, why should that be viewed differently.[5] A buyer's refusal to agree to an "anti-sandbagging" clause and its insistence on the inclusion of a "knowledge savings" or "anti-anti-sandbagging" clause is to the buyer what the seller's insistence on the inclusion of a "non-reliance" clause is to the seller.

"Reliance" by Buyer on Express, Contractual Warranty as a Purported Pre-Condition to Imposing Liability on the Seller for its Breach

The ability of a buyer to obtain the benefit of the negotiated representations and warranties made by the seller in an acquisition agreement, when the seller questions whether the buyer truly relied upon those representations and warranties in entering into the transaction, has long been a difficult issue for the courts in the U.S.[6] Because of the contortion of contract and tort law principles, state courts have not reached consensus as to whether "reliance" is a necessary element of a claim for breach of an express contractual warranty or representation to the same extent that "reliance" has always been an element of a tort claim for fraud based on an intentional or reckless misrepresentation of fact.[7]

Contract law is generally based on the simple principle that the court should enforce the expectations of the parties according to the bargain made by those parties. A contract exists if there is an offer, an acceptance and an exchange of consideration. Stated differently, a contract exists if there is mutual assent to mutual promises made. A claim for breach of contract requires only that the claimant prove that the other party to the agreement failed to perform its promises pursuant to the contract and the claimant incurred damages as a result. There is no requirement that a claimant prove that it specifically relied upon a specific promise made by the other party in entering into the contract; rather, a claimant is entitled to enforce all of the promises made in the contract independent of any specific reliance on each particular promise made by the other party.[8] In most tort-based claims arising from commercial relationships, however, reliance is a critical element in imposing liability.

A tort claim is based not on a bargain made between the parties, but on a wrongful act committed by another party that resulted in injury to the claimant. In commercial relationships, that wrongful act is typically an intentional, reckless or negligent misrepresentation of fact intended to cause another person to act in a manner detrimental to such person. Because such a claim is extra-contractual, a tort-based misrepresentation claim is not premised on the breach of reciprocal promises; rather the claim is that a party was induced to detrimentally change its position (i.e., enter into an agreement) in reliance upon a false statement of fact that it was justified in believing and acting upon. The reason "non-reliance" clauses generally work to relieve the seller of extra-contractual tort claims based on statements made by the seller or its representatives outside of the contract is that the existence of such a clause makes the buyer's claim of reliance on such statements to its detriment unjustified and unreasonable.[9]

Early on, the courts did not consider affirmations of fact (or mere representations) to be the equivalent of promises and, therefore, they did not consider such representations part of the contract, even if they were set forth within the contract. In other words, representations of fact (even if set forth in a contract) were not considered promises to pay damages if the facts were untrue, but merely statements of fact made to induce the other party to make and receive the promises that were in fact made in the contract. Accordingly, a tort claim could be made based on the untruth of any such representations, but not a contract claim. If any such affirmations of fact did not actually induce the other party to enter into the contract, because the other party: (a) knew

the affirmations of fact to be false, (b) had reason to doubt their truth, or (c) simply didn't care whether such affirmations of fact were true or false, then based on extra-contractual tort principles, no liability was incurred.

Historically, part of the reason there are "representations *and* warranties" in modern U.S. acquisition agreements, rather than just representations (or affirmations) is that the terms "warrants" and "warranty" were thought (by some) to carry with them a contractual promise (as opposed to just an affirmation or representation) that the stated facts were true. The affirmed facts thus warranted (or promised) to be true were thereby deemed to be coupled with a concomitant obligation to answer in damages pursuant to the contract if the promised warranty was unfulfilled independent of whether a tort-based misrepresentation claim could be made.[10] Of course, in modern U.S. practice, contractual indemnification is provided explicitly for breaches of representation and warranties, as well as for specifically identified matters for which a bargained-for special indemnity has been given. In the U.S. both the indemnifiable representations and warranties and the separate special indemnifiable matters are all expressly made a part of the contract and subject to the exclusive contractual remedies provided therein. Interestingly, in an apparent effort to specifically avoid the importation of tort concepts into a contractual arrangement, most acquisition agreements in the United Kingdom appear to only include "warranties" and specifically do not include "representations."[11]

