

KIRKLAND M&A UPDATE

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General Release — Handle with Caution

In negotiating and executing releases, principals should pay heed to the court's admonition of acting with "eyes wide open".

A [recent decision](#) by the highest court in New York highlights once again the broad finality of a general release given in a transactional context, even in cases where significant fraud is subsequently alleged. As we noted in a prior [M&A Update](#), courts are reluctant to permit parties to circumvent the typically broad language of general releases by allowing the aggrieved party to argue that it really did not mean to release the claim being pursued despite the claim clearly falling within the literal words of the release.

The recent Court of Appeals decision arose out of a complicated set of transactions involving interests in various Latin American telecom businesses that culminated in a majority shareholder affiliated with Carlos Slim buying out the interests of minority shareholders. The sellers later alleged that they sold their interests at the agreed price only as a result of fraudulent information provided to them by the purchaser, resulting in an undervaluation of almost \$1 billion. The purchaser asserted that all claims were barred by a broad release ("all manner of actions ... whatsoever ... future, actual or contingent ...") given by the sellers at the time the buy-out was completed.

The court held that even unknown fraud claims relating to the subject transaction were covered by a broad release unless the releasing party was able to prove a separate fraud (independent from the fraud in the transaction) that induced the release. Interestingly, the court noted that the existence of a fiduciary relationship between the parties (the purchaser was a majority shareholder) did not alter the conclusion; the court noted that a sophisticated party represented by counsel can release a fiduciary from even fraud claims particularly if the release is in the context of a transaction, like the buyout here, where the "relationship is no longer one of unquestioning trust". The court was also swayed by the pattern of dealings between the parties which showed that the releasing party had deep suspicions about the information provided by the purchaser but nonetheless entered into the sale and executed the release without any conditions or exceptions.

In the transactional context, releases can serve a useful purpose of offering closure upon the completion of a transaction. Parties should be mindful that, absent a relevant express exception in the release, New York (and other) courts are extremely loath to undermine the principles of finality and certainty even where extreme claims of fraud are later made. In the court's view, a release should not be converted into "a starting point for new litigation". In negotiating and executing releases, principals should pay heed to the court's admonition of acting with "eyes wide open".

If you have any questions about the matters addressed in this *M&A Update*, please contact the following Kirkland authors or your regular Kirkland contact.

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