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## Sandbagging: Eagle Force Holdings & the Market's Reaction

Griffith Kimball

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# Sandbagging: *Eagle Force Holdings & the Market's Reaction*

Griffith Kimball\*

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## INTRODUCTION

In corporate transactions, "sandbagging" refers to a situation where a buyer knows that a seller's representation in a purchase agreement is false, but nevertheless closes the transaction and later seeks to hold the seller liable for that breach. In recent years, Delaware has held the reputation of being a "pro-sandbagging" state due to its commitment to freedom-of-contract principles and certain Chancery Court opinions. However, on May 24, 2018, the Delaware Supreme Court cast that reputation into doubt. In *Eagle Force Holdings, LLC v. Campbell*, the court mentioned sandbagging in a footnote stating that "we have not yet resolved"

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\* J. Reuben Clark Law School, J.D. Candidate 2021; Texas Tech University, B.A. 2018. This Article would not have been possible without the statistical expertise and generous mentorship of Professor Matthew Jennejohn. Any error is my own.

whether a buyer who knows of a breach of a representation or warranty can recover against a seller.<sup>1</sup>

With just a footnote, the Delaware Supreme Court sent ripples of uncertainty into the market as practitioners and academics wondered if the state's highest court was considering a shift away from a pro-sandbagging default rule. My empirical study asked how the mergers and acquisitions market dealt—and continues to deal—with that uncertainty. The data ultimately showed: (1) the market as a whole generally did not include a sandbagging provision, leaving the parties subject to the state's default rules; (2) although some law firms took a similar sandbagging approach in all deals, a majority of repeat mergers and acquisition players did not; and (3) when a pro-sandbagging provision was used, there was an increase in the similarity of the provision's language in Delaware agreements after the *Eagle Force* holding.

This data likely suggests that the market trusts that Delaware will continue a pro-sandbagging default regime—or at least that increased seller negotiating leverage in a hot acquisition market outweighs any need to negotiate for an explicit pro-sandbagging provision. Furthermore, the use of similar pro-sandbagging provisions may suggest a trend whereby new contractual language drafted or altered in response to *Eagle Force* is becoming “locked in” to the market, standardizing across law firms. Further research should trace the development of sandbagging provisions over time to see if these patterns continue, as well as keep abreast on subsequent Delaware cases that provide clues as to the corporate state's stance on sandbagging and any related market reaction.

In Part I, this Article examines: (i) the doctrine of sandbagging generally, (ii) what the Delaware Supreme Court said in *Eagle Force*, (iii) how the sandbagging question might be resolved in the future based on comments the court made in the *Eagle Force* footnote, and (iv) a Court of Chancery case that briefly addressed the issue post-*Eagle Force*. Part II adds to the literature with empirical research regarding sandbagging in Delaware and New York transactions after *Eagle Force*; while articles, law firm websites, and practitioners' comments encouraged pro-sandbagging provisions in light of *Eagle Force*'s disruption, there was no increase in the provisions in the months following the case. Purchase agreements

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1. *Eagle Force Holdings, LLC v. Campbell*, 187 A.3d 1209, 1236 n.185 (Del. 2018).

of all types were largely and increasingly silent on sandbagging, leaving the parties subject to Delaware's default rule. Finally, Part III hypothesizes on what the data communicates about the market's lack of reaction to *Eagle Force*, arguing that parties ultimately still believe Delaware's pro-sandbagging reputation will hold true, or that at least any uncertainty created by *Eagle Force* is outweighed by increased seller leverage in the market and the desire to avoid increased transaction costs negotiating for explicit protection.

## I. THE CURRENT STATE OF "SANDBAGGING" JURISPRUDENCE

### A. What is "Sandbagging"?

In mergers and acquisitions, "sandbagging" refers to a situation where the buyer knows that the seller's representation in a purchase agreement is false, but nevertheless closes the transaction and later seeks to hold the seller liable for breach of that representation.<sup>2</sup> The word carries a negative connotation; Merriam-Webster defines it as meaning "to treat unfairly or harshly" or "to conceal or misrepresent one's true position, potential, or intent especially in order to gain an advantage."<sup>3</sup> But sandbaggers are not always as surreptitious as the term may imply.

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2. Mark Edgarton & Kevin C. Quigley, *Sandbagging: Choice of Law Matters*, CHOATE: INSIGHTS (Sept. 6, 2018), <https://www.choate.com/insights/sandbagging-choice-of-law-matters.html>; see also Jacek Jastrzębski, "Sandbagging" and the Distinction Between Warranty Clauses and Contractual Indemnities, 19 U.C. DAVIS BUS. L.J. 207, 208–09 (2019); Brandon Cole, Knowledge Is Not Necessarily Power: Sandbagging in New York M&A Transactions, 42 J. CORP. L. 445, 446 (2016); Sara Garcia Duran & Sacha Jamal, Possible Shift in Delaware Law: Buyer's Silence on Sandbagging Is Not Golden, BUS. L. TODAY: MERGERS & ACQUISITIONS (Sept. 28, 2018), <https://businesslawtoday.org/2018/09/possible-shift-delaware-law-buyers-silence-sandbagging-not-golden/>.

3. *Sandbag*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/sandbag> (last visited Sept. 30, 2020); see also Stacey A. Shadden, *How to Sandbag Your Opponent in the Unsuspecting World of High Stakes Acquisitions*, 47 CREIGHTON L. REV. 459, 459 (2014); Seth Cleary, *Delaware Law, Friend or Foe? The Debate Surrounding Sandbagging and How Delaware's Highest Court Should Rule on a Default Rule*, 72 SMU L. REV. 821, 825 (2019) ("The term 'sandbagger' is commonly used in golf to denote a player who pretends, usually through an inflated handicap, to be worse than they are to take advantage of the opposition."); Duran & Jamal, *supra* note 2, at n.1 ("The term 'sandbagging' dates back to the 19th century when street gangs would craft a homemade weapon by pouring sand into socks. Although the sock looked innocuous enough, when swung at an enemy, the concealed lump of sand could inflict substantial damage. The term has evolved to represent concealing or misrepresenting with the purpose of deceiving another.")

Buyers could bring concerns about the validity of certain representations to the seller before closing only to have the seller dismiss those concerns, refuse to adjust the purchase price, and demand that the sale go through.<sup>4</sup> Sandbagging thus serves as a remedy for buyers, who may feel pressured to close, to confirm the accuracy of the seller's representations or be compensated otherwise. The seller represented as to certain facts in the agreement, and sandbagging buyers contracted for the right to hold them accountable to those representations.<sup>5</sup>

Traditionally, a buyer must have relied on the seller's warranty in order to bring a claim, "reflecting the action's historical grounding in tort."<sup>6</sup> Sandbagging law has evolved from tort to contract law, and "modern theory"<sup>7</sup> courts like Delaware and New York generally consider the representations and warranties as bargained-for provisions and refuse to change the parties'

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4. See, e.g., *CBS Inc. v. Ziff-Davis Publ'g Co.*, 553 N.E.2d 997, 998 (N.Y. 1990).

5. Jastrzębski, *supra* note 2, at 223 ("[U]nder modern contract law, express warranties are of purely contractual nature and should be construed and enforced in exactly the same method as other terms of the agreement."); see Charles K. Whitehead, *Sandbagging: Default Rules and Acquisition Agreements*, 36 DEL. J. CORP. L. 1081, 1085 (2011) ("Chief among Buyer's arguments . . . is the claim that Buyer 'purchased the warranties' from Seller, and therefore, the cost of a sandbagging right was reflected in the price it paid."); Aleksandra Miziolek & Dimitrios Angelakos, *Sandbagging: From Poker to the World of Mergers and Acquisitions*, 92 MICH. BAR J. 30, 31 (2013) (arguing that the responsibility for accurate disclosure depends on the seller, the buyer's ability to rely on accurate warranties is part of the bargain struck between the parties, and that an inquiry into the buyer's knowledge would complicate the indemnification process and stymie a buyer's recovery with mere allegations). *But see* Whitehead, *supra*, at 1103 ("Deliberate sandbagging is ethically questionable to many, and anti-sandbagging is the norm in Europe."); Miziolek & Angelakos, *supra* ("[S]ellers contend that it is fundamentally unfair to be subjected to full due diligence review by a buyer's sophisticated advisors only to have the buyer withhold discovered information, acquire the business, and seek to recover damages on a breach of warranty claim."). See Professor Whitehead's article generally for efficiency-based, risk-based, and empirically based arguments in support of a default anti-sandbagging rule. Sandbagging provisions may be more appropriate in some cases than others. See Ana Sofia Batista, Carl-Olof E. Bouveng, Wayne D. Gray, Abhijit Joshi, Gregory E. Ostling & Ronaldo C. Veirano, *Private Mergers and Acquisitions – Global Trends in Buyer Protection*, 26 INT'L L. PRACTICUM 59, 62 (2013).

