

A blurred, motion-captured photograph of a modern office hallway. The image shows a long, brightly lit corridor with glass railings on the left and a wall of windows on the right. The motion blur creates a sense of depth and movement, with light trails and streaks of color. The overall color palette is dominated by warm, golden-yellow and blue tones.

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Gibson Dunn Webcast:
**Critical Developments
and Trends in M&A Post-
Closing Remedies**

November 18, 2015



Webcast Agenda

This fast-paced program explores the latest trends, structures, pitfalls and opportunities in drafting and negotiating post-closing remedies in M&A transactions.

The presentation will address pertinent topics including:

- Latest trends in negotiating indemnification provisions;
- Representations and warranties insurance;
- Unforeseen impacts of damages waivers; and
- Consequences of exceptions to the exclusive remedies provision.



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Representations and
Warranties Insurance
Comes of Age



Representations and Warranties Insurance Comes of Age

- Surge in global demand
- More than 1,500 policies written globally in 2014, including about 600 in the United States
- Two largest brokers alone placed more than \$13 billion of aggregate coverage in 2014
- Another record year expected for 2015

Representations and Warranties Insurance Comes of Age

- Emerging markets particularly strong
- Financial buyers top users of R&W insurance, except in Asia-Pacific region
- Record demand attracting new underwriters
- Buyer-side policies dominate

A blurred, motion-captured photograph of a modern interior space, likely a hallway or office area. The image features glass railings, metal handrails, and architectural details, all rendered with a sense of movement and depth. The color palette is dominated by cool blues and greys on the left, transitioning to warm golds and yellows on the right.

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Issues and Trends
in Representations
and Warranties
Insurance



Issues and Trends in Representations and Warranties Insurance

Marketplace changes driving changes to coverage. Examples:

- **Less seller “skin in the game”**
 - **But:** Watch for effect on policy retention

Issues and Trends in Representations and Warranties Insurance

Longer Standard Coverage Periods

- Standard representations
 - Three years versus acquisition agreement indemnity period
- Fundamental representations
 - Shorter of six years or applicable statute of limitations period

Higher Aggregate Coverage Available

- More underwriting capital chasing deals
- Now possible to provide coverage on largest private deals

Issues and Trends in Representations and Warranties Insurance

Modestly Higher Average Insurance Premiums

- Greater overall demand causing prices to rise, even as supply to the market has increased
- Current market average premium range has tightened to 3.5% to 4.0%, from former 1.5% to 4.0% range
 - All-in average cost of policies (including premium, due diligence fee, brokerage commission and applicable surplus lines taxes) now typically ranges from 3.75% to 4.5%
 - Average premiums assume a standard 1-2% retention and coverage for 10% of the deal size

Issues and Trends in Representations and Warranties Insurance

More Coverage Exclusions.

- Underwriters' due diligence and claims experience driving more coverage limitations and exclusions
- Matters most likely to be excluded: health care compliance, cybersecurity and data privacy matters, product liability, environmental matters, and certain labor and employment matters, such as FLSA and wage/hour matters
 - Coverage may be available if separately underwritten
- Also expect exclusion for losses paid covered under purchase price adjustment provisions
 - Negotiating point: “paid” versus “payable”

Issues and Trends in Representations and Warranties Insurance

Expansion of Universe of Covered Losses

- Consequential damages
- Damages based on multiplier
- Diminution in value
- Punitive damages (paid to third party)
 - **But**: Not in New York

Issues and Trends in Representations and Warranties Insurance

Increased Focus on “Excess” Coverage Concept

- Then: General loss mitigation requirement
- Now: Loss mitigation requirement plus affirmative duty to maintain primary insurance
 - Best to define universe of required insurance upfront

Changes to Retention Concept

- “Stepped down” retention

Other Developments

Increased Streamlining of Underwriting Process

- Shorter, more concentrated underwriting due diligence
 - **But:** Greater tendency to comment on acquisition agreement drafts and negotiations

Increasing Claims Experience

- Defying common earlier perception, claims are being made and paid
- Overall claims incidence still low
- Something to watch: Claims-making buyers encountering insurer resistance to issuing new policies to those buyers

A blurred, motion-captured photograph of a modern office hallway. The image shows a long, brightly lit corridor with glass walls and doors on the right side. The perspective is from a low angle, looking down the hallway. The motion blur gives a sense of speed and activity. The color palette is dominated by warm, golden-brown tones from the lighting, contrasted with the cool blues and greys of the office architecture.

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Hot Topics in
Indemnification



Types of Damages

Parties often negotiate the type of damages that can be recovered in the definition of “Losses” or “Damages.”

- Buyer wants the definition to be as broad as possible (no, or limited, exclusions).
- Seller wants to exclude certain types of damages, such as consequential, incidental, punitive and exemplary damages.
- Exclusions, particularly of consequential damages, can be interpreted to include direct damages in some situations.
- Contract law generally limits damages to those that were reasonably foreseeable by the parties.
- If the concern is the extent of exposure to damages, that concern should be addressed by a cap on the amount of damages, rather than including a waiver of certain types of damages.

Types of Damages (cont'd)

- Direct
- Indirect
- Consequential
- Special
- Incidental
- Lost Profits
- Punitive
- Exemplary
- Diminution in Value
- Business Interruption
- Multiple-Based

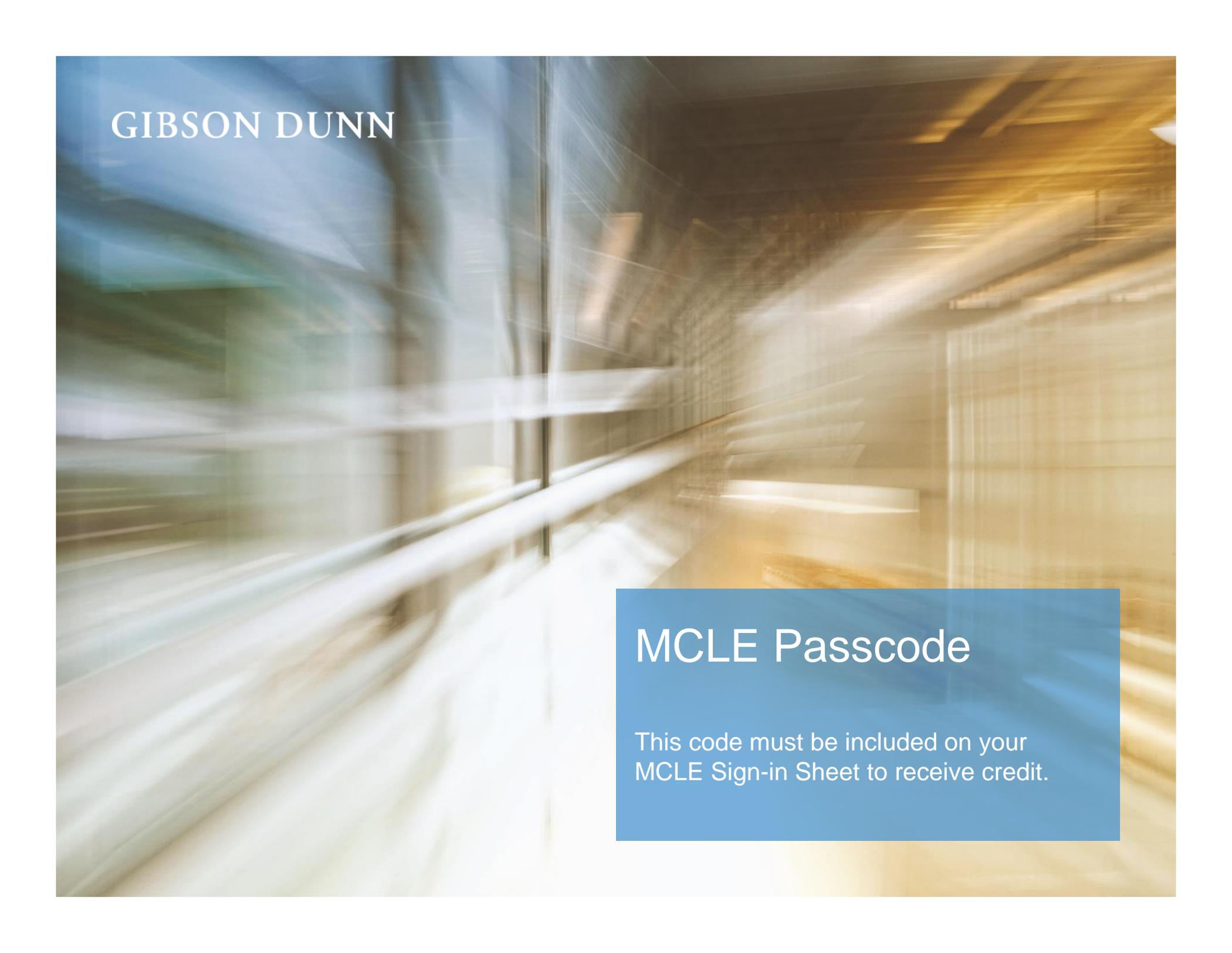
Duty to Mitigate

Should the purchase agreement include an express obligation by an indemnified party to mitigate damages?

- General principle of contract law:
 - A party cannot recover damages for loss if those damages could have been reasonably mitigated or avoided.
- Purchase agreement language may vary common law duty.
 - What is intended?

Requirement to Seek Recovery from Third Parties

- Insurance
 - Actually paid v. available
 - Requisite efforts to pursue claims
- Other responsible parties
- Net of cost of recovery, including increased insurance premiums
- Subrogation
 - Potential claims against customers or suppliers



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MCLE Passcode

This code must be included on your
MCLE Sign-in Sheet to receive credit.

Duty to Defend

Duty to defend v. duty to indemnify

- Duty to defend is the obligation to provide a defense of a covered claim
- Duty to indemnify does not arise unless the outcome of the claim is adverse
- Separate and distinct obligations
 - In some states (e.g., New York) an indemnitor generally has no duty to defend unless the contract specifically requires the defense

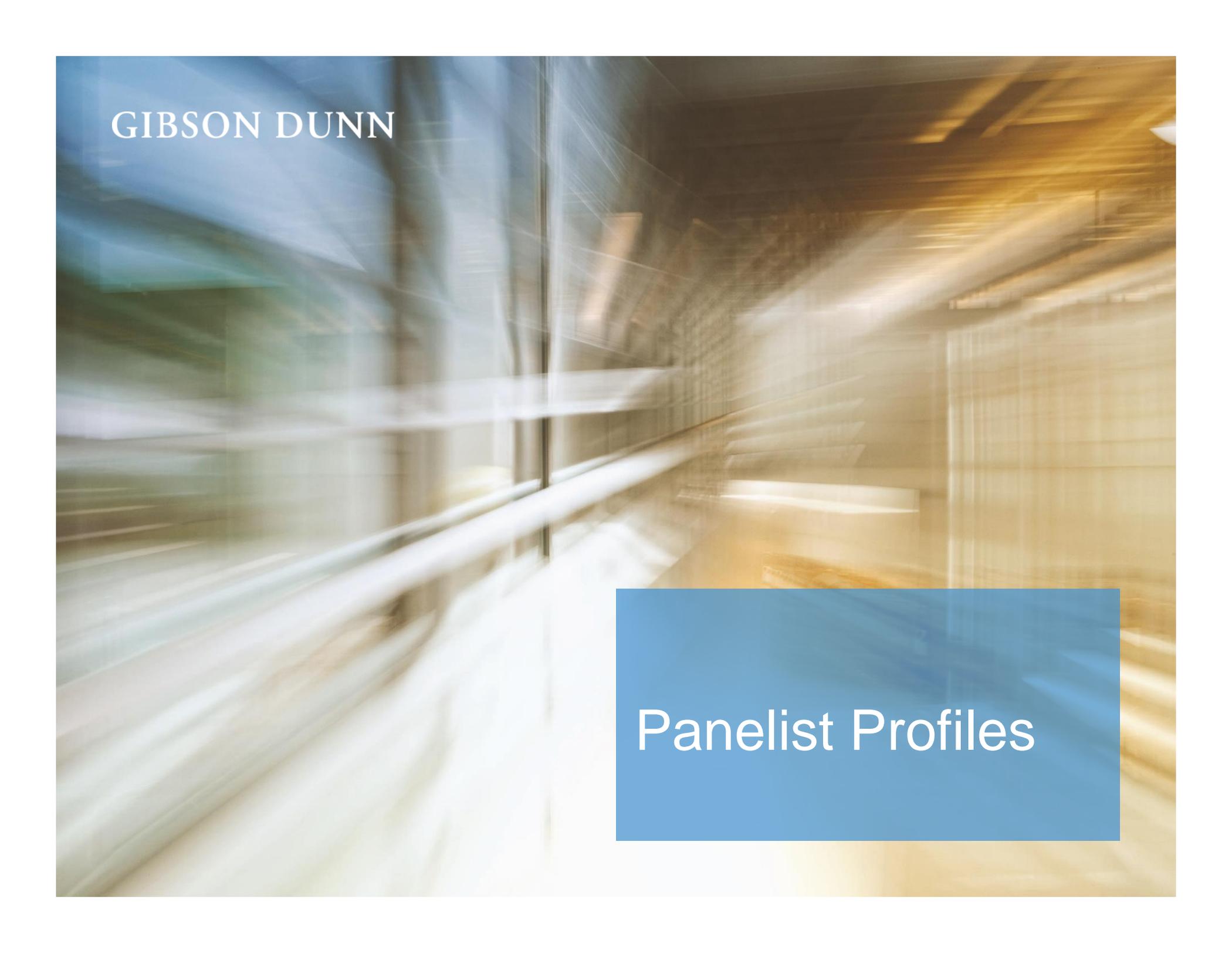
Assumption of Defense

Exceptions to the Indemnifying Party's right to assume the defense of a third party claim

