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## Reconciling Overlapping General and Specific Contract Terms

Many legal contracts, including purchase agreements, include multiple instances where the same subject matter may be covered by both a general provision and a specific provision. To take a simple example — an undisclosed government investigation could be a breach of both a general “no undisclosed liabilities” representation and a specific “compliance with laws” representation. The question of which provision is implicated can be decisive, such as where the compliance representation is knowledge-qualified while the undisclosed liabilities representation is not.

A recent [Delaware decision](#) (*Reynolds*) highlights the risk of failing to rationalize the intended hierarchy between general and specific provisions. In this case, the asset and liability allocation provisions (i.e., which ones are included/excluded in the asset purchase) included multiple instances of general categories of assumed liabilities by the buyer (e.g., “all liabilities for Actions arising out of the operation of the business after Closing”) as well as specific ones (e.g., “all liabilities arising out of the four state investigations listed on Schedule X”).

In simplified form, the question before the court was which party was responsible in the event of a fifth state investigation that generates liability from the post-closing conduct of the acquired business. The seller argued that the buyer is responsible as this fell under the “general” post-closing Actions category. The buyer argued that the listing of only the four state investigations in the “specific” subsection showed an express intent to not assume responsibility for the fifth state investigation.

In the *Reynolds* decision, Chancellor Bouchard rejected both parties’ claims for judgment on the pleadings, finding that each reading was at least reasonable and therefore extrinsic evidence to determine the intent of the parties was required.

**A recent Delaware case highlights the importance of rationalizing the intended hierarchy between general and specific contract provisions.**

In support of the buyer’s reading, Chancellor Bouchard pointed to a 2005 Delaware Supreme Court decision (*DCV*) that addressed the overlapping representation question described in the first paragraph above. In *DCV*, the Supreme Court applied the contract interpretation principle that the specific takes precedence over the general and held that indemnification could only be sought by the buyer under the specific knowledge-qualified compliance representation.

Chancellor Bouchard did not accept the seller’s attempt to distinguish the *DCV* case, rejecting the seller’s argument that in *DCV* the two contradictory representations were in different sections while here the two “conflicting” sections were within the same list of seven assumed liabilities and therefore should be viewed as supplemental to each other.

The *Reynolds* case highlights the importance of not unduly relying on catch-all provisions to “clean up” leftovers from more specific provisions — and conversely not assuming that exclusions from a specific provision still will be picked up by the general provision — because of the ambiguity as to which term governs.

Where a contract includes both general and specific provisions that could be implicated by the same question, parties should consider specifying a hierarchy among the provisions or expressly indicating whether or not the specific terms are intended as “including but not limited to” examples of the general provision.

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

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