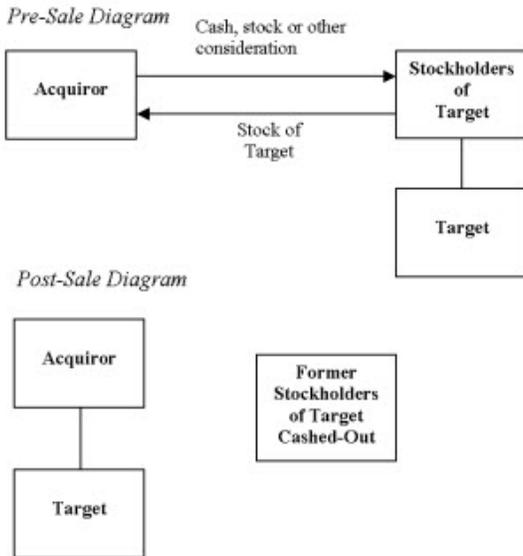


ASSET PURCHASE AGREEMENTS - SESSION 2

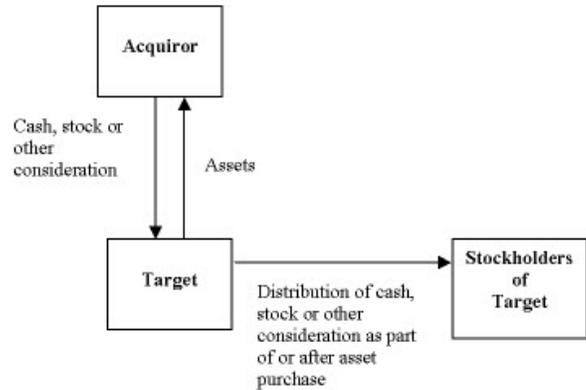
Impact of Acquisition Structures on the Effect of Anti-Assignment Provisions

- **Simple Form:** “This contract shall not be assigned or transferred by Party X without first obtaining the written consent of Party Y.”
- **More Comprehensive Form:** “Party X shall not assign this Agreement in whole or in part without Party Y’s prior written consent, which consent shall not be unreasonably withheld, conditioned, or delayed. Any change in control of Party X resulting from a merger, consolidation, stock transfer, or asset sale shall be deemed an assignment or transfer for purposes of this Agreement that requires Party Y’s prior written consent. The term “control” shall mean....

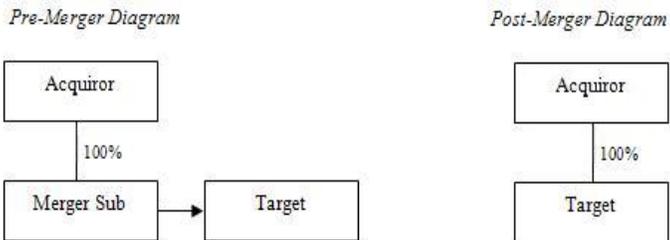
Direct Stock Purchase



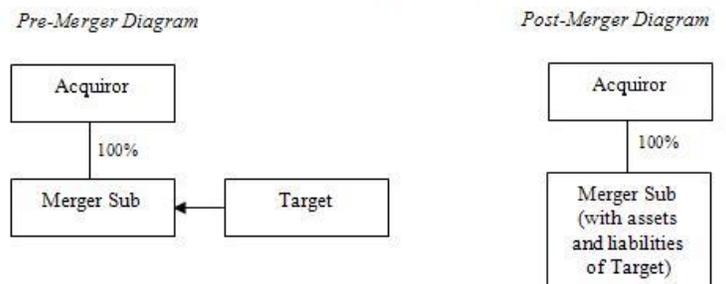
Asset Purchase



Reverse Triangular Merger



Forward Triangular Merger



Disclaimers of Extra-Contractual Representations and Warranties

An ineffective disclaimer of other R&Ws [good if you represent the buyer]:

Contractual Provisions:

"Except for the representations and warranties set forth in Articles III and IV, neither the Company nor any Seller makes any other express or implied representation or warranty with respect to the Company...or any Seller or the transactions contemplated by this Agreement."

"This Agreement constitutes the entire agreement among the Parties with respect to the subject matter of this Agreement and supersedes all other prior agreements and understandings, both written and oral, between the Parties with respect to the subject matter of this Agreement."

Excerpt from *Anvil Holdings Corp. v. Iron Acquisition Co., Inc.* (Del. Ch. May 2013):

"I **do not** find that [the no other representations provision] and the [entire agreement] provision of the Purchase Agreement **reflect a clear promise by the Buyer that it was not relying on statements made to it outside of the Agreement** to make its decision to enter into the Agreement. The Sections just quoted do not state that the parties **disclaim reliance** upon extra-contractual statements. They indicate that the Company represented that neither it nor any Seller was 'making any other express or implied representation or warranty with respect to the Company' and that the Purchase Agreement constitutes the entire agreement of the parties. **The Buyer's fraud claim is not precluded by this promise.**" (Emphasis added)¹

An effective disclaimer of other R&Ws [good if you represent the seller]:

Contractual Provisions:

"Acquiror acknowledges and agrees that neither the Company nor the Selling Stockholder has made any representation or warranty, express or implied, as to the Company or any Company Subsidiary or as to the accuracy or completeness of any information regarding the Company or any Company Subsidiary furnished or made available to Acquiror and its representatives, except as expressly set forth in this Agreement...and neither the Company nor the Selling Stockholder shall have or be subject to any liability to Acquiror or any other person resulting from the distribution to Acquiror, or Acquiror's use of **or reliance on**, any such information or any information, documents or material made available to Acquiror...in expectation of, or in connection with, the transactions contemplated hereby."

Excerpt from *ABRY Partners V, L.P. v. F&W Acquisition LLC* (Del. Ch. 2006):²

"[T]he case law of this court gives effect to non-reliance provisions that disclaim reliance on extra-contractual representations...."

¹ Notably, in *TransDigm Inc. v. Alcoa Global Fasteners, Inc.* (Del Ch. May 2013), the Delaware chancery court also permitted a buyer's claim for fraudulent concealment of material information to proceed where a provision read as follows: "Buyer agrees to accept the Shares without reliance upon any express or implied representations or warranties of any nature...except as expressly set forth in this Agreement."

² See also *RAA Management, LLC v. Savage Sports Holdings, Inc.*, where the court reached a similar conclusion.