Notwithstanding the fact that there is no longer any distinction in contract between a warranty, a representation, and a separately indemnifiable matter in the U.S. (if there ever was), many courts continue to rely upon the tort-based, rather than contract-based, approach to determining liability for a seller's breach of an express contractual representation or warranty. In some states, therefore, there is a clear requirement that the buyer prove that it justifiably relied upon a particular contractual representation or warranty made by the seller in order to sustain its contractual claim for breach of that representation or warranty.[12] Other states are clear that a buyer claiming a breach of a contractual representation or warranty need only show that there was in fact a breach, because such claims are based on contract not tort law.[13] Still other states, like New York, having purportedly adopted the modern contract-based approach to the enforcement of express, contractual representations and warranties without requiring a showing of "reliance" by the buyer, have introduced concepts like "waiver" into the discussion by suggesting that a buyer that closes a transaction in the face of a known breach by the seller of an express representation or warranty (at least in the circumstance where such breach is in fact disclosed to the buyer by the seller prior to closing) waives its rights to sue on that known breach, unless the buyer specifically preserves its rights to so sue prior to the closing.[14]

Typical Negotiations over "Anti-Sandbagging" and "Knowledge Savings" Clauses

As a result of these continuing uncertainties regarding a buyer's right to enforce its bargained-for indemnification in the event of a breach of the seller's express, contractual representations and warranties, casting the buyer in the role of the potential sandbagger seems unjust. Indeed, given the uncertainties that reliance and waiver concepts can introduce into the ability of the buyer to enforce rights otherwise created in its favor by the acquisition agreement, the buyer typically seeks to clarify these uncertainties by asking that the seller include a provision in the acquisition agreement that makes any purported knowledge of the buyer contractually irrelevant. The seller, on the other hand, typically seeks to make the buyer's ability to obtain indemnification for the seller's breach of any of its representations and warranties specifically conditioned upon the buyer not being aware of such representations or warranties having been breached prior to signing and/or closing.

The standard provision designed to achieve the seller's goal of further conditioning the buyer's ability to benefit from the bargained-for representations and warranties made by the seller is referred to as an "anti-sandbagging" clause. An "anti-sandbagging" clause is any provision that is designed to deny the buyer the benefit of any contractually bargained-for representation or warranty to the extent that the buyer is aware of the fact that the representation or warranty was untrue when made by the seller, at signing or, in some cases, either at signing or at closing.[15] A particularly nasty version of such a clause

(borrowed from a recent draft of an acquisition agreement provided in an auction context) is as follows:

> **Effect of Buyer's Knowledge — Notwithstanding anything contained herein to the contrary, Seller shall not have (a) any liability for any breach of or inaccuracy in any representation or warranty made by Seller to the extent that Buyer, any of its Affiliates or any of its or their respective officers, employees, counsel or other representatives (i) had knowledge at or before the Closing of the facts as a result of which such representation or warranty was breached or inaccurate or (ii) was provided access to, at or before the Closing, a document disclosing such facts; or (b) any liability after the Closing for any breach of or failure to perform before the Closing any covenant or obligation of Seller to the extent that Buyer, of its Affiliates or any of its or their respective officers, employees, counsel or other representatives (i) had knowledge at or before the Closing of such breach or failure or (ii) was provided access to, at or before the Closing, a document disclosing such breach or failure.**

The standard provision designed to achieve the buyer's goal of ensuring the contractual benefit of its bargained-for representations and warranties made by the seller is referred to an "anti-anti-sandbagging" or a "knowledge savings" clause—a specific provision reinforcing the benefit to the buyer of the bargained-for representations and warranties notwithstanding any knowledge or awareness by buyer of their untruth when made by the seller, however and whenever such knowledge or awareness was acquired. An example of such a provision is as follows:

> **No Waiver of Contractual Representations and Warranties — Seller has agreed that Buyer's rights to indemnification for the express representations and warranties set forth herein are part of the basis of the bargain contemplated by this Agreement; and Buyer's rights to indemnification shall not be affected or waived by virtue of (and Buyer shall be deemed to have relied upon the express representations and warranties set forth herein notwithstanding) any knowledge on the part of Buyer of any untruth of any such representation or warranty of Seller expressly set forth in this Agreement, regardless of whether such knowledge was obtained through Buyer's own investigation or through disclosure by Seller or another person, and regardless of whether such knowledge was obtained before or after the execution and delivery of this Agreement.**

