

## Disclosure Schedules: Pariah Of The Purchase Agreement

By **Daniel T. Janis** (Law360 - March 15, 2018, 1:02 PM EDT)

One of the biggest moments in the life cycle of a company sale is when the purchase agreement gets finalized. Negotiations are nearing completion. The deal starts to feel real. The client's big cashout is in sight. And then comes the big transactional buzzkill — the disclosure schedules. While disclosure schedules are labor-intensive, redundant and all-around boring, they are also mission critical to limiting a seller's liability following a deal closing. So, when the time comes to draft the disclosure schedules, deal counsel has to take a deep breath, get the client on the line and have "the talk."

To help lessen the blow and the inevitable client backlash, I have prepared this tutorial, a one-act play. Send it to your client when the time is right. Tell them to put on some music, pour a glass of wine, and settle in for a fun story about the most interesting topic they've never heard of — disclosure schedules.



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[It's a cool, rainy evening in Boston. There's an office light on in a downtown building. Inside, a bedraggled-looking lawyer picks up the phone, puts it down, picks it up again, takes a deep breath, and dials a number. The phone rings. The client answers.]

**Deal Lawyer:** Well Client, we're getting close. You've spent a lifetime building up a successful business, and now the sale is in sight. I'm very pleased with where we ended up on those last deal points. This is a great result for you.

**Agitated Seller Client:** Yeah, that's great. Sure was a lot of gobbledygook in that agreement. I'm glad we're done. So, I'm off to go climbing in the Himalayas on Tuesday. Can we close by then?

**DL:** Right, so, here's the thing. Before we sign the agreement, there's one more thing we have to do. We have to draft disclosure schedules. Disclosure schedules qualify all of the representations and warranties in the purchase agreement. If a representation isn't completely true, and we don't make a disclosure, you'll be on the hook. So, it's really important.

**ASC:** OK. Got it. So go ahead with those, and let me know where to sign.

**DL:** Yes, well, I can help. I'll send you a template and fill in some of the things I know about, but I'm gonna need help from you. [Long pause]. So, here's what I need you to do. Section 3 of the agreement is the reps and warranties. That starts on, uhh, page 15 and goes through [shuffle, shuffle, shuffle] page 47. You need to go through and look for cross-references to the disclosure schedules. Wherever there is one, you need to make a list of whatever is called for. Then, you need to go back and read every word of every paragraph very carefully and think about whether every sentence is absolutely, 100 percent true, and if not, write down every single item you can think of that has to be disclosed to make it true. Finally, you need to look at everything you've written, and go back to all the other reps and warranties and think about whether it needs to be listed anywhere else. Make sense?

**ASC:** What!? No! It doesn't make sense! Not at all! Isn't this exactly what we've been doing over the past six months for the "due diligence" we keep talking about? The buyer already knows about all of this! We had calls and meetings, and we wrote summary paragraphs, and you put everything into that "virtual data room." Why do we have to do this all again?

**DL:** OK, here's how it works. All of the due diligence — the document gathering, the data room, the summaries, the meetings, the financial models — that's just to help the buyer understand the business, and get comfortable that they really want to go through with the deal. But once the deal closes, nothing matters but the agreement. And the schedules are part of the agreement. If it's not in the schedules, it's like it never existed. All those conversations and meetings? Meaningless!

The representations and warranties in the purchase agreement are a long, long series of paragraphs promising that every facet of the company is perfect and flawless. You have to certify that, since the formation of the company through this very day, you have dotted every "i," crossed every "t," filed every form, complied with every provision of every contract, never made a single mistake about anything, ever. But of course, that can't be true. Give yourself a break, ASC; you're only human! You operate a business in the real world. Not everything can be perfect all the time.

Enter the disclosure schedules. Disclosure schedules qualify the representations and warranties. They're carveouts to all the statements you've made. If it's in the disclosure schedules, there's no breach of a rep. And if there's no breach of a rep, you're off the hook! Exonerated! Disclosure schedules are your friend! I know it doesn't feel like it now, but the more you hunker down now, the more elaborate and detailed and comprehensive your disclosures are, the less liability you'll have after the deal closes. You'll walk away scot-free, with nothing to think about but how to spend all the money you got from the sale.

**ASC:** Alright, fine. I'll do it. But, honestly, this all seems ridiculous. I've got other things to do, you know. Why do lawyers have to make everything so complicated? Why are you always taking up so much of my time?

[ASC cancels plans for the week, holes up in office, generates voluminous lists, descriptions and summaries, and sends them to DL. DL sends back comments, and asks even more questions that make ASC continuously more irritated.]

[Eighteen months later: The escrow period has expired. There were no claims. The buyer hand-delivers a check for the full amount of the escrow to ASC's home, commending ASC on how well ASC had described the company in the disclosure schedules, how seamlessly integration had gone, and how happy the buyer was to have encountered not a single post-closing surprise.]

[ASC gets DL on the phone.]

**ASC:** Hey DL! I just wanted to let you know how happy I am with how the deal went! I got all of the escrow funds back! I'm so grateful to you for creating such a good result for me — the absence of litigation. Every nickel of your hourly billable rate was well worth it! I'm going to recommend you to all of my business owner friends, many of whom are thinking about selling their companies. I'd like to take you out to dinner, and give you a totally out-of-the-blue success bonus for all your hard work. You know, if I've learned one thing from going through this process, it's how important, and just downright fun, disclosure schedules are. They really were an instrumental component of the deal. I only wish more people understood what disclosure schedules are and how critical they are to a successful company sale. Thanks for all you do. For me, and for sellers everywhere. All hail the great disclosure schedules!

[Curtain falls. Deal lawyer walks into the sunset, a smile on her face, happy to have spread the gospel of the disclosure schedules.]

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