6. Whitehead, *supra* note 5, at 1084; see also Jastrzębski, *supra* note 2, at 219–20.

7. See Jastrzębski, *supra* note 2, at 209, 215 ("[T]he trend is that U.S. state law is gradually moving from anti-sandbagging positions to pro-sandbagging positions," with the two most prominent corporate jurisdictions, Delaware and New York, adopting a pro-sandbagging default rule.).

deliberate allocation of risk.<sup>8</sup> Although “characterizing a state as pro-sandbagging or anti-sandbagging may not provide a *complete* description of the relevant case law,”<sup>9</sup> Delaware—known for its commitment to freedom-of-contract principles—has long held the reputation of a pro-sandbagging state.<sup>10</sup> This belief was largely based on Delaware Chancery Court opinions, as the Delaware Supreme Court has not definitively ruled on the issue.<sup>11</sup>

In 2015, Vice Chancellor Laster explicitly said in *NASDI Holdings v. North American Leasing* that “Delaware is what is affectionately known as a ‘sandbagging’ state,”<sup>12</sup> noting that the fact that a party completed due diligence does not contravene the representations and warranties’ allocation of risk.<sup>13</sup> Vice Chancellor Laster is not an anomaly either. Then-Vice Chancellor Strine authored at least one opinion that has been commonly interpreted as holding that buyers are not required to show reliance in order to

8. See, e.g., Whitehead, *supra* note 5, at 1084 n.14 (quoting then-Chancellor Strine in *Cobalt Operating, LLC v. James Crystal Enters.*, No. Civ.A. 714-VCS, 2007 WL 2142926, at \*28 (Del. Ch. July 20, 2007)).

9. *Id.* at 1091 (emphasis added).

10. See, e.g., Timothy R. Donovan & Jodi A. Simala, *The Definitive M&A Agreement – Anti-sandbagging Provisions*, 3 SUCCESSFUL PARTNERING BETWEEN INSIDE & OUTSIDE COUNS. § 41:43 (“Until recently, the only relevant question under Delaware law seemed to be whether the seller breached any of its representations or warranties.”); Cole, *supra* note 2, at 448 (“Delaware does not require a buyer to prove reliance on the truth of the representation in order to assert a breach of warranty claim . . . .”); The Ann. Surv. Working Grp. of the M&A Juris. Subcomm., Mergers & Acquisitions Comm., ABA Bus. L. Section, *Annual Survey of Judicial Developments Pertaining to Mergers and Acquisitions*, 74 BUS. LAW. 437, 461 (2019) [hereinafter Annual Survey Working Group] (“For most practitioners, Delaware law for at least the last decade had seemed settled . . . .”); Duran & Jamal, *supra* note 2 (“The law regarding sandbagging . . . in Delaware seemed clear to many practitioners.”); Daniel E. Wolf, *Sandbagging in Delaware*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 20, 2018), <https://corpgov.law.harvard.edu/2018/06/20/sandbagging-in-delaware/> (“The popular belief among dealmakers has been that Delaware is generally ‘pro-sandbagging’ . . . .”); Edgerton & Quigley, *supra* note 2 (“For at least the past decade, Delaware has been widely understood by both corporate practitioners and litigators to be a pro-sandbagging state.”); Cleary, *supra* note 3, at 828 (“Delaware is considered by many as allowing parties great latitude when contracting and having that freedom judicially enforced.”). *But see id.* at 829 (“However, this simple approach to the issue is flawed because it does not consider the intermixing of tort and contract principles that afflict Delaware’s pro-contract jurisprudence . . . .”).

11. Annual Survey Working Group, *supra* note 10.

12. Duran & Jamal, *supra* note 2 (quoting from *NASDI Holdings v. North Am. Leasing*, No. 10540-VCL, slip op. at 57 (Del. Ch. Oct. 23, 2015)); Wolf, *supra* note 10 (quoting from the same case).

13. Wolf, *supra* note 10.

bring a breach of contract claim,<sup>14</sup> which essentially amounts to a pro-sandbagging rule. As he stated: “A breach of contract claim is not dependent on a showing of justifiable reliance. . . . Having contractually promised [the buyer] that it could rely on certain representations, [the seller] is in no position to contend that [the buyer] was unreasonable in relying on [the seller’s] own binding words.”<sup>15</sup> In fact, Vice Chancellor Laster has relied heavily on this very language in deciding later cases.<sup>16</sup>

Of course, attorneys drafting these transactions could simply negotiate for an anti-sandbagging provision in order to prevent it from happening.<sup>17</sup> However, states’ default sandbagging rules matter because “agreements very often remain silent on the issue,” despite the option to contract for explicit pro- or anti-sandbagging provisions.<sup>18</sup> And parties often pick Delaware as the agreement’s governing law precisely for their understanding of the contractarian, free-market state’s default rules. As Glenn West, a lawyer for Weil, Gotshal & Manges, stated: “[T]he selection of Delaware law was viewed by many buyers as avoiding the need for

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14. Duran & Jamal, *supra* note 2 (referencing *Cobalt Operating, LLC v. James Crystal Enters.*, No. Civ.A. 714-VCS, 2007 WL 2142926, at \*28 (Del. Ch. July 20, 2007)); Annual Survey Working Group, *supra* note 10 (citing *Cobalt* to support the claim that practitioners’ belief in Delaware’s pro-sandbagging stance was based on Chancery decisions). Note that Professor Whitehead quotes the same case *supra* note 5. *Contra* Duran & Jamal, *supra* note 2 (“[B]ut the *Cobalt* case might not be as strong as it first appears because the contract . . . contained a clause that representations would not be affected by due diligence, and the court found that the *Cobalt* defendant intentionally obscured its fraud and gave misleading explanations when the plaintiff inquired about inconsistencies . . . . These two facts can make it easy for a court to distinguish the case . . . .”). Despite Duran and Jamal’s misgivings about the strength of *Cobalt*, Vice Chancellor Laster’s reliance on it explicitly and in large part in at least two later cases minimizes its distinguishability. *See infra* note 16.

15. Edgerton & Quigley, *supra* note 2 (quoting *Cobalt Operating, LLC*, 2007 WL 2142926, at \*28).

16. *See Akorn, Inc. v. Fresenius Kabi AG*, No. 2018-0300-JTL, 2018 WL 4719347, at \*76-77 (Del. Ch. Oct. 1, 2018) (unpublished opinion); *Universal Enter. Grp., L.P. v. Duncan Petrol. Corp.*, No. 4948-VCL, 2013 WL 3353743, at \*17 (Del. Ch. July 1, 2013) (unpublished opinion).

17. Cole, *supra* note 2 (“Parties can directly approach this issue [of sandbagging] by incorporating sandbagging or anti-sandbagging provisions into the acquisition agreement.”); Whitehead, *supra* note 5, at 1085 (“The parties, however, can contract around both the traditional and modern default rules.”).

18. Jastrzęnski, *supra* note 2, at 209.

the inclusion of any specific clause addressing this issue.”<sup>19</sup> Thus, Delaware’s actual and perceived pro-sandbagging stance is of consequence as parties—buyers in particular—rely on the state’s default rule in drafting their agreements.

