



**M&A Insights: AI Clauses, New HSR  
Form Litigation, *Johnson & Johnson*  
Earn-Out Decision, *Moelis* Stockholder  
Agreement Decision**

**GIBSON DUNN**

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# Today's Speakers



**Elizabeth P. Papez**  
Partner, Washington D.C.

Elizabeth P. Papez is a former Deputy Assistant Attorney General at the U.S. Department of Justice and partner in Gibson Dunn's litigation and regulatory groups. Elizabeth has extensive experience handling high-stakes disputes arising out of M&A transactions and regularly advises clients on front-end drafting solutions designed to protect deal economics and mitigate risk. She is one of the few lawyers in the country who has successfully invoked forward-looking deal language to defend multi-decade public-private partnership transactions from taxpayer and other litigation challenges that are relevant to an increasing number of infrastructure and energy deals.



**Jamie E. France**  
Partner, Washington D.C.

Jamie E. France is a partner in the Washington, D.C. office of Gibson Dunn and a member of the firm's Antitrust and Competition Practice Group. Jamie represents clients in antitrust merger and non-merger investigations before the U.S. Federal Trade Commission and the U.S. Department of Justice Antitrust Division, as well as in complex private and government antitrust litigation. She also counsels clients on a range of antitrust merger and conduct matters. Her experience encompasses a broad set of industries, including healthcare, technology, consumer goods, retail, pharmaceuticals, software, financial services, and gaming. Jamie has been recognized in the 2024 edition of the Best Lawyers: Ones to Watch® in America for Antitrust Law and Litigation – Antitrust.



**Branden C. Berns**  
Partner, San Francisco

Branden C. Berns is a partner in the San Francisco office of Gibson Dunn where he practices in the firm's Transactional Department. He represents leading life sciences companies and investors on a broad range of complex corporate transactions, including mergers and acquisitions, asset sales, spin-offs, joint ventures, PIPEs, as well as a variety of financing transactions, including initial public offerings, secondary equity offerings and venture and growth equity financings. Branden also serves as principal outside counsel for numerous publicly-traded life sciences companies and advises management and boards of directors on corporate law matters, SEC reporting and corporate governance.



**Mark H. Mixon, Jr.**  
Of Counsel, New York

Mark H. Mixon, Jr. is Of Counsel in the New York office of Gibson Dunn and a member of the firm's Securities Litigation Practice Group. Mark represents individual and corporate clients in complex, high-stakes business and corporate governance disputes, including commercial breach of contract actions, corporate-control litigation, disputes related to directors' and controlling stockholders' fiduciary duties, stockholder derivative and securities litigation, M&A-related litigation, and antitrust and competition matters. He frequently litigates in the Delaware Court of Chancery, where he clerked for the Honorable J. Travis Laster, the Honorable Tamika R. Montgomery-Reeves, and the Honorable Donald F. Parsons, Jr. Mark has been recognized in Best Lawyers: Ones to Watch® in America (2024-2026).



**Stephen I. Glover (Moderator)**  
Partner, Washington D.C.

Stephen I. Glover is a partner in the Washington, D.C. office of Gibson Dunn and a former Co-Chair of the firm's Global Mergers and Acquisitions Practice. Stephen has an extensive practice representing public and private companies in complex mergers and acquisitions, joint ventures, equity and debt offerings, and corporate governance matters. His clients include large public corporations, emerging growth companies and middle market companies in a wide range of industries. He also advises private equity firms, individual investors, and others. Stephen has been ranked in the top tier of corporate transactions attorneys in Washington, D.C. for the past nineteen years (2005 – 2025) by Chambers USA America's Leading Business Lawyers, among numerous other accolades.