The seller argues that the failure of the buyer to agree to an "anti-sandbagging" clause is outrageous: "How can anyone suggest that it is acceptable behavior for the buyer to 'lie behind the log' knowing that the seller is incurring liability to the buyer for a representation or warranty that the buyer knows to be untrue and therefore could not possibly have been relied upon by the buyer in entering into the agreement?" The buyer, in contrast, argues that if "the deal is the deal" for the seller, the same should be true for the buyer. After all, the seller has bargained-for indemnification, with a generous deductible, a limited cap, and time limitations on survival, as the sole and exclusive remedy for any breach of representations or warranties made by the seller. The seller has further disclaimed, through an extensive "disclaimer of reliance" clause, any obligation with respect to any other representation or warranties, other than those specifically set forth in the agreement. The buyer, as a matter of contract, has accepted those limitations on its rights of recovery against the seller if there is a breach of any of the bargained-for representations and warranties set forth in the agreement and priced those bargained-for representations and warranties (as so limited) into the consideration it agreed to pay. If the seller does not wish to expose itself to the vagaries of extra-contractual claims based on what the seller might have known or might have told the buyer outside the four corners of the agreement, why should the buyer? Why does the buyer's purported knowledge of the breach of any of the seller's express, contractual representations and warranties eliminate even the limited remedies against the seller that were bargained for by the buyer?

The seller will sometimes argue that the "anti-sandbagging" clause is merely intended to be used as a shield, protecting the seller from liability for breaches that the buyer is in a better position than the seller to know prior to signing and/or closing, because the buyer has done more diligence than the seller has done. More often than not, however, the clause is subject to being abused by sellers as a sword to provide a convenient and standard retort by the seller (i.e., the buyer had knowledge of the breach) to any indemnity claim brought by a buyer. The inclusion of an "anti-sandbagging" clause in favor of the seller, or failing to include an "anti-anti-sandbagging" or "knowledge savings" clause in favor of the buyer, virtually guarantees, in many jurisdictions, a situation in which the buyer will have an additional hurdle to overcome in enforcing its bargained-for indemnification rights against the seller, i.e., proving that it in fact relied upon the disputed representation or warranty or defending against allegations that it knew of the breach pre-signing or pre-closing. In addition, if we are looking for the true potential for sandbagging, including an "anti-sandbagging" clause in favor of the seller (or failing to include an "anti-anti-sandbagging" or "knowledge savings" clause in favor of the buyer) may actually create incentives for the seller to give partial or incomplete disclosure in its schedules or, in certain cases, to actually withhold information until just before closing. Then who is sandbagging whom?

Suggested Guidelines for a Private Equity Buyer Facing a Seller's Request for an Anti-Sandbagging Provision

Given the uncertainty the contortion of tort and contract law can cause in putting together a written agreement intended to definitively allocate risk among the parties, we suggest that a private equity buyer consider the following guidelines in negotiating the "sandbagging" issue with the seller:

- Whenever possible, buyers should resist an "anti-sandbagging" clause and require the inclusion of an "anti-anti-sandbagging" or "knowledge savings" provision. It is not enough to remove the "anti-sandbagging" clause and leave the agreement silent on the issue, because in some jurisdictions silence may equal agreeing to a broader "anti-sandbagging" standard than would have been negotiated as part of a specific provision.
- Just as the courts are not uniform in their enforcement of "non-reliance" provisions to protect the seller from the extra-contractual claims of a disappointed buyer, buyers should be similarly cautioned in assuming that a "knowledge savings" or "anti-anti-sandbagging" clause will protect the buyer against the claims of a seller that the buyer did not rely upon or waived the specific representation for which indemnification is being sought by the buyer. Choose governing law carefully.[16]
- A buyer who becomes aware of a specific issue pre-signing (e.g., a specific litigation or environmental compliance issue) that would constitute a breach of the seller's representations and warranties, should not rely on an indemnity related to the breach of the applicable representation or warranty. The buyer should seek a "special indemnity" covering losses related to the specific known issue or, otherwise, be aware that any recourse with respect to such matter may be limited.
- Sellers are well advised to avoid agreeing to a broad exclusion of "fraud" from an exclusive remedies provision, because "fraud" includes actions that fall far short of deliberate lying and may involve the actions of persons over which the seller had no actual knowledge or control. If the parties intend that the cap on seller's indemnification obligations will not apply in the event of the seller's deliberate and knowing breach of a representation and warranty set forth in the contract, the agreement should expressly and only say that and not introduce a broad tort concept like "fraud."[17] Similarly, if the buyer is forced to compromise and agree to some form of an "anti-sandbagging" provision, the buyer should be sure to limit the standard of proof to "actual" knowledge and not allow the possibility of constructive, implied, or imputed knowledge to affect the buyer's ability to enforce the seller's contractual indemnification obligations. Also, it is advisable to limit the scope of knowledge to a fixed, small group of individuals, just

as the seller seeks to do in defining "knowledge" for those representations and warranties qualified by knowledge. For example, you may want to limit this provision to the "actual" knowledge of the key members of the buyer involved in the transaction. Buyers should also seek to avoid imputation of knowledge gained by accountants and attorneys in the diligence process that was not specifically communicated to the buyer.[18] Additionally, the burden of proving that the buyer had "actual" knowledge of the breach should be placed on the seller. Finally, the buyer's actual knowledge of a breach should be limited to the actual knowledge buyer had at the time of signing, not any knowledge gained between signing and closing.

- Allowing the seller to update disclosure schedules between signing and closing is often a compromise for the seller on this issue. Buyers that agree to allow the seller to update disclosure schedules, however, should insist that (i) updates are only permissible to the extent that the seller acknowledges in writing that such updates give the buyer the right to walk away from the deal, (ii) there should be separate consequences for updates that should have been part of the original schedules and those that are truly "new" because they arose between signing and closing, and (iii) updates (like the original negotiated schedules) must possess specific, detailed and "fair and complete" disclosure, so that the buyer can clearly understand the manner in which a specific representation and warranty is being affected by the updated schedules.

Conclusion

The purpose of a written acquisition agreement is to specifically allocate risk between the seller and the buyer. When a contract is negotiated between sophisticated parties and those risks have been thus contractually allocated, tort-based concepts should not be permitted to create uncertainty in either party's rights or obligations. Both parties should be entitled to the benefit of the rights they bargained for in the agreement, and having bargained for those specific rights, neither party should thereafter be able to claim it was sandbagged.

NOTES

1. Brent Kelly, "What is the Origin of the Term 'Sandbagger'?" *Your Guide to Golf,* available at http://golf.about.com.
2. *See, e.g.*, Daragh McDonald, *Recent Cases Concerning Mergers and Acquisitions*, I.C.C.L.R. 2000, 11(9), 287-300.
3. For a recent article highlighting the difficulty of using "Material Adverse Effect" clauses to walk away from a deal where the seller objects, *see* Glenn D. West and S. Scott Parel, *Revisiting Material Adverse Change Clauses — Private Equity Buyers Should (But Mostly Can't/Don't) Special Order their MACs,* Weil, Gotshal & Manges LLP Private Equity Alert (July 2006), available at www.weil.com.
4. Glenn D. West, *Avoiding Extra-Contractual Fraud Claims in Portfolio Company Sales Transactions—Is "Walk-Away" Deal Certainty Achievable for the Seller?* Weil, Gotshal & Manges LLP Private Equity Alert (March 2006), available at www.weil.com.
5. *Id.*
6. The requirement of reliance is an issue that the courts in the United Kingdom have also been forced to grapple with. *See Eurocopy plc v. Teesdale*, [1992] B.C.L.C. 1067, 1992 WL 895057 (CA (Civ. Div.) 1992).
7. *See generally*, Sidney Kwestel, *Freedom from Reliance: A Contract Approach to Express Warranty*, 26 Suffolk U. L. Rev. 959 (1992); Sidney Kwestel, *Express Warranty as Contractual—The Need for a Clear Approach*, 53 Mercer L. Rev. 557 (2002).
8. *Id.*
9. *West*, *supra* note 4.
10. *Kwestel, supra* note 7.
11. *See Man Nutzfahrzeuge AG v. Freightliner Ltd.*, [2005] EWHC 2347, 2005 WL 2893816, at *32 (QBD (Comm Ct) 2005) (describing the different measure of damages available for warranties versus representations).
12. *See, e.g.*, *Hendricks v. Callahan*, 972 F.2d 190 (8th Cir. 1992) (applying Minnesota law); *Land v. Roper Corp.*, 531 F.2d 445 (10th Cir. 1976) (applying Kansas law); *The Middleby Corporation v. Hussmann Corporation*, 1992 WL 220922 (N.D. Ill. 1992) (applying Delaware law). *See also*, Bill Payne, *Representations, Reliance & Remedies: The Legacy of Hendricks v. Callahan*, 62-SEP Bench & B. Minn. 30 (2005) (criticizing Minnesota's requirement of reliance to sustain a claim for a breach of an express, contractual warranty); Frank J. Wozniak, *Purchaser's disbelief in, or non-reliance upon, express warranties made by seller*