### B. Eagle Force Holdings

Delaware’s strong pro-sandbagging reputation was cast into doubt in May 2018, when the Delaware Supreme Court decided *Eagle Force Holdings, LLC v. Campbell*.<sup>20</sup> The issue of the case was whether certain contracts were binding on the parties. Sandbagging was of no consequence in deciding the case. However, in a footnote, the court stated:

We acknowledge the debate over whether a party can recover on a breach of warranty claim where the parties know that, at signing, certain of them were not true. Campbell argues that reliance is required, *but we have not yet resolved this interesting question. And we observe that a majority of states have followed the New York Court of Appeals’ decision in CBS Inc. v. Ziff-Davis Publishing Co., which holds that traditional reliance is not required to recover for breach of an express warranty: the only “reliance” required is that the express warranty is part of the bargain between the parties. (“This view of ‘reliance’—i.e., as requiring no more than reliance on the express warranty as being a part of the bargain between the parties—reflects the prevailing perception of an action for breach of express warranty as one that is no longer grounded in tort, but essentially in contract.”)*. We need not decide this interesting issue because such claims are not before the court.<sup>21</sup>

To summarize, the court acknowledged the sandbagging debate, stated that the issue was not resolved in Delaware, and identified *CBS Inc v. Ziff-Davis*, a seminal New York case in favor of

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19. Glenn D. West, *A Delaware Supreme Court Footnote Reignites Concerns About the Reliability of Contractual Representations & Warranties—Are Deal Lawyers Really Going to Start Debating Sandbagging Again?*, WEIL: GLOB. PRIV. EQUITY WATCH (Oct. 1, 2018), <https://privateequity.weil.com/features/delaware-supreme-court-footnote/>. *But see* Whitehead, *supra* note 5, at 1081 (“[T]he law around sandbagging is unsettled.”).

20. *Eagle Force Holdings, LLC v. Campbell*, 187 A.3d 1209 (Del. 2018).

21. *Id.* at 1236 n.185 (emphasis added) (citations omitted).

sandbagging, as one received favorably by a majority of states. The court said no more, noting that its words were dicta.

Chief Justice Strine in his concurring-in-part/dissenting-in-part opinion also addressed sandbagging in passing. He appeared to take a less favorable stance than the majority: “[T]o the extent [the buyer] is seeking damages because [the seller] supposedly made promises that were false, there is doubt that he can then turn around and sue because what he knew to be false remained so. Venerable Delaware law casts doubt on [the buyer’s] ability to do so . . . .”<sup>22</sup> Chief Justice Strine cited a case from 1913—*Clough v. Cook*<sup>23</sup>—with an explanatory parenthetical, saying “a party who signs a contract with knowledge that a representation is false may not later claim reliance on it.”<sup>24</sup>

Although the Delaware Supreme Court’s comments were but briefly mentioned in a footnote and are clearly dicta (the court admitted “such claims are not before the court”<sup>25</sup>), the corporate world was nevertheless swift to react. Within a few months, lawyers from Sidley Austin, Kirkland & Ellis, and Weil, Gotshal & Manges (just to name a few) authored articles in reaction to the case, advising buyers to include pro-sandbagging provisions in their agreements to avoid being subject to disputes over “what they knew and when in order to enforce the seller’s express contractual warranties.”<sup>26</sup> Although some attorneys have recognized that “the

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22. *Id.* at 1247 (Strine, C.J., concurring in part/dissenting in part). It is interesting to note that Chief Justice Strine took a less favorable stance on sandbagging in *Eagle Force*, but he authored the *Cobalt* opinion that has been heavily relied on in establishing Delaware’s pro-sandbagging jurisprudence. See *supra* notes 14–16 and accompanying text.

23. *Clough v. Cook*, 87 A. 1017, 1018 (Del. Ch. 1913).

24. *Eagle Force Holdings*, 187 A.3d at 1247 n.39.

25. *Id.* at 1236 n.185.

26. West, *supra* note 19 (West is a partner at Weil, Gotshal & Manges LLP. *People*, WEIL, <https://www.weil.com/people/glenn-west> (last visited Mar. 27, 2020)); Duran & Jamal, *supra* note 2 (“[B]uyers are best advised to include a pro-sandbagging clause . . . in the purchase agreement. . . . *Eagle Force* has put buyers on notice that they might need to update their approach to sandbagging.”) (Duran is a partner at Sidley Austin LLP. *People*, SIDLEY, <https://www.sidley.com/en/people/d/duran-sara-garcia> (last visited Mar. 27, 2020)); Wolf, *supra* note 10 (“Parties may wish to take account of these comments from the Supreme Court in negotiating purchase agreement provisions relating to sandbagging.”) (Wolf is a partner at Kirkland & Ellis. *Lawyers*, KIRKLAND & ELLIS, <https://www.kirkland.com/lawyers/w/wolf-daniel-e-pc> (last visited Mar. 27, 2020)); Annual Survey Working Group, *supra* note 10, at 464 (“[C]ounsel to buyers should strongly consider including a ‘pro-sandbagging’ or ‘knowledge-saving’ clause in their acquisition agreements rather than being silent on the subject and leaving it up to Delaware’s default rule.”).

stated need to reignite the pro- versus anti-sandbagging clause debate may be overstated," given Delaware's commitment to "contractarianism,"<sup>27</sup> there is no doubt that corporate attorneys are keeping close tabs on potential developments in Delaware sandbagging law. *Eagle Force* "is the first Delaware Supreme Court pronouncement on sandbagging," and may signal a shift in Delaware law.<sup>28</sup>

In predicting Delaware's stance, it is imperative to note what the Delaware Supreme Court did *not* say. It did not cite any of "the extensive pro-sandbagging Chancery Court case law in Delaware."<sup>29</sup> It referenced the influential New York Court of Appeals case *Ziff-Davis*, and it suggested—but did not explicitly state—that it would follow it. The court also did not mention later New York jurisprudence—*Ziff-Davis*'s progeny—that narrowed New York's pro-sandbagging stance by taking into account the source of the buyer's knowledge and other nuances.<sup>30</sup> However, as the court hinted that it would follow *Ziff-Davis*, that case likely gives the corporate world the best clue as to what the court might hold in the future.

### C. *Ziff-Davis and New York Sandbagging Law*

In *Ziff-Davis*, parties to a transaction entered a binding agreement, and the seller represented as to the truthfulness of the financial statements provided to the buyer. While performing due diligence, the buyer came to believe that the warranted information was untrue. When the seller was approached with this concern, the seller dismissed it as meritless and "insisted that the sale go through as agreed."<sup>31</sup> The parties closed the transaction, and the buyer sued. The issue posed by the court was as follows: "Did the buyer's manifested lack of belief in and reliance on the truth of the

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27. West, *supra* note 19.

28. Donovan & Simala, *supra* note 10.

29. Edgerton & Quigley, *supra* note 2. See *Akorn, Inc. v. Fresenius Kabi AG*, No. 2018-0300-JTL, 2018 WL 4719347, at \*77 n.756 (Del. Ch. Oct. 1, 2018), for a list of Delaware precedent on this point cited by Vice Chancellor Laster.

30. See Edgerton & Quigley, *supra* note 2 (citing *Galli v. Metz*, 973 F.2d 145 (2nd Cir. 1992) ("If the buyer's knowledge is based on facts affirmatively disclosed by the seller, as opposed to facts uncovered through the buyer's own due diligence, then the buyer may not be able to recover for breach absent an express pro-sandbagging provision.")).