# Agenda

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**01** The use of AI clauses in merger agreements

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**02** The status of litigation challenging the new HSR form

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**03** The implications of the recent *Johnson & Johnson* decision for earn-outs

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**04** The Delaware Supreme Court's decision in the *Moelis* stockholder agreement case

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# AI CLAUSES IN MERGER AGREEMENTS

01

# “Generative Interpretation”



Public Law and Legal Theory Research Paper Series

Research Paper No. 23-27

## Generative Interpretation

*We introduce generative interpretation, a new approach to estimating contractual meaning using large language models. As AI triumphalism is the order of the day, we proceed by way of grounded case studies, each illustrating the capabilities of these novel tools in distinct*

*tation. As more courts commit to generative interpretation, parties may come to prefer contextual evaluation of meaning when their deals are evaluated, thus flipping a longstanding default rule in contract law.<sup>35</sup>*

# Trends

“AI is increasingly being used as a support tool throughout the life cycle of the M&A process—to locate deals, assess risk, analyze historical deal data, automate due diligence and disclosure schedules, manage the regulatory approval process, produce documents, and facilitate post-closing integration.”

2025 M&A/PE Key Developments

***United States v. Deleon*, 116 F.4th 1260; *Snell v. United Specialty Ins. Co.*, 102 F.4th 1208 (11th Cir. 2024)**

- Judge Kevin C. Newsom authors concurring opinions about how AI-based LLMs can aid in conducting interpretive analysis aligned with “ordinary meaning” precedents for evaluating legal texts

***Ross v. United States*, 331 A.3d 220, 222, 236-37 (D.C. 2025)**

- Dissenting appellate judge relies on ChatGTP output as evidence to support scienter element of criminal conviction

# M&A

## **AI impact on drafting and later interpretation of:**

- Representations & Warranties
- Indemnity clauses
- Material Adverse Effect (MAE) definitions
- Purchase price adjustments
- Earnouts
- Termination rights
- Covenants (pre- and post-closing)

# Use Cases & Cautions

Use Cases	Cautions
<b>Ingest &amp; Compare Documents</b> <ul style="list-style-type: none"><li>• Survey terms, disclosure schedules, etc.</li><li>• Compare against drafts, internal playbooks, market data, risk flags</li></ul>	<b>Deal-specific dynamics</b> <ul style="list-style-type: none"><li>• E.g., distressed assets/sellers, strategic buyers, government incentives</li><li>• Regulatory considerations</li></ul>
<b>Segment &amp; Extract Language</b> <ul style="list-style-type: none"><li>• Extract value-relevant variables</li><li>• Caps, baskets, thresholds, time periods</li></ul>	<b>Negotiation leverage</b> <ul style="list-style-type: none"><li>• Brand strength, asset base</li><li>• Investor/consumer sentiment</li></ul>
<b>Output Summaries</b> <ul style="list-style-type: none"><li>• Industry standards &amp; evolution</li><li>• Identification of custom terms</li><li>• Risk foci</li></ul>	<b>Interdependence</b> <ul style="list-style-type: none"><li>• MAE + bring-down + term rights</li><li>• Indemnity caps + baskets and escrows</li><li>• Intentional ambiguity or silence</li></ul>

# Frontier Strategy

**“The best way to predict the future is to create it”**

<https://www.nprillinois.org/lincoln/2018-02-02/governor-goofs-honest-abe-quote>

- **Relationships & Networks for Content**
- **Constitutional and Regulatory Navigation**
- **Strategic Litigation & Legislation**

# Sample Provisions

## **Traditional Principles of Interpretation.**

The Parties agree that any ambiguity, uncertainty, or question of interpretation arising under or concerning this Agreement shall be resolved exclusively by reference to the express terms of this Agreement and, to the extent necessary, by applying traditional canons of contract construction and interpretive aids including dictionaries, trade usage, and course of dealing recognized in the agreed jurisdiction(s) for dispute resolution as of the date of this Agreement.

# Sample Provisions

## **Exclusion of Artificial Intelligence Tools (AI Tools) for Interpretation and Enforcement.**

For the avoidance of doubt, the Parties agree that no artificial intelligence system, machine learning model, or other automated interpretive tool (“AI Tools”) shall be used to determine, supplement, or resolve any ambiguity, uncertainty, or question about the proper interpretation of this Agreement or the Parties’ intent.

Any outputs, summaries, or analyses generated by AI Tools shall be deemed non-binding and shall have no legal or evidentiary effect in interpreting this Agreement.

# Sample Provisions

## Permitted Administrative Use of AI Tools.

Notwithstanding the foregoing or other provisions of this Agreement, either Party may use AI Tools for internal administrative or organizational purposes (such as summarization or contract management), provided that such use does not (i) result in disclosure of the other Party's confidential information in violation of this Agreement or (ii) involve reliance on such tools for purposes of interpreting or enforcing this Agreement.

# NEW HSR FORM LITIGATION

02

# Background:

## 2024 HSR Premerger Notification Rule

- The FTC's 2024 final rule overhauling the Hart-Scott-Rodino (HSR) premerger notification form was the most significant overhaul of HSR filing requirements since the original premerger notification form's publication in 1978
- Key additions to premerger notification requirements in the 2024 HSR Rule:
  - Deal documents from supervisory deal team leads, not just officers and directors
  - Certain ordinary course competitive documents
  - Narrative descriptions of transaction rationale and competitive overlaps
  - Supply relationship information
- 2024 HSR Rule went into effect in February 2025 after a bipartisan FTC approved the final rule on a 5-0 vote

# Federal District Court Vacates FTC's 2024 HSR Premerger Notification Rule

- In *Chamber of Commerce v. FTC*, a coalition of business groups led by the U.S. Chamber of Commerce challenged the FTC's 2024 HSR Rule in the U.S. District Court for the Eastern District of Texas
- On February 12, 2026, Judge Kernodle granted summary judgment to the plaintiffs, holding that the 2024 HSR Rule exceeded the FTC's statutory authority because "the agency has not shown that the Rule's claimed benefits will 'reasonably outweigh' its significant and widespread costs"
  - The FTC was unable to identify a single illegal merger in the 46-year history of the prior form that the new form would have prevented
  - District court noted that any efficiency gains from the 2024 HSR Rule would accrue only in the ~8% of transactions the FTC investigates, whereas all filers would bear increased compliance burden
- Judge Kernodle also found the 2024 HSR Rule to be arbitrary and capricious because the FTC failed to consider whether the 2024 Rule's benefits "bear a rational relationship" to its costs and the FTC "did not adequately explain its rejection of less costly and burdensome alternatives," such as targeted voluntary submissions or more focused Second Requests
- The district court vacated and set aside the 2024 Rule, but stayed its decision until February 19 to allow the FTC time to appeal

# Fifth Circuit Order Enables Parties to Revert Immediately to Pre-2024 HSR Form

- On February 17, the FTC filed an emergency motion seeking a stay of the District Court’s decision pending appeal
- On February 19, the Fifth Circuit entered an administrative stay of the District Court judgment, keeping in place the 2024 HSR form “until further order of [the] court”
  - Without that stay, the premerger notification requirements immediately would have reverted to the prior HSR reporting rule (and associated less burdensome filing requirements)
- On March 19, the Fifth Circuit denied the FTC’s requested stay pending appeal of the district court order—making the district court’s judgment vacating the 2024 HSR Rule effective immediately
- The FTC has announced that it is now accepting HSR filings using the form and instructions that were in effect prior to the 2024 HSR Rule, although it will continue to accept filings submitted under the 2024 HSR Rule on a voluntary basis
  - The old form and instructions generally call for less information and fewer documents than the 2024 HSR rule, making filings under the old rules typically less time-intensive and costly
- The FTC’s Fifth Circuit appeal remains pending
  - But the denial of the stay suggests that the Fifth Circuit is receptive to the Chamber’s arguments that the 2024 HSR Rule imposes a significant burden and should be permanently vacated
- On March 25, the FTC and DOJ launched a public inquiry seeking comments on whether the 2024 HSR form has enabled the Agencies to identify potentially anticompetitive mergers more efficiently and more quickly determine whether a deal requires an in-depth antitrust investigation

# Key Takeaways

## **2024 HSR Rule is No Longer in Effect**

As of March 19, 2026, the premerger notification requirements have reverted to the prior HSR rule while the FTC's Fifth Circuit appeal remains pending, but the FTC will continue to accept filings submitted under the 2024 Rule on a voluntary basis.

## **Dealmakers Should Not Expect a Permanent Return to the Pre-2024 Filing Regime**

The District Court's decision rests on procedural grounds, not a rejection of the FTC's authority to modernize the HSR form. Given the previous bipartisan FTC support for stronger filing requirements, if the Fifth Circuit sustains the District Court's vacatur, the FTC may promulgate a similar rule with a more developed administrative record.

## **Agency Staff Retain Significant Investigative Tools**

Even if the 2024 Rule ultimately is vacated, U.S. antitrust agency staff retain authority to request similar information from merging parties on a voluntary basis during the initial HSR waiting period, and on a mandatory basis at a later stage for transactions that trigger a Second Request.

## **Early Engagement with Antitrust Counsel Remains Critical**

Parties considering M&A activities should continue engaging antitrust counsel early. Transaction agreements may benefit from additional regulatory flexibility to accommodate potential changes in filing requirements or extended review timelines.

# ***JOHNSON & JOHNSON*** **EARN-OUT DECISION**

Delaware Supreme Court | January 12, 2026

No. 490, 2024 (en banc)

Opinion by Justice Abigail M. LeGrow

First Delaware Supreme Court opinion addressing the recent wave of earn-out disputes

# TRANSACTION BACKGROUND

## J&J's Acquisition of Auris Health, Inc.

### The Deal (February 2019)

- \$3.4 billion upfront cash consideration
- Up to \$2.35 billion in contingent earn-out payments tied to 10 incremental milestones (2020–2024)
- Target: Auris Health — medical robotics company with two flagship robotic-assisted surgical devices ("RASDs"): Monarch and iPlatform

### Key Contractual Terms

- Earn-out milestones expressly conditioned on obtaining "510(k) premarket notification "from the FDA"
- "Commercially reasonable efforts" (CRE) obligation — defined as efforts consistent with J&J's usual practice for its own "priority medical device products"
- One-way anti-reliance clause (J&J disclaimed reliance; Auris did not)
- Exclusive remedy provision for post-closing claims, with a carve-out for fraud

### Post-Closing Developments

- Four months after closing, FDA confirmed first-generation RASDs would no longer be eligible for 510(k) clearance — required more rigorous De Novo review
- J&J launched "Project Manhattan" — pitting iPlatform against its own Verb product in a "winner-take-all showdown"
- J&J shifted strategic approach, eliminated employee incentive awards tied to contractual milestones, and ultimately shelved the iPlatform program
- None of the \$2.35 billion in earn-outs was paid

# Court of Chancery Decision (Sept. 2024) Vice Chancellor Lori W. Will

## Holdings — All Favorable to Seller (Fortis/Auris)

- J&J breached its CRE obligations as to all iPlatform milestones
- Implied covenant of good faith required J&J to pursue the De Novo pathway as a functional equivalent of 510(k) for the first milestone
- J&J fraudulently induced Auris to accept a contingent \$100M milestone payment related to Monarch by concealing a patient death during a related clinical study

## Damages — Over \$1 Billion

- \$300 million — breach re: first earn-out payment (implied covenant)
- \$600 million — breach re: remaining earn-out payments (CRE)
- \$61 million — fraud in the inducement
- Remainder — pre-judgment interest
- One of the largest earn-out judgments in Delaware Court of Chancery history

# Delaware Supreme Court Decision (Jan. 12, 2026) Affirmed in Part, Reversed in Part

## **REVERSED** — Implied Covenant / First Milestone (~\$300M)

- No genuine contractual gap existed — the merger agreement repeatedly and expressly conditioned the first regulatory milestone on the 510(k) pathway
- The FDA's shift to De Novo review was foreseeable at the time of contracting — Auris had received indications from the FDA and the 510(k) overhaul was publicly known
- Implied covenant is a "narrow gap-filling tool of last resort" — it cannot rewrite the parties' bargained-for agreement
- Protections against regulatory pathway risk should have been secured at the bargaining table, not in the courtroom

## **AFFIRMED** — CRE Breach / Remaining Milestones (~\$600M+)

- Once iPlatform obtained De Novo approval, it could serve as its own predicate device for subsequent 510(k) clearances — J&J's CRE obligation for later milestones remained intact
- J&J's internal decisions (Project Manhattan, shelving iPlatform, eliminating incentives) fell short of the contractual CRE standard benchmarked to how J&J treated its own comparable product, Velys
- Shift from 510(k) to De Novo had an "immaterial effect" on time and cost for iPlatform's first approval — did not excuse abandonment

## **AFFIRMED** — Fraud in the Inducement (~\$61M)

- J&J's CEO misrepresented a Monarch-related milestone as "essentially certain" while concealing a patient death and FDA investigation
- Exclusive remedy clause ≠ anti-reliance clause — an exclusive remedy provision does not preclude extracontractual fraud claims absent express anti-reliance language running against the seller

# Three Key Principles Reinforced

## Delaware M&A and Contract Law

### Implied Covenant Has Narrow Limits

Courts will not use the implied covenant of good faith and fair dealing to rewrite the parties' agreement. It applies only where there is a genuine contractual gap about a truly unanticipated development. If a risk was foreseeable — even if unlikely — parties bear responsibility for addressing it in the contract.

*(Buyer-favorable on this point)*

### Efforts Obligations Are Enforceable as Written

Where a party's obligation depends on regulatory approval, courts will hold the parties to the standard they set. An internally-defined CRE standard ("consistent with buyer's usual practice for its own priority products") creates a concrete, enforceable benchmark — and the buyer's own conduct will be the measuring stick.

*(Seller-favorable on this point)*

### Exclusive Remedy ≠ Anti-Reliance

Fraud claims based on extracontractual statements are precluded only by clear anti-reliance language in the contract — not by a general exclusive remedy provision. A buyer seeking protection from fraud claims must obtain an express disclaimer of reliance from the seller.

*(Seller-favorable on this point)*

# Practical Drafting Takeaways

## Lessons for M&A Practitioners

### For Sellers / Earn-Out Recipients

- Define milestones broadly — include alternative or successor regulatory pathways (e.g., "510(k) or any successor or alternative pathway")
- Include adjustment mechanisms if regulators change the applicable pathway, timeline, or cost of approval
- Negotiate specific operational covenants (staffing levels, resource commitments, reporting obligations) — do not rely solely on general efforts clauses
- Ensure anti-reliance provisions are mutual or do not run against the seller, to preserve fraud claims for buyer misrepresentations about earn-out achievability

### For Buyers / Acquirers

- Be precise in defining milestones — specificity can allocate risk of regulatory changes to the seller (as occurred here for the first milestone)
- Understand that an inward-facing CRE standard tied to buyer's own practices creates a discoverable, enforceable benchmark — document compliance carefully
- Do not assume that a regulatory change excuses all downstream earn-out obligations — each milestone must be analyzed independently
- Seek express, bilateral anti-reliance provisions to preclude fraud claims based on pre-signing statements about likelihood of milestone achievement

# Broader Implications & Looking Ahead

## The Evolving Earn-Out Landscape in Delaware

### Significance of the Decision

- First Delaware Supreme Court opinion addressing the recent wave of earn-out disputes (following Chancery decisions in J&J/Auris, Alexion, and others)
- Reinforces a strict, text-first approach to interpreting earn-out provisions
- Narrows the implied covenant doctrine — likely reducing its use as a gap-filler in M&A disputes going forward
- Net effect: de-risks earn-outs somewhat for buyers by confirming courts won't rewrite agreements to add terms the parties could have negotiated

### Open Questions

- Case remanded to Court of Chancery for re-determination of damages (reduction of ~\$300M from first milestone)
- How will courts apply this framework where the regulatory change was not foreseen at all by either party?
- Will this decision curb the recent trend of large earn-out awards, or will sellers respond with more protective drafting?
- Interplay with the Alexion earn-out litigation — further guidance expected from the Court of Chancery

### Key Takeaway

Earn-out provisions remain high-stakes contractual mechanisms — the J&J/Auris saga underscores that meticulous drafting and thorough risk allocation at the bargaining table are the best protection for both sides.

***MOELIS* STOCKHOLDER  
AGREEMENT  
DECISION**

**04**

# ***W. Palm Beach Firefighters’ Pension Fund v. Moelis & Co.***

## **Background**

A stockholder challenged the facial validity of provisions in a stockholder agreement as allegedly depriving the board of its authority in violation of DGCL § 141(a).

The action was filed *nine years* after three categories of provisions were adopted in connection with the company’s IPO: “Pre-Approval Requirements,” “Board Composition Provisions,” and “Committee Composition Provisions.”