in contract for sale of business as precluding action for breach of express warranties, 7 A.L.R.5th 841 (1992) (discussing the foregoing cases among others).

13. *See e.g.*, *Pegasus Management Co., Inc. v. Lyssa, Inc*. 995 F. Supp. 43 (Mass. 1998) (applying Connecticut law); *American Family Brands, Inc. v. Giuffrida Enterprises, Inc.,* 1998 WL 196402 (E.D. Pa. April 23, 1998) (applying Pennsylvania law); *Shambaugh v. Lindsay*, 445 N.E.2d 124 (Ind. App. 1983); *Southern Broadcast Group, LLC v. GEM Broadcasting, Inc.*, 145 F. Supp.2d 1316 (M.D. Fla. 2001) (applying Florida law). *See also, Wozniak*, *supra* note 12.
14. *CBS, Inc. v. Ziff-Davis Publishing Co.*, 554 N.Y.S.2d 449 (Ct. App. 1990); *Galli v. Metz*, 973 F.2d 145 (2d Cir. 1992); *Rogath v. Siebenman*, 129 F.3d 261 (2d Cir. 1997); *Coastal Power International, Ltd. v. Transcontinental Capital Corp.*, 10 F. Supp.2d 345 (S.D.N.Y. 1998); *Paraco Gas Corp. v. AGA Gas Inc.*, 253 F. Supp.2d 563 (S.D.N.Y. 2003). *See also* Robert F. Quaintance, *Can You Sandbag? When a Buyer Knows Seller's Reps and Warranties are Untrue*, 5 The M&A Lawyer 8 (2002) (discussing some of these cases).
15. For an example of a case in which the inclusion of an anti-sandbagging clause defeated a buyer's claim for breach of a specific representation in an acquisition agreement, *see Jackson v. Russell*, 498 N.E.2d 22, 36 (Ind. App. 1st Dist. 1986).
16. Even in states where reliance may be a required element of a cause of action for breach of an express, contractual warranty, a well-drafted "knowledge saving" or "anti-anti-sandbagging" clause can be effective. *See, e.g.*, *Telephia, Inc. v. Cuppy*, 411 F. Supp.2d 1178 (N.D. Cal. 2006) (applying California law). In *Telephia*, the purchase agreement stated, "[n]o information or knowledge obtained in any investigation . . . shall affect or be deemed to modify any representation or warranty contained in this Agreement . . ." and "[n]o investigation made by or on behalf of the [buyer] with respect to [the seller] or the Securityholders shall be deemed to affect the [buyer's] . . . reliance on the representations, warranties, covenants, and agreements made by [the seller]." *Id*. at 1188.
17. West, *supra* note 4.
18. The English case of *Infiniteland Ltd. v. Artisan Contracting Limited*, [2005] EWCA Civ. 758, 2005 WL 1458705 (CA (Civ. Div. June 22, 2005)) (Chadwick J.) is an effective illustration of this concern.