31. *CBS Inc. v. Ziff-Davis Publ'g Co.*, 553 N.E.2d 997, 998 (N.Y. 1990).

warranted information prior to the closing relieve the seller of its obligations under the warranties?"<sup>32</sup> The *Ziff-Davis* court said the answer is no. The New York Court of Appeals held "that reliance is not required to recover for a breach of a representation or warranty."<sup>33</sup> The only "reliance" needed is reliance on the express warranty as being a part of the bargain between the parties.<sup>34</sup> The court noted that the parties had a "mutual understanding" that closing would not constitute a waiver of any rights under the purchase agreement, and the "critical question [was] not whether the buyer believed in the truth of the warranted information . . . but 'whether [it] believed [it] was purchasing the [seller's] promise [as to its truth].'"<sup>35</sup> The express warranty was part of the contract, and requiring reliance would have deprived the warranties of their primary purpose and value—assuring the buyer that the representations were true. In short, the court held that "[t]he right to indemnification depends only on establishing that the warranty was breached."<sup>36</sup>

Largely because of *Ziff-Davis*, New York has generally been considered a pro-sandbagging state, but commentators have recognized the development of more nuance and ambiguity since the case was decided in 1990.<sup>37</sup> Subsequent federal cases applying New York contract law, most notably *Galli v. Metz*, narrowed the *Ziff-Davis* holding.<sup>38</sup> *Galli* suggests that New York courts should consider the source of the knowledge in determining whether sandbagging is appropriate.<sup>39</sup> Buyers would be unable to indemnify the seller based on facts affirmatively disclosed by the seller (absent an express pro-sandbagging provision), while facts uncovered through the buyer's due diligence process would be fair game for indemnification purposes.<sup>40</sup> Additionally, *when* the buyer

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32. *Id.*

33. Wolf, *supra* note 10.

34. *Ziff-Davis*, 553 N.E.2d at 1001.

35. *Id.* at 1000-01 (alteration in original).

36. *Id.* at 1001.

37. Cole, *supra* note 2, at 446, 449.

38. *Galli v. Metz*, 973 F.2d 145 (2d Cir. 1992).

39. *Id.* at 151 ("Thus, whether [buyer's] knowledge . . . vitiates his warranty breach claim depends on the circumstances in which [buyer] learned of the problem.").

40. *Id.* ("Where a buyer closes on a contract in the full knowledge and acceptance of facts disclosed by the seller which would constitute a breach of warranty under the terms of

discovered the falsity could affect her recovery; “knowledge of the breach pre-signing, as opposed to only pre-closing, may prevent a buyer from later claiming indemnification for a breach.”<sup>41</sup>

After *Ziff-Davis* and *Galli*, courts have “struggled to apply New York [sandbagging] law,” trying to balance the broad wording of *Ziff-Davis* with the potentially distinguishable facts of *Ziff-Davis* and the limiting language of *Galli*.<sup>42</sup> As a result, some courts have confirmed New York’s purported pro-sandbagging stance established by *Ziff-Davis*, while others have distinguished cases based on *Galli*’s stated exception—the source of buyer’s knowledge.<sup>43</sup> Thus, the stance of New York sandbagging law is, as Professor Jastrzębski called it, “more nuanced.”<sup>44</sup> A synthesis of New York sandbagging law could read as follows:

[U]nless there is an effective pro-sandbagging clause in the M&A agreement, a purchaser’s knowledge prior to closing of a breach of representation, warranty or covenant contained in a M&A agreement will prevent that purchaser from seeking damages or indemnification post-closing IF the purchaser is aware of such breach as a result of the vendor’s disclosure.<sup>45</sup>

If the Delaware Supreme Court was hinting that it would follow New York sandbagging law, then we can expect a similar sort of qualified pro-sandbagging regime. It is imperative to note, however, that the court only cited *CBS v. Ziff-Davis*, stating that a majority of states have followed that seminal case. Since *Ziff-Davis* is unquestionably a strong pro-sandbagging case, perhaps its

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the contract, the buyer should be foreclosed from later asserting the breach.”); see Cole, *supra* note 2, at 450 (“[I]f a third party disclosed the breach of warranty, the buyer in *Galli* would have a strong argument under the *CBS* rule. This distinction was later illustrated in *Rogath v. Siebenmann*. . . . [I]f the source of buyer knowledge is common knowledge or a third party disclosed the information to them . . . the buyer may prevail in a breach of warranty claim.”) (citing *Galli*, 973 F.2d at 151; *Rogath v. Siebenmann*, 129 F.3d 261, 265 (2d Cir. 1997)).

41. Wolf, *supra* note 10.

42. Jastrzębski, *supra* note 2, at 217.

43. See *id.* nn. 43–47.

44. *Id.* at 218; Cole, *supra* note 2, at 446 (“The focus of this Note, the State of New York, has ambiguous sandbagging case law that has made it difficult to predict what the appropriate outcome would be for buyers and sellers of businesses.”). Cole argues in his article that New York’s stance is “more equitable.” Cole, *supra* note 2, at 457.

45. Cole, *supra* note 2, at 450 (alteration in original) (quoting Joe Brennan, “Sandbagging” and “Knowledge” Clauses in M&A Agreements, SHEA NERLAND L. (Nov. 2, 2012), <http://www.snclaw.com/cgblog/48/123/Sandbagging-and-Knowledge-Clauses-in-M-A-Agreements> [<https://perma.cc/Y4UP-PNZY>]).

progeny is irrelevant, and the court is hinting at a broader pro-sandbagging rule. This is likely where practitioners and scholars alike thought Delaware's stance was all along.

But if the Delaware Supreme Court wanted to set out a pro-sandbagging stance, why refer to a New York case instead of Delaware Chancery caselaw? There might be a number of reasons: First, although there *is* Chancery case law in support of sandbagging as a default rule, *Ziff-Davis* is unquestionably the leading case on the topic. Perhaps the court was simply pointing to the case that most famously represented the principle, regardless of the jurisdiction. Second, as has been noted, the state's supreme court has not yet taken a stance on it. Citing a seminal New York opinion that has been followed by a majority of states could signal the court's thoughts on taking an official stance on the subject instead of simply falling in line with the less weighty Chancery opinions. Third, although dealmakers seem to believe the case law in Delaware points one direction, Chief Justice Strine seems to think that "venerable Delaware law" points the other direction. The majority opinion in *Eagle Force* could be showing Chief Justice Strine another way for him to justify a pro-sandbagging stance through persuasive authority.

#### *D. A Delaware Chancery Opinion Post-Eagle Force*

As of this writing, the Delaware Supreme Court has still not definitively ruled on sandbagging. However, the issue came up in the Court of Chancery in the famous material adverse effect (MAE) case, *Akorn, Inc. v. Fresenius Kabi AG*,<sup>46</sup> which was decided a few months after *Eagle Force* in October 2018. Vice Chancellor Laster, cited previously in this Article for his elucidation on Delaware's pro-sandbagging stance years before,<sup>47</sup> confidently stated that:

I agree that Fresenius knew broadly about the risk of regulatory non-compliance; that is precisely why Fresenius bargained for representations on this subject. I do not agree, however, that Fresenius's general knowledge about potential regulatory issues or questions about the extent to which it conducted due diligence

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46. *Akorn, Inc. v. Fresenius Kabi AG*, No. 2018-0300-JTL, 2018 WL 4719347 (Del. Ch. Oct. 1, 2018).

47. *See supra* notes 12-13 and accompanying text.

into these issues means that Fresenius cannot now rely on the representation it obtained.<sup>48</sup>

He then referred to the aforementioned *Cobalt* case,<sup>49</sup> citing Chief Justice Strine's statement that "[A] breach of contract claim is not dependent on a showing of justifiable reliance" because representations and warranties are essentially an important "risk allocation function."<sup>50</sup> Other Delaware cases were cited for the same principle.<sup>51</sup>

Vice Chancellor Laster thus reiterated that reliance is not needed to breach a representation or warranty, which is essentially what *Ziff-Davis* stands for.<sup>52</sup> Furthermore, the citation of *Cobalt* and a lengthy string cite of other Delaware cases rebuts the point made in the *Eagle Force* footnote that there is a debate on this issue,<sup>53</sup> and it especially refutes Chief Justice Strine's opinion that "[v]enerable Delaware law casts doubt on [the buyer's] ability" to sue when the buyer is aware that information represented to was false.<sup>54</sup> Admittedly, Vice Chancellor Laster refers only to Chancery cases, Delaware Superior Court cases, and secondary sources,<sup>55</sup> so the question is still undecided by the Delaware Supreme Court. Or, as the *Eagle Force* majority stated, "we have not yet resolved this interesting question."<sup>56</sup>

That being said, Vice Chancellor Laster was clearly undeterred by any doubt created by the Delaware Supreme Court in *Eagle Force* based on his strong language in *Akorn v. Fresenius*. Adopting Vice Chancellor Laster's view of sandbagging as expressed here would be akin to following the general principle from *Ziff-Davis*. *Akorn*, coupled with the dicta reference to *Ziff-Davis* in *Eagle Force*, lead to an inference that sandbagging might not be in danger after all.