### ***Moelis I* denied a motion to dismiss based on timeliness (laches).**

- Held: If the challenged provisions violated § 141(a), then they are void *ab initio* (rather than merely voidable) and therefore equitable defenses like laches are not available.
- Held: Even if laches were applicable, it would not bar the facial challenge, because the challenged provisions’ alleged violation of § 141(a) was not discrete but a continuing wrong.
  - See 310 A.3d 985, 2024 WL 550750 (Del. Ch. Feb. 12, 2024)

### ***Moelis II* denied a motion to dismiss for failure to adequately plead facial challenge.**

- Held: The “Pre-Approval Requirements” violated § 141(a), because they purported to directly limit the board’s ability to take “virtually any action the directors might want to take” without founder consent.
- Held: Some of the “Board Composition Provisions” violated § 141(a).
  - See 311 A.3d 809, 2024 WL 747180 (Del. Ch. Feb. 23, 2024)

### ***Moelis III* reversed *Moelis I* based on laches and vacated the judgments below.**

- See — A.3d —, 2026 WL 184868 (Del. Ch. Jan. 20, 2026)

# Delaware General Corporation Law

## Section 122(18)

Every corporation created under this chapter shall have power, whether or not so provided in the certificate of incorporation, to:

(18) Notwithstanding § 141(a) of this title, **make contracts with 1 or more current or prospective stockholders (or 1 or more beneficial owners of stock), in its or their capacity as such, in exchange for such minimum consideration as determined by the board of directors** (which may include inducing stockholders or beneficial owners of stock to take, or refrain from taking, 1 or more actions); provided that no provision of such contract shall be enforceable against the corporation to the extent such contract provision is contrary to the certificate of incorporation or would be contrary to the laws of this State (other than § 115 of this title) if included in the certificate of incorporation. Without limiting the provisions that may be included in any such contracts, the corporation may agree to: (a) **restrict or prohibit itself from taking actions specified in the contract**, (b) **require the approval or consent of 1 or more persons or bodies before the corporation may take actions specified in the contract** (which persons or bodies may include the board of directors or 1 or more current or future directors, stockholders or beneficial owners of stock of the corporation), and (c) **covenant that the corporation or 1 or more persons or bodies will take, or refrain from taking, actions specified in the contract** (which persons or bodies may include the board of directors or 1 or more current or future directors, stockholders or beneficial owners of stock of the corporation). Solely for purposes of applying the proviso in the first sentence of this subsection, a restriction, prohibition or covenant in any such contract that relates to any specified action shall not be deemed contrary to the laws of this State or the certificate of incorporation by reason of a provision of this title or the certificate of incorporation that authorizes or empowers the board of directors (or any 1 or more directors) to take such action. With respect to all contracts made under this paragraph (18), the corporation shall be subject to the remedies available under the law governing the contract, including for any failure to perform or comply with its agreements under such contract.

# Moelis III – Voidability & Laches

The Supreme Court held that, to the extent the challenged provisions are at odds with § 141(a), they are **voidable**, not **void**. Hence, equitable defenses like laches are available.

- **Void acts** are not ratifiable because the corporation cannot, in any case, lawfully accomplish them. Void acts are illegal acts or acts beyond the authority of the corporation.
- In contrast, **voidable acts** are ratifiable because the corporation can lawfully accomplish them if it does so in the appropriate manner.

The Supreme Court held that the plaintiff's facial challenge accrued, and the three-year limitations period applicable to **laches** began to run, when the challenged provisions were adopted *nine years* before the complaint was filed.

- “[T]he corporation’s performance under the contract was not a **continuing wrong**, even if the manner in which the contract was created might have been wrongful.”
- The Supreme Court reasoned that the plaintiff’s facial validity claims arose when enforceable legal rights were created and adequate relief was available.

The Supreme Court clarified that **as-applied challenges** may be advanced after the period for bringing facial challenges has expired:

- It agreed that “holding plaintiff’s claims of *facial* statutory invalidity to be time-barred does not prevent stockholders from bringing *as-applied* claims against the companies or its fiduciaries, based on specific circumstances that may arise in the future.”

**GIBSON DUNN**