- Unsuitable counsel
- Conflict of interest
- Potential criminal liability
- Potential exposure in excess of indemnification cap
- Potential exposure to equitable relief
- Potential material adverse effects on the Indemnified Party's business
- Requirement to assume responsibility for claim v. reservation of rights
- Ability to settle claim

Exclusive Remedy

- Exceptions to exclusive remedy provision
 - Fraud
 - Intentional fraud
 - Intentional breach
 - Willful misconduct
 - Willful misrepresentation
 - Gross negligence
 - Equitable relief
- Understanding the ramifications of exclusions
 - Be wary of the introduction of tort concepts

A blurred, long-exposure photograph of a modern architectural interior. The image shows a hallway or atrium with a curved wall on the left and a series of white, cylindrical light fixtures or columns extending into the distance. The lighting is warm and golden, creating a sense of depth and movement. The overall aesthetic is clean and contemporary.

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Panelist Profiles

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Terrence R. Allen is a partner in Gibson, Dunn & Crutcher's Orange County Office and is a member of the firm's Corporate Department and Mergers and Acquisitions practice group.

Mr. Allen has experience in a broad array of corporate transactions, including public and private mergers, stock purchases, asset sales and leveraged recapitalizations. He has represented issuers and underwriters in initial public offerings, secondary equity offerings, as well as issuers in private placements and venture capital deals and investors in purchases of equity and start-up and other private companies. Mr. Allen has also advised public companies on corporate governance and disclosure issues.

Mr. Allen earned his law degree in 1993 and bachelor's degrees in business administration and journalism in 1989 from the University of Southern California, where he was a Trustee Scholar and a National Merit Scholar. He is a *Los Angeles Magazine Super Lawyer*.

Mr. Allen has conducted extensive market research relating to private M&A transactions. In 2003, he conceived and led the development of one of the earliest and most comprehensive "deal points" studies to achieve circulation in the marketplace. The study involved the analysis of more than 250 acquisition agreements pertaining to closed private M&A transactions in more than two dozen industries to determine the prevalence of approximately 70 different provisions often included in these agreements. In 2009, he conceived and led the development of Gibson Dunn's groundbreaking, multi-year study regarding indemnification claims in private M&A transactions. Since 2008, Mr. Allen has served as an editor of the *Lexis-Nexis M&A Practice Guide*.

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Robert B. Little is a partner in Gibson, Dunn & Crutcher's Dallas office. He is a member of the firm's Mergers and Acquisitions, Capital Markets, Energy and Infrastructure, Private Equity, Securities Regulation and Corporate Governance, Global Finance, and Corporate Transactions practice groups. Mr. Little serves on the Gibson Dunn Hiring Committee and is the hiring partner for the Dallas office.

Consistently recognized as one of *The Best Lawyers in America*®, Mr. Little's practice focuses on corporate transactions, including mergers and acquisitions, securities offerings, joint ventures, investments in public and private entities, and commercial transactions. He also advises business organizations regarding matters such as securities law disclosure, corporate governance, and fiduciary obligations. In addition, he represents investment funds and their sponsors along with investors in such funds. Mr. Little has represented clients in a variety of industries, including energy, retail, technology, transportation, manufacturing, and financial services.

In 2013, Mr. Little was the youngest corporate M&A lawyer in Texas to receive a ranking by *Chambers USA: America's Leading Lawyers for Business*. *Texas Lawyer* named Mr. Little to its 2013 list of "Legal Leaders on the Rise" recognizing Texas lawyers under age 40 whose accomplishments distinguish them from their peers. In addition, *Dallas Business Journal* named Mr. Little to its list of Who's Who in Energy 2013, featuring "the movers and shakers of the energy industry."

Mr. Little received his law degree in 1998 with highest honors from The University of Texas School of Law, where he was named a Chancellor and a member of Order of the Coif and served as Articles Editor of the *Texas Law Review*. He also holds a B.A. from Baylor University, where he graduated *summa cum laude* in 1995.

Prior to joining Gibson Dunn in 2011, Mr. Little was a partner in the Dallas office of Vinson & Elkins. He previously served as a law clerk to The Honorable Patrick Higginbotham of the U.S. Court of Appeals for the Fifth Circuit. Mr. Little is the Chairman of the Mergers & Acquisitions Section of the Dallas Bar Association and is admitted to practice in Texas. He is a frequent writer and speaker on corporate law matters.

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