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48. *Akorn, Inc.*, 2018 WL 4719347, at \*76.

49. See *supra* notes 14-15 and accompanying text.

50. *Akorn, Inc.*, 2018 WL 4719347, at \*76 (alteration in original).

51. *Id.* at \*77 n. 756.

52. See *supra* Section I.C.

53. See *supra* note 19 and accompanying text.

54. *Eagle Force Holdings, LLC v. Campbell*, 187 A.3d 1209, 1247 (Del. 2018).

55. *Akorn, Inc.*, 2018 WL 4719347, at \*77 n.756.

56. *Eagle Force Holdings*, 187 A.3d at 1236 n.185.

*E. Summary*

Today, despite the uncertainty caused by the *Eagle Force* footnote,<sup>57</sup> many attorneys still feel confident that Delaware remains a pro-sandbagging state. Edgerton and Quigley wrote that “given the robust body of Chancery Court case law and the jurisdiction’s longstanding embrace of freedom of contract between sophisticated corporate parties, Delaware courts appear likely to continue to affirm a strict pro-sandbagging approach.”<sup>58</sup> Although many attorneys would rather be safe than sorry, advising buyers to put in pro-sandbagging provisions, other dealmakers likely doubt that *Eagle Force* drastically shifted Delaware sandbagging law for several reasons. For one, as previously mentioned, the court’s comments on sandbagging are dicta, and thus not binding authority. Second, buyers can take heart that the majority opinion seemed to cite *Ziff-Davis* favorably, perhaps indicating a future adoption of a pro-sandbagging default rule by the Delaware Supreme Court. Third, like Edgerton and Quigley stated, Delaware is generally committed to freedom-of-contract principles, which may influence the court in leaning that direction should it encounter a close call. Finally, the reiteration of a pro-sandbagging stance by Vice Chancellor Laster in *Akorn v. Fresenius* shows that at least for one prominent member of the Delaware judiciary, sandbagging is alive and well.

With this in mind, Part II looks to the market in order to determine the effect of *Eagle Force* on sandbagging provisions.

## II. AN EMPIRICAL STUDY

*A. Overview*

In order to assess the effect of *Eagle Force* on the market, I took an empirical approach.<sup>59</sup> My goal was to analyze the following across all types of merger agreements: (1) the percentages of deals with sandbagging provisions, (2) law firm usage of sandbagging

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57. *See id.* at 1247 n.39 (Strine, J., concurring).

58. Edgerton & Quigley, *supra* note 2.

59. As Professor Whitehead wrote, “[t]he effect of a pro-sandbagging or anti-sandbagging rule on sandbagging rights is an empirical question.” Whitehead, *supra* note 5, at 1092.

provisions, and (3) how the language of the provisions compared to each other.

This is not the first empirical attempt to determine how often silence as well as pro- and anti-sandbagging provisions occur in merger and purchase agreements. In 2017, a *Deal Points Study* by the American Bar Association found that “51 percent of surveyed acquisition agreements were silent on sandbagging, while 42 percent contained pro-sandbagging clauses and 6 percent contained anti-sandbagging clauses.”<sup>60</sup> Another study conducted in 2017 found a predominance of silence in acquisition agreements—around 75%—with 25% containing a pro-sandbagging provision and no surveyed transactions containing anti-sandbagging provisions.<sup>61</sup>

My research was both narrower and broader than these past surveys. Now that a year and a half has passed since *Eagle Force*, I pulled agreements from the months preceding and following the disruptive case to see if any changes had occurred. I narrowed my search to contracts with Delaware and New York choice of law provisions—Delaware because that is the jurisdiction we are concerned with, and New York both because of the court’s citation to *CBS v. Ziff-Davis* (and potential adoption of it) and to serve as a control to Delaware. My research was also broader than previous studies; I looked not only at the frequency of sandbagging provisions, but the timing of the agreements, the language used, and the law firms drafting the agreements. In analyzing these patterns, this study provides a unique addition to the existing literature by presenting an empirical test of whether and how *Eagle Force* has affected the broader mergers and acquisitions markets, as well as giving insight into how deal lawyers are engineering their agreements in response to the case.

### *B. Typical Sandbagging Provisions*

Sandbagging provisions are usually contained in the indemnification section of a purchase agreement, although they may be included as a representation, a covenant, or a provision

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60. Edgerton & Quigley, *supra* note 2; see also Thomas R. Taylor, “Sandbagging” in *M&A Transactions*, DURHAM JONES & PINEGAR (Jun. 12, 2019), <https://www.djplaw.com/news/sandbagging-in-ma-transactions/>.

61. Taylor, *supra* note 60.

placed separately in the miscellaneous section.<sup>62</sup> A common sample pro-sandbagging provision from my research reads as follows:

The representations, warranties and covenants of the Indemnifying Party, and the Indemnified Party's right to indemnification with respect thereto, shall not be affected or deemed waived by reason of any investigation made by or on behalf of the Indemnified Party (including by any of its Representatives) or by reason of the fact that the Indemnified Party or any of its Representatives knew or should have known that any such representation or warranty is, was or might be inaccurate or by reason of the Indemnified Party's waiver of any condition set forth in [provisions named].

Anti-sandbagging provisions also are almost always found in the indemnification section of a purchase agreement. In my research, the structure of anti-sandbagging provisions varied much more than the pro-sandbagging provisions.<sup>63</sup> An anti-sandbagging provision might appear similar to the following example, drafted by Alston & Bird:

Notwithstanding any other provision of this Agreement to the contrary, if on or before the Effective Date, the Buyer has Knowledge of any fact, event, circumstance or information that would cause or establish one or more of the representations and warranties made by any Indemnifying Party in this Agreement, or in any document delivered in connection with the consummation of the transactions contemplated hereby, to be inaccurate, erroneous, untrue, incorrect or incomplete, in whole or part, as of the date made, then the Buyer (or any Indemnified Party claiming through Buyer) shall have no right to assert any claim for indemnification hereunder or to seek any remedy after the Closing with respect to such inaccuracy, error, falsity, mistake or omission or any such breach of representations and warranties and shall be deemed to have waived its rights to indemnification hereunder for Losses in respect thereof.<sup>64</sup>

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62. Shadden, *supra* note 3, at 461.

63. *See infra* Section II.C.

64. Alston & Bird, Crown Pine Purchase Agreement by and Among Crown Pine Parent, L.P., Crown Pine Reit, Inc., GPT1 LLC, Crown Pine Timber 1, L.P., and Creek Pine Holdings, LLC 58 (May 14, 2018) (Bloomberg Law).

### C. My Study

My process was as follows: First, using Bloomberg Law's Transactional Precedent tool, I randomly selected 200 purchase agreements—100 executed in the months leading up to the *Eagle Force* holding and 100 executed in the months following. Delaware was the governing law of choice for half of the agreements, with the other half choosing New York law. I took samples of all types of purchase agreements, including merger agreements, stock purchase agreements, and asset purchase agreements. I then used a program called Exploratory to analyze the various agreements.<sup>65</sup> While drawing inferences from 200 samples may not be enough to definitively *prove* these trends, it is likely enough to uncover the potential trends and consequences of *Eagle Force* and illuminate areas that deserve further research.

Table 1 reflects the percentage of agreements containing pro-, anti-, or no sandbagging provisions.

	Pro-sandbagging provision	Anti-sandbagging provision	No sandbagging provision
NY pre- <i>Eagle Force</i>	26%	6%	68%
DE pre- <i>Eagle Force</i>	16%	6%	78%
NY post- <i>Eagle Force</i>	30%	8%	62%
DE post- <i>Eagle Force</i>	10%	0%	90%

Table 1: Frequency of Pro-, Anti-, and Nonexistent Sandbagging Provisions

From the data, it seems clear that not including a sandbagging provision is the market norm. This is consistent with both Professor Whitehead's 2011 observation of a "recent increase in silence" regarding sandbagging provisions, as well as the 2017 study that found silence in 75% of surveyed transactions.<sup>66</sup> A majority of deals might be silent regarding the issue because the market believes that Delaware and New York support pro-sandbagging as a default

65. Exploratory is a user interface for extracting, visualizing, and analyzing data. It is accessible at <https://exploratory.io/>.

66. Whitehead, *supra* note 5, at 1097; Taylor, *supra* note 60.

rule.<sup>67</sup> Silence is more common in Delaware than New York perhaps because of Delaware's strong sandbagging reputation and deal lawyers' knowledge of New York's slightly narrowed pro-sandbagging stance.<sup>68</sup>

Second, again using Bloomberg's Transactional Precedent tool, I conducted an analysis of various firms' use and nonuse of pro- and anti-sandbagging provisions previously gathered. Interestingly, although a few firms had a consistent approach—Kirkland & Ellis and Latham & Watkins were silent on sandbagging in every surveyed transaction agreement—many of the firms did not. Ellenoff Grossman & Schole had some transactions silent on sandbagging and others with express pro-sandbagging provisions. Wachtell, Lipton, Rosen & Katz, the M&A behemoth, was mostly silent, but one transaction was pulled that contained a pro-sandbagging provision. Sidley Austin, Gibson Dunn, and Lowenstein Sandler had fairly even numbers of silent vs. pro-sandbagging agreements. Davis Polk & Wardwell and Cleary Gottlieb were largely silent, but they each had one surveyed transaction with an anti-sandbagging provision. In sum, the data showed that although a few firms had consistent approaches, most of the repeat players in mergers and acquisitions did not.

Finally, using Exploratory, I analyzed the natural language of each sandbagging provision using word vectors.<sup>69</sup> Each word is assigned a value of 1, and then each word is compared against all other words in the provisions in context. Provisions are compared on a scale of 0 to 1—1 signifying that the provisions use exactly the same verbiage and 0 meaning they share no common words or uses at all. A high commonality of words suggests a standardized provision, even though standardization of merger agreements is surprisingly limited.<sup>70</sup> Similar language in a provision may highlight a trend whereby law firms incorporate the same

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67. See *supra* notes 10, 37.

68. See *supra* Section I.C.

69. For a layman's discussion of how word vectors can be used with distributional semantics to identify similarities in language, see Allison Parrish, *Understanding Word Vectors*, GITHUB <https://github.com/aparrish/rwet/blob/master/understanding-word-vectors.ipynb> (last visited Sept. 30, 2020).

70. See Matthew Jennejohn, *The Architecture of Contract Innovation*, 59 B.C. L. REV. 71, 85–86 (2018) (“Thus, instead of being highly standardized, merger agreements appear to occupy a space somewhere between the two extremes of bespoke and boilerplate contracting . . .”).

sandbagging language into their precedent documents, and counterparty law firms adopt them into their own agreements as they believe the provision is becoming more of a market norm. Figures 1 and 2 show the results:

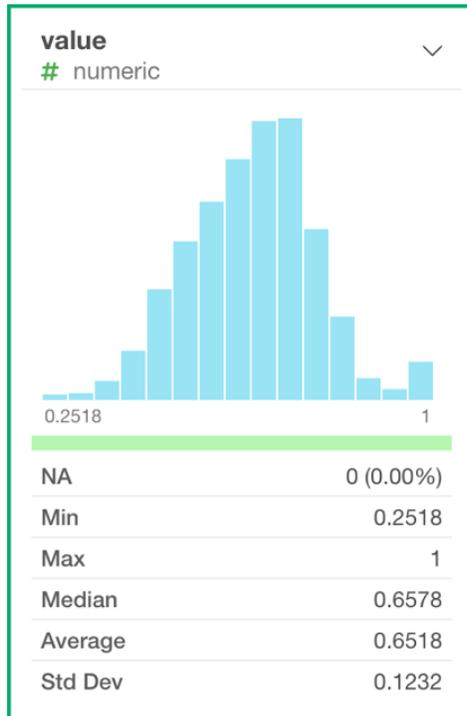


Figure 1: Natural Language in the Provision

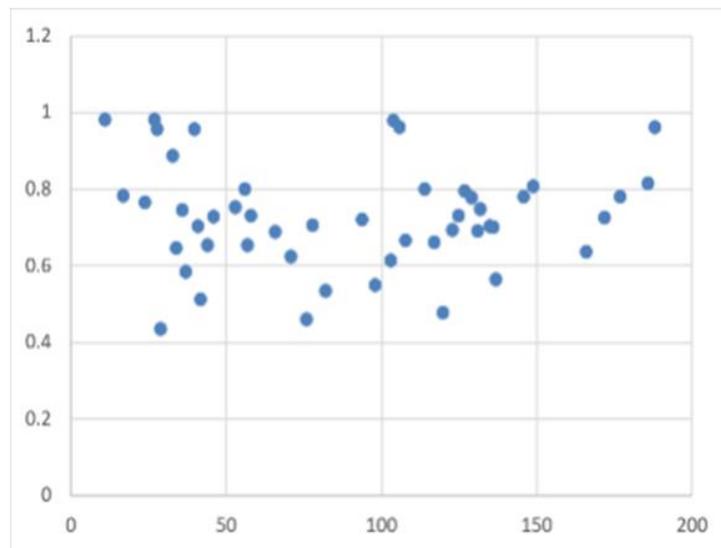


Figure 2: Scatterplot of Natural Language in the Provision

Across all sandbagging provisions surveyed, whether pro- or anti-sandbagging, both the median and the average score on this analysis was about 0.65. The language, therefore, was somewhat consistent, even across different types of agreements and different law firms. Table 2 shows the results divided by governing law and their temporal relation to *Eagle Force*:

New York Pre-Mean	0.754095
New York Post-Mean	0.729935
Delaware Pre-Mean	0.655709
Delaware Post-Mean	0.782977

Table 2: Natural Language Based on Time of Agreement and Governing Law

The difference between New York agreements before and after *Eagle Force* is negligible and likely statistically insignificant. Like the information from Table 1, there seems to be almost no New York market reaction to the Delaware Supreme Court case. However, there is a clear increased reaction in the Delaware agreements. This difference implies that while fewer Delaware agreements contained a sandbagging clause, the language of the provision appears to be becoming more standardized. Admittedly, some of the consistency in agreements could be based on the fact that the sample size is small – only 10% of the agreements I pulled governed by Delaware law post-*Eagle Force* had sandbagging provisions at all to be analyzed. Thus, subsequent research is likely needed to confirm this pattern.

### III. ANALYSIS

#### A. Why the Silence?

Perhaps the biggest takeaway from the empirical research is that there was no strong market reaction in the Delaware-governed agreements after *Eagle Force* was decided, despite strong recommendations by attorneys to include pro-sandbagging provisions.<sup>71</sup> If Delaware was thought to be a sandbagging state by default, and many parties relied on that in not putting express pro-

71. See *supra* note 26.

sandbagging provisions in their agreements, why didn't those numbers increase dramatically? Or at all? I believe that (i) most dealmakers believe that Delaware's pro-sandbagging stance remains in force<sup>72</sup> and (ii) any uncertainty created by *Eagle Force* is outweighed by increased seller leverage in the marketplace as high acquisition activity continued in the months following the decision.

Professor Whitehead believed an increase in pro-sandbagging provisions signified an increase in buyer leverage in the negotiations, whereas an increase in silence conversely signaled an increase in seller leverage.<sup>73</sup> The Institute for Mergers, Acquisitions & Alliances (IMAA) noted an increase in mergers and acquisitions activity in 2018, the year *Eagle Force* was decided.<sup>74</sup> Although it predicted a very slight decrease in 2019, merger activity still remained relatively high, as seen in Figure 3:

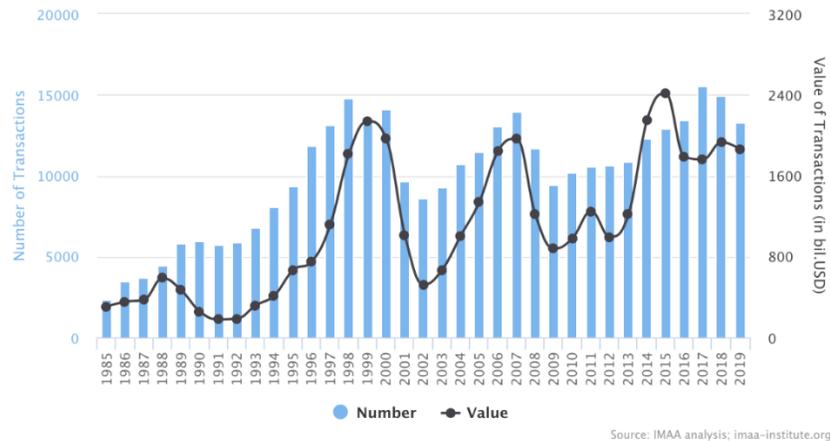


Figure 3: Mergers & Acquisitions in the United States by Year<sup>75</sup>

72. Reasons to believe in Delaware continuing a default sandbagging regime include the majority's citation of *CBS v. Ziff-Davis*, Delaware Chancery pro-sandbagging cases, comparative New York sandbagging law, Delaware's general commitment to freedom-of-contract principles, Vice Chancellor Laster's recent rejection of reliance as a requirement to bring a breach of warranty claim in *Akorn v. Fresenius*, and the fact that the comments in *Eagle Force* are dicta. These arguments are identified *supra* Part I.

73. Whitehead, *supra* note 5, at 1098.

74. *M&A in the United States*, INST. FOR MERGERS, ACQUISITIONS & ALLS. (2019), <https://imaa-institute.org/m-and-a-us-united-states/>.

75. *Id.*

Cravath, Swaine & Moore's last quarterly mergers and acquisitions report for 2019 summarized global deal value and deal count from 2014 to 2019. It showed similar results:

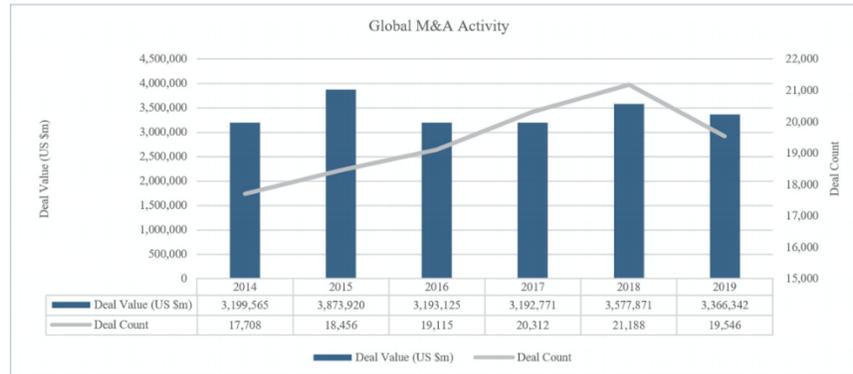


Figure 4: Global M&A Activity from 2014 to 2019<sup>76</sup>

Similar to the data on U.S. merger activity, Cravath reported that although both 2019 deal values and volume declined slightly, it was still by all counts “a robust year for global M&A activity,” as it marked the “sixth successive year that global deal values exceeded \$3 trillion.”<sup>77</sup> And 2018, the year *Eagle Force* was decided, had even higher numbers.<sup>78</sup> Moreover, Cravath reported that “the United States continued to capture an outsized share of the global M&A market, posting its second best year in terms of deal value since 2009.”<sup>79</sup> Put simply, the latter part of 2018 and the beginning of 2019—the period from which the post-*Eagle Force* transactions were pulled—was a hot market for M&A activity, particularly in the United States.

Additionally, not only was M&A activity robust, but corporate executives *believed* that the trend would continue. In Deloitte Touche Tohmatsu Limited's 2019 *M&A Trends Survey* report, the

76. Cravath, Swaine & Moore LLP, *M&A, Activism and Corporate Governance*, CRAVATH Q. REV., Quarter 4 2019, at 1, <https://www.cravath.com/a/web/11874/Cravath%20Quarterly%20Review%20-%20M&A,%20Activism%20and%20Corporate%20Governance.pdf>.

77. *Id.* The year 2019 had “the third highest level of M&A activity in terms of deal value since 2009.” *Id.*

78. *Id.*; see also *supra* Figure 4.

79. Cravath, Swaine & Moore LLP, *supra* note 76.

firm asked 1,000 executives and private equity firms for their insight, opinions, and expectations on deal activity for the next twelve months – from Fall 2018 to Fall 2019.<sup>80</sup> Their report showed that 76% of executives and 87% of leaders at private equity firms expected the number of deals done by their organizations to increase.<sup>81</sup> Moreover, not only did they expect the *number* of deals to increase, but they also anticipated that the *size* of such deals would increase.<sup>82</sup> Thus, not only was M&A activity very high, but a large majority of executives leading the big players in the acquisition market believed in late 2018 – the months after *Eagle Force* – that such activity would continue to grow.

This data supports Whitehead's hypothesis; as merger activity remains strong and parties believe that this activity will continue, sellers have more potential buyers and thus greater leverage in negotiating purchase agreements. Buyers, in order to remain competitive in the bidding process, could be less forceful about negotiating pro-sandbagging provisions and instead are comfortable with relying (or are forced to rely) on the state's default rules. Increased seller leverage could thus explain the increase in silence as buyers are simply willing to let default rules govern as part of the acquisition process.

Silence could also be an indicator that a buyer and seller were unable to agree on a provision<sup>83</sup> or simply believed it would not be worth the increased transaction cost. There is a tension between the need for "sufficient certainty to support investment, on one hand, and the ability to adapt to changing, unforeseeable circumstances, on the other."<sup>84</sup> Potential negotiations of a sandbagging clause may be very time consuming and intensive, and parties may adopt the pragmatic solution of not bearing this cost *ex ante* and instead take their chances of litigation.<sup>85</sup>

Furthermore, Whitehead, and later Jastrzębski, argue that under a pro-sandbagging regime, sellers and buyers have limited

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80. RUSSELL THOMSON, SUSAN DETTMAR & MARK GARAY, DELOITTE, THE STATE OF THE DEAL: M&A TRENDS 2019, at 1 (2018), <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/mergers-acquisitions/us-mergers-acquisitions-trends-2019-report.pdf>.

81. *Id.*

82. *Id.*

83. See Taylor, *supra* note 60.

84. See Jennejohn, *supra* note 70, at 87.

85. See Jastrzębski, *supra* note 2, at 236.

incentives to contract around the default rule.<sup>86</sup> Sellers want to demonstrate to buyers that they are credible and that the buyers can rely on their representations and warranties.<sup>87</sup> Pushing hard for an anti-sandbagging clause would likely undermine that credibility. Buyers working within a pro-sandbagging rule have little incentive to argue for an explicit provision when the default goes in their favor. Why pay higher negotiating and transaction costs when silence gets you the same result?<sup>88</sup> The compromise is therefore often silence.

However, the incentives argument carries less weight considering the doubt of a Delaware pro-sandbagging regime created by *Eagle Force*. Buyers who strongly desire sandbagging rights would be willing to pay a little more in transaction costs in order to confirm those rights and avoid the uncertainty that comes with relying on a default rule. Thus, my argument is that (i) most dealmakers believe that Delaware's pro-sandbagging stance remains in force<sup>89</sup> and (ii) any uncertainty created by *Eagle Force* is outweighed by increased seller leverage in the marketplace as high acquisition activity continued in the months following the decision. Buyers, wanting to remain competitive throughout the auction process, appear confident enough to be willing to potentially test sandbagging in Delaware courts.

#### B. Law Firm Data & Provision Language

As mentioned previously,<sup>90</sup> although some law firms had a consistent approach to whether they included a sandbagging provision, most law firms who were repeat players varied to some degree. The variance could be explained simply by recognizing that different contracting parties cared more or less about sandbagging rights, and law firms were tailoring the agreements to the needs and preferences of the parties. It also suggests that despite evidence of the language in sandbagging provisions in Delaware agreements becoming more standardized,<sup>91</sup> the same standardization

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86. Whitehead, *supra* note 5, at 1081, 1088; Jastrzębski, *supra* note 2, at 236–37.

87. See Whitehead, *supra* note 5, at 1088.

88. See *id.* at 1102.

89. See *supra* note 72.

90. See *supra* Part II.

91. See *supra* notes 70–74 and accompanying text.

regarding sandbagging provisions does not necessarily exist within most firms. The fact that most of the law firms varied to some degree also implies that although some firms may have a default—which is likely no sandbagging provision—sandbagging provisions are still very much customizable.<sup>92</sup> The inclusion of a provision is likely still the result of a bargained-for-agreement, as law firms address the risks their clients care about and structure their deals accordingly.

The lack of systematic change could also be a signal that although some attorneys viewed *Eagle Force* as a legitimate threat to Delaware's pro-sandbagging default,<sup>93</sup> law firms as a whole did not. Some sophisticated counsel—Kirkland & Ellis and Latham & Watkins—were silent on sandbagging in every agreement I examined that they worked as counsel, potentially meaning that they were not too preoccupied with the threat of change by *Eagle Force*. Alternatively, perhaps even if the attorneys thought it wise to include an explicit pro-sandbagging provision, the negotiating leverage of sellers in the market outweighed those concerns, and the buyers, with the advice of counsel, thought silence would simply have to do.

Similar arguments can be made about the language of the sandbagging provisions. There was no material change in how similar or dissimilar the provisions were in the New York agreements. However, the increased similarity of provisions in Delaware could mean that because of doubt created by *Eagle Force*, some law firms took language from other law firms in an attempt to improve their provision for clarity, strength, etc. Thus, uncertainty as to Delaware's stance on sandbagging could cause firms to adopt a pro-sandbagging provision, and others, seeing their sophisticated counterparty include that provision, to decide to adopt that provision wholesale into their next agreement when a sandbagging provision is needed. Here, standardization of sandbagging provisions means that although the *inclusion* of a sandbagging provision is still very negotiable, the *language* of the term may be becoming more boilerplate.

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92. See Jennejohn, *supra* note 70, at Part I for a discussion on the mass customization of merger agreements.

93. See *supra* note 26.

This trend, if confirmed by further research, is significant, as merger agreements are not fully standardized, despite their complexity.<sup>94</sup> Standardization across a market allows deal attorneys to achieve economies of scale, thereby reducing transaction and negotiating costs for parties.<sup>95</sup> There are other benefits to standard language in contracts: provisions become boilerplate as market participants and their counsel determine that the language is useful and serves their ends.<sup>96</sup> Courts can thus feel confident enforcing such provisions, and parties can more predictably determine how courts will interpret them.<sup>97</sup> A standardized sandbagging provision could also serve as a “signaling mechanism,” where law firms signal their sophistication by proposing standardized or “market” terms.<sup>98</sup> All of these benefits attach to the potential standardization of a Delaware sandbagging provision.

However, the idea that parties would simply accept boilerplate sandbagging language undermines the assumption that agreements accurately reflect the preferences of the parties. Law firm intermediaries may simply agree, or convince their clients to agree, to what they perceive to be “market” terms.<sup>99</sup> It could then be argued that sandbagging provisions, when included, may not necessarily reflect the parties’ true intentions in their bargained-for-agreement—a principle that courts have explicitly relied on in deciding sandbagging cases.<sup>100</sup> For example, the *Ziff-Davis* court said that in enforcing sandbagging, the critical question was whether the buyer believed it was purchasing the seller’s promise

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94. See Jennejohn, *supra* note 70, at 75.

95. See *id.* at 89 (“[S]cale economies can play a role in contract design, as in many other markets. Market complexity can lead parties to standardize contract terms . . .”). But see Professor Jennejohn’s article generally for an explanation of how deal engineers achieve economies of scale *and* scope, or “mass customization,” through what he terms “flexible specialization.” *Id.*

96. See, e.g., Steven W. Feldman, *Actual Agreement, Shared Meaning Analysis, and the Invalidation of Boilerplate: A Response to Professors Kar and Radin*, 84 MO. L. REV. 711, 729 (2019).

97. See *id.*; Jennejohn, *supra* note 70, at 90 (“Widely adopted standardized terms allow parties to reduce both front-end negotiating costs—both parties to the deal understand the common language, which can streamline costly dickering—and back-end enforcement costs—if a court has given a standard term a definitive interpretation, then enforcement uncertainty can be reduced.”).

98. See Jennejohn, *supra* note 70, at 90.

99. *Id.* at 90–91.

100. See, e.g., *supra* notes 26–34 and accompanying text.

of truth.<sup>101</sup> If the provision was included because it was “market” and not because the buyer thought it was purchasing the representation as part of the agreement, then a primary justification for a pro-sandbagging regime is lost. However, this concern can be eliminated by the fact that parties likely would have not included a sandbagging provision at all had they not cared; in fact, because the data shows that silence is the market norm,<sup>102</sup> parties likely only include a sandbagging provision when it is the clear intention of the parties. Pro-sandbagging provisions in today’s market likely only occur when the buyer specifically requests it and has the bargaining power to obtain it. Thus, the inclusion of any pro-sandbagging provision means that the buyer thought it was purchasing the seller’s truth, and the concern is unfounded.

In short, *Eagle Force*’s longest-lasting impact may not be that parties more often use express pro-sandbagging provisions in their agreements, but that when used, pro-sandbagging provisions are more standardized across the market. As disclosed previously, subsequent research should confirm this trend, as this data could potentially be insignificant because of the small sample size. Despite my research’s shortcomings, however, the data highlights potential trends that shed light on both how practitioners perceive Delaware’s and New York’s default sandbagging rules, as well as how they deal with that perception in the agreements themselves.

#### CONCLUSION

*Eagle Force Holdings, LLC v. Campbell* likely does not signal a change in Delaware sandbagging law, despite the strong reaction from law firms and practitioners. I believe that should the Delaware Supreme Court take up the issue, the court will follow the New York Court of Appeals decision in *CBS v. Ziff-Davis* and explicitly adopt a pro-sandbagging regime, consistent with its contractarian reputation and Court of Chancery caselaw. The fact that *Eagle Force* did not deter Vice Chancellor Laster in *Akorn v. Fresenius* lends support for my prediction. The collected data shows that law firms drafting and negotiating Delaware and New York agreements are largely leaving them silent as to sandbagging provisions, entrusting parties to the states’ default rules. Delaware contracts in

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101. See *supra* note 35.

102. See *supra* Table 1.

particular actually became increasingly silent following *Eagle Force*. This data likely signals that most dealmakers trust Delaware's pro-sandbagging reputation despite *Eagle Force*, or alternatively, that any doubts created thereby are outweighed by sellers' negotiating leverage in a strong acquisition market and the desire to avoid increased transaction costs associated with drafting and negotiating sandbagging provisions. Similar language in Delaware agreements post-*Eagle Force* may suggest a trend whereby sandbagging provisions are becoming standardized in the mergers and acquisitions market due to the uncertainty created by the case. Thus, while *Eagle Force* surprisingly did not trigger an increase in pro-sandbagging provisions in Delaware agreements, it appears to have affected agreement language—still quite an impact for a